

12.9 Repayment of Attorneys Fees

A. Contribution vs. Reimbursement

There are essentially two different types of procedures utilized by states to obtain repayment of the costs of providing counsel to indigent defendants—contribution and reimbursement. *See* ABA STANDARDS FOR CRIMINAL JUSTICE: PROVIDING DEFENSE SERVICES, Standard 5-7.2 & Commentary (3d ed. 1992).

“Contribution” refers to situations in which the defendant makes a contribution to the cost of counsel, usually of a small, fixed amount at the beginning or end of the proceedings. The \$60 appointment fee, described *supra* § 12.5E, \$60 Appointment Fee in Criminal Cases, is a form of contribution.

“Reimbursement,” called recoupment in North Carolina, applies to situations in which the defendant is ordered after the proceedings to pay for the representation provided. North Carolina primarily uses recoupment to recover the attorneys fees paid by the State to an appointed attorney or, if the defendant was represented by a public defender or other IDS-employed attorney, the monetary value of legal services provided. The following discussion deals with those cost-recovery procedures.

B. Constitutionality of Recoupment Procedures

Cost recovery statutes must meet the standards established by the U.S. Supreme Court in *Fuller v. Oregon*, 417 U.S. 40 (1974). The requirements are as follows:

1. The procedures must guarantee the right to counsel without cumbersome obstacles.
2. The imposition of the burden of repayment may not be made without notice and a meaningful opportunity to be heard.
3. The entity deciding whether to require repayment must take cognizance of the person’s resources, the other demands on his or her own and family’s finances, and the hardships the person or family will endure if repayment is required. The purpose of this inquiry is to assure that repayment is not required as long as the person remains indigent.
4. The person must not be exposed to more severe collection practices than an ordinary civil debtor.
5. The person cannot be imprisoned for failing to pay as long as default is attributable to his or her poverty.

North Carolina’s recoupment statutes have been found to satisfy these constitutional requirements. *See Alexander v. Johnson*, 742 F.2d 117 (4th Cir. 1984) (North Carolina’s statutes and court decisions interpreting them meet the facial constitutional requirements established by the U.S. Supreme Court). In individual cases, however, orders related to recoupment have sometimes been stricken as unconstitutional or in violation of statutory requirements. *See infra* § 12.9E, Violations of Constitutional and Statutory Requirements.

C. Types of Cases Subject to Recoupment

Adult criminal cases. G.S. 7A-455 authorizes recoupment from an adult defendant in a criminal case if he or she is convicted. *See also State v. Bass*, 53 N.C. App. 40 (1981) (recognizing conviction requirement). The statute also authorizes recoupment for other expenses incurred in representing the defendant. *See State v. Harris*, 198 N.C. App. 371 (2009) (trial judge could order indigent defendant to repay costs of trial transcripts [court states that trial judge had authority to make repayment a condition of post-release supervision, but Post-Release Supervision and Parole Commission generally decides conditions to impose; issue not addressed by court]). Because the statute requires a “conviction,” there are some instances in which the court may not be able to assess fees even though the defendant does not completely prevail—for example, when a defendant receives a prayer for judgment continued (PJC) or is charged with a criminal offense and is found responsible for an infraction. *See also State v. Rogers*, 161 N.C. App. 345 (2003) (indigent defendant could not be held responsible for attorneys fees at trial level when conviction was reversed on appeal for ineffective assistance of counsel); G.S. 7A-455(c) (recoupment not permitted for appellate or postconviction proceedings if all matters that person raised in the proceeding are vacated, reversed, or remanded for a new trial or resentencing). Cases in other contexts suggest that a “conviction” includes an adjudication of guilt or plea of guilty or no contest without formal entry of judgment, but it is not clear from those cases whether it would be permissible to assess attorneys fees for a PJC. *See, e.g., State v. Graham*, 149 N.C. App. 215 (2002) (PJC constitutes prior conviction for purposes of determining defendant’s sentence for subsequent offense). Although G.S. 7A-455 precludes a court from entering a fee judgment against a person who is placed on probation pursuant to a deferred prosecution agreement, which does not constitute a conviction, many prosecutors condition deferred prosecution on the defendant’s agreement to repay attorneys fees. *See generally* G.S. 15A-1341(a1) (person who receives deferred prosecution may be placed on probation as provided in probation article); G.S. 15A-1343(e) (authorizing attorneys fees as condition of probation).

Criminal and other cases involving minors and dependent adults. Recoupment is also authorized in criminal and certain civil proceedings involving minors or dependent adults. G.S. 7A-450.1 through G.S. 7A-450.4 authorizes recoupment from a parent or guardian of the costs of an attorney or guardian ad litem appointed for a minor or dependent adult. Under these statutes, whether to require a parent or guardian to repay fees is within the court’s discretion, except that G.S. 7A-450.1 bars recoupment if the person for whom an attorney or guardian ad litem is appointed prevails. The statutes governing the particular proceeding may place additional limits on recoupment.

The principal types of cases in which a parent or guardian may be found liable for attorneys fees under G.S. 7A-450.1 through G.S. 7A-450.4, are:

- criminal cases (*see also* G.S. 7A-455(d));
- juvenile delinquency proceedings (*see also* G.S. 7B-2002);
- abuse, neglect, and dependency and termination of parental rights proceedings (*see also* G.S. 7B-603(a1), G.S. 7B-1108(b) (authorizing repayment of fees of guardian ad

- litem for juvenile)); and
- involuntary commitment proceedings (*see also* G.S. 122C-224.1(a)).

Counsel for adult parents. G.S. 7B-603(b1) authorizes, although does not require, the court to order recoupment for the fees of attorneys appointed pursuant to G.S. 7B-602 (parent’s right to appointed counsel in abuse, neglect, or dependency proceeding) and G.S. 7B-1101.1 (termination of parental rights proceeding [G.S. 7B-603(b1) refers to G.S. 7B-1101, but the correct statute is G.S. 7B-1101.1]). The parent may only be required to pay the attorneys fees if the child is found to be abused, neglected, or dependent, or if parental rights are terminated. The court must consider the parent’s financial ability to pay in determining whether to order reimbursement.

Cases not subject to recoupment. No other appointed cases are covered by North Carolina’s statutes. Thus, although the State incurs appointed counsel expenses in other non-criminal proceedings, such as civil contempt, involuntary commitment, and incompetency proceedings, no statute specifically authorizes recoupment.

It may be permissible for the courts to order recoupment when a person is convicted of criminal contempt, such as when a person willfully fails to pay child support in violation of a court order, because a finding of criminal contempt could be viewed as a conviction. *But cf. State v. Reaves*, 142 N.C. App. 629 (2001) (adjudication of criminal contempt is not prior conviction under structured sentencing); *see also Blue Jeans Corp. v. Amalgamated Clothing Workers of America*, 275 N.C. 503 (1969) (criminal contempt is sui generis—that is, one of kind). For civil contempt, there is no statute authorizing recoupment of attorneys fees. *See* John L. Saxon, *McBride v. McBride: Implementing the Supreme Court’s Decision Requiring Appointment of Counsel in Civil Contempt Proceedings*, ADMINISTRATION OF JUSTICE MEMORANDUM No. 94/05 at 6 & n.45 (Institute of Government, May 1994).

IDS rules. The IDS rules addressing recoupment are: Rule 1.11 (recoupment of fees in noncapital and noncriminal cases); Rule 2A.4 (capital cases); Rule 2B.3 (appellate counsel in capital appeals); Rule 2C.3 (postconviction counsel); and Rule 3.3 (appellate counsel in noncapital and noncriminal appeals).

D. Methods of Recoupment

There are essentially three recoupment methods, discussed below.

Judgment. G.S. 7A-455(b) provides for entry of judgment against a convicted defendant for the amount of fees found to be due. Although it may use the collection procedures available to other judgment creditors, the State typically does not execute on attorneys fee judgments. Instead, the State recovers the amount due under the judgment through the interception of tax refunds. *See* G.S. 105A-1 through G.S. 105A-16 (Setoff Debt Collection Act). The judgment also becomes a lien against the defendant’s real property as provided in G.S. 7A-455(c). In criminal cases involving an adult criminal defendant, entry of judgment is required when the statutory requirements are met; in other cases

subject to recoupment, entry of judgment is in the court's discretion.

Condition of probation. In criminal cases, the court may make repayment of attorneys fees a condition of probation. *See* G.S. 15A-1340.37(c) (repayment to State of attorneys fees is permissible form of restitution); G.S. 15A-1343(e) (requiring court to order repayment of attorneys fees as condition of probation unless it finds extenuating circumstances). When a person receives an active sentence of imprisonment, the court may recommend repayment of attorneys fees as a condition of work release or post-release supervision. *See* G.S. 148-33.2(c); G.S.148-57.1(c); *State v. Wingate*, 149 N.C. App. 879 (2002) (permissible for court to recommend to Department of Correction that repayment of attorneys fees be made condition of work release).

Order to pay clerk. G.S. 7A-455(a) and (c) provide in criminal cases that if a person is partially indigent and is convicted, the court may order the person to pay a portion of the fees incurred to the clerk of court. It is unclear to what extent, if at all, this method of recovery is being used. The procedure appears to be a recoupment procedure following conviction. It does not appear to authorize the court to require payment by a partially indigent person earlier in the proceedings. (Another statute, G.S. 7A-450(d), requires a person who has been found indigent to advise the court if he or she becomes financially able to secure legal representation. Presumably, the court then may require the person to retain counsel, although it is unclear how often this statute is used.)

In noncriminal cases in which recoupment is authorized and the court requires repayment, the responsible person pays the amount due to the clerk of court. Judgment is entered only if payment is not made at the time of disposition. *See* G.S. 7A-450.3 [amended in 2005, by 2005 N.C. Sess. Laws Ch. 254 (S 594), to repeal the 90-day grace period following an order to pay and before entry of judgment].

In delinquency proceedings in which a responsible person has been ordered to pay attorneys fees incurred in representing a juvenile, the court may hold the person in contempt for failing to pay. *See* G.S. 7B-2002 (authorizing civil contempt for failure to pay); *see generally* G.S. 7B-2706 (authorizing contempt proceeding for failing to comply with order of court). In abuse, neglect, and dependency and termination of parental rights proceedings, the court may not have this authority. *See* 2005 N.C. Sess. Laws. Ch. 254 (S 594) (repealing G.S. 7B-603(c), which had authorized contempt proceedings against a parent or guardian for failing to comply with an order to pay attorneys fees). *But cf.* G.S. 7B-904(e) (authorizing contempt generally for violation of disposition order of court).

E. Violations of Constitutional and Statutory Requirements

Although North Carolina's recoupment procedures have been found constitutional, individual orders have been stricken as unconstitutional or in violation of statutory requirements. Errors may include:

- Failing to afford the person an opportunity to be heard before imposing the recoupment obligation (either as a judgment or as a condition of probation). *See State*

- v. Crews*, 284 N.C. 427 (1974) (record failed to show that defendant had notice of and opportunity to be heard on recoupment judgment; judgment vacated without prejudice to State's right to reapply); *State v. Jacobs*, 172 N.C. App. 220 (2005) (judgment vacated where judge informed defendant of his intention to impose attorneys fees before counsel calculated his hours; no notice and opportunity to be heard on total hours or fees imposed); *State v. Washington*, 51 N.C. App. 458 (1981) (to same effect as *Crews*); *State v. Stafford*, 45 N.C. App. 297 (1980) (notice in affidavit of indigency of potential for entry of civil judgment not sufficient; even if notice had been sufficient, defendant was not afforded opportunity to be heard).
- Fixing an amount not supported by the evidence. *See generally State v. Killian*, 37 N.C. App. 234, 238 (1978) (restitution order “must be supported by the evidence” and “reasonably related to the damages incurred”).
 - Imposing unduly burdensome financial obligations as a condition of probation. *See generally State v. Hayes*, 113 N.C. App. 172 (1993) (defendant's probation could not be conditioned on payment of more than \$3,000 per month in restitution, as defendant clearly would be unable to pay that amount); *State v. Smith*, 90 N.C. App. 161 (1988) (on appeal of probationary judgment, court holds that trial court was not authorized to condition probation on payment of total restitution of \$500,000 over five years, which was greater than defendant was able to pay), *aff'd per curiam*, 323 N.C. 703 (1989); *see also* G.S. 15A-1340.36(a) (in determining amount of restitution, court must assess defendant's ability to make restitution); G.S. 15A-1343(e) (court not required to make repayment of attorneys fees a condition of probation if extenuating circumstances exist).
 - Revoking a person's probation and activating his or her sentence for failing to pay a financial obligation without regard to the person's ability to pay. *See generally Bearden v. Georgia*, 461 U.S. 660 (1983) (unconstitutional for court to revoke probation and imprison person for failure to pay if he or she is unable to do so); *Alexander v. Johnson*, 742 F.2d 117 (4th Cir. 1984) (person cannot be imprisoned for failing to repay attorneys fees as long as default is attributable to his or her poverty); *State v. Hill*, 132 N.C. App. 209 (1999) (trial court erred in revoking probation without considering defendant's disability, which was reason for defendant's failure to make restitution as ordered); STEVENS H. CLARKE, LAW OF SENTENCING, PROBATION, AND PAROLE IN NORTH CAROLINA 24–26 (2d ed. 1997) (discussing cases recognizing that probation may not be revoked for inability to pay and questioning North Carolina cases placing burden of proof on defendant to show inability to pay).