

Trial Court Jurisdiction Following Appeal of a Civil Case

I. General rule: no jurisdiction after appeal is filed

- a. General rule is that an appropriate appeal divests a trial court of jurisdiction “with regard to all matters embraced within or affected by the judgment which is the subject of the appeal.” *Lowder v. Mills, Inc.*, 301 N.C. 561 (1981); *Brooks v. Giesey*, 106 N.C. App. 586 (1992).
- b. “When an appeal is perfected . . . , it stays all further proceedings in the court below upon the judgment appealed from, or upon the matter embraced therein”. G.S. 1-294.
- c. The trial court is divested of jurisdiction when a party gives notice of appeal, and pending the appeal, the trial judge is *functus officio*. Any judgment entered when trial court is without jurisdiction is a nullity. *See Carpenter v. Carpenter*, 25 N.C. App. 307 (1975) and *Patrick v. Hurdle*, 7 N.C. App. 44 (1969). *See also* Tom Fowler, *Authority of the Trial Court After Appeal*, 81 N.C. Law Rev. 2332 (2003)(Tom Fowler was Associate Counsel at the NC Administrative Office of the Courts at the time he wrote this article. He focuses on North Carolina law, so the article is extremely helpful to NC court officials).
- d. Recent examples
 - i. *Romulus v. Romulus*, N.C. App. (September 20, 2011). Trial court did not have jurisdiction to determine amount due and owing by a defendant pursuant to an equitable distribution judgment that required him to pay a distributive award in monthly installments because earlier appeal of ED judgment divested trial court of all jurisdiction with regard to the ED matter.
 - ii. *France v. France*, 705 S.E.2d 399 (N.C. App. 2011). Trial court lost jurisdiction to proceed in domestic case when party filed notice of appeal of trial court decision denying request to close court proceedings. All actions taken by trial judge after the appeal were void.
 - iii. *Rosero v. Blake*, 150 N.C. App. 251, rev’d on other grounds, 357 NC 193 (2003) Trial court lost jurisdiction to address plaintiff’s claim for an injunction regarding the child while custody order was on appeal.

II. Matters not affected by the judgment appealed can be addressed by trial court

- a. Trial court retains jurisdiction to proceed with matters not affected by the judgment appealed, as long as they do not concern the subject matter of the appeal. *See Cox v. Dine-a-Mate, Inc.*, 131 N.C. App. 542 (1998)(appeal of trial court's denial of defendant's motion to dismiss plaintiff's claim for breach of contract did not deprive trial court of jurisdiction to hear and decide plaintiff's motion to enjoin defendants from proceeding with a separate action against plaintiff in another state because the motion to enjoin defendant did not involve any of the issues included in the appeal); *High Point Bank & Trust Co. v. Morgan-Schultheiss*, 33 N.C. App. 406 (1977)(appeal of summary judgment against plaintiff did not deprive trial court of jurisdiction to decide defendant's counterclaims against plaintiff); *Cox v. Cox*, 33 N.C. App. 73 (1977)(appeal of denial of motion to compel wife to accept appraisal involving division of property did not deprive trial court of jurisdiction to hear and decide motion to reduce child support as the motion did not involve the matter on appeal). *Cf. Rosero v. Blake*, 150 N.C. App. 251, rev'd on other grounds, 357 N.C. 193 (2003)(trial court did lose jurisdiction to deal with plaintiff's claim for an injunction while custody order was on appeal because substance of injunction request was custody of child).
- b. Therefore, for example, trial court can proceed with equitable distribution claim even though custody claim filed in same matter has been appealed. *See e.g. Connell v. McConnell*, 151 N.C. App. 622 (2002)(dissent states that claims in domestic cases are separate causes of action that could be brought as separate lawsuits).
- c. Attorney fees for matter appealed
 - i. The court of appeals has consistently held that the trial court loses jurisdiction to enter an award of attorney fees after an appeal has been filed. *See In re Johnson*, N.C. App. (June 21, 2011)(no jurisdiction to award attorney fees after appeal even where judgment "reserved" the issue of attorney fees for later hearing); *Condie v. Condie*, 51 N.C. App. 522 (1981)(following an appeal of an alimony order, trial court lost jurisdiction to hear attorney fee request); *In re Scarce*, 81 N.C. App. 662 (1986)(following appeal in custody case, trial court lost jurisdiction to enter attorney fee award); *Gibbons v. Cole*, 132 N.C. App. 777 (1999)(trial court lost jurisdiction to enter judgment on defendant's request for attorney fees following appeal by plaintiff of trial court's judgment on the pleadings). *But cf. Surles v. Surles*, 113 N.C. App. 32 (1993)(where trial court expressly reserved issue of attorney fees at the time final judgment was entered on all other issues, trial court "retained the authority to consider the issue since attorney's fees were within the trial courts 'oral announcements'"); and *Whedon v. Whedon*, 58 N.C. App. 524 (1982)(where final judgment specified that trial court would consider the award of fees

upon presentation of affidavits by the parties, trial court did not lose jurisdiction when appeal was filed).

- ii. However, attorney fee requests can be raised and/or heard following completion of the appeal. *In re Scarce*, 81 N.C. App. 662 (1986); *Okwara v. Dillard Department Store*, 136 N.C. App. 587 (2000)(trial court had jurisdiction to consider request for attorney fees following supreme court’s denial of petition for discretionary review, even though it had been 2 years since the trial court entered judgment).
- d. Rule 59 and 60(b) motions regarding the matter appealed
- i. Trial court does not have jurisdiction to act on a Rule 59 or 60(b) motion regarding the judgment appealed. *Wiggins v. Bunch*, 280 N.C. 106 (1971).
 - ii. After appeal, any motion for a new trial (Rule 59) or motion to set aside the judgment (Rule 60(b)) should be made to the appellate court, which can remand the matter to the trial court if necessary. *Id.*; *Swaygert v. Swaygert*, 46 N.C. App. 173 (1980).
 - iii. However, court of appeals has held that a trial court can hear a Rule 60(b) motion following appeal and render an ‘advisory’ decision indicating how it would resolve the issue if it had jurisdiction to do so. *See Talbert v. Mauney*, 80 N.C. App. 477 (1986)(trial court retains ‘limited jurisdiction’ to hear and consider what action it would take on a Rule 60(b) motion were an appeal not pending.”).

III. Trial court has jurisdiction to aid in appeal

- a. Trial judge retains the power to settle the record on appeal. *See* G.S. 1-283 and Rule 11 of the Rules of Appellate Procedure.
- b. Trial court can decide motions specifically authorized by Rule 11 of the Rules of Appellate procedure (Rule 11 allows trial court to extend time to produce transcript and extend time for serving proposed record once for no more than 30 days), but all other motions to extend time must be made to the appellate court. *See Strauss v. Hunt*, 140 N.C. App. 345 (2000)(trial court had no authority to “toll the time for plaintiff to serve approval, objections, amendments or [alternative] record of appeal”).
- c. Trial court also retains authority to dismiss an appeal for failure to perfect the appeal. *See* Rule 25 of Rules of Appellate Procedure; *Farm Credit Bank v. Edwards*, 121N.C. App. 72 (1995).

IV. Enforcement during appeal: execution allowed but contempt is not, unless order on appeal is child custody, child support, or alimony

- a. Enforcement of judgments “directing the payment of money” are not stayed pending appeal, and execution may issue, unless an appropriate execution bond has been entered. GS 1-289.
- b. The court of appeals has held that orders requiring the payment of alimony, child support, and a distributive award in an equitable distribution case are all judgments directing the payment of money subject to execution pending appeal, unless an appropriate bond has been posted. *Romulus v. Romulus*, N.C. App. (September 20, 2011), citing *Quick v. Quick*, 305 N.C. 446 (1982).
 - i. But *Romulus* also held that the trial court does not have jurisdiction to determine amount due and owing under a judgment which requires periodic payments. Therefore, even though Clerk of Court has jurisdiction to issue execution if no bond has been posted, there can be no execution when there is no way to determine the appropriate amount due and owing.
- c. Trial court has no jurisdiction, absent express statutory authority, to enforce a court order by contempt while that order is on appeal. *See Lowder v. All Star Mills*, 301 N.C. 561 (1981).
 - i. “The appeal stays contempt proceedings until the validity of the judgment is determined. But taking an appeal does not authorize violation of the order. One who willfully violates an order does so at his own peril. If the order is upheld by the appellate court the violation may be inquired into when the case is remanded to the trial court.” *Joyner v. Joyner*, 256 N.C. 588 (1962).
- d. Statutory exceptions in domestic relations cases allow contempt but not modification. *See Hackworth v. Hackworth*, 87 N.C. App. 284 (1987)(trial court has no jurisdiction to modify custody while custody order is on appeal).
 - i. Custody orders. GS 50-13.3 (a): “Notwithstanding the provisions of GS 1-294, an order pertaining to child custody which has been appealed to the appellate division is enforceable in the trial court by proceedings for civil contempt during the pendency of the appeal. Upon motion of an aggrieved party, the court of the appellate division in which the appeal is pending may stay any order for civil contempt entered for child custody until the appeal is decided, if justice requires.”

- ii. Child support orders. GS 50-13.4(f)(9): “Notwithstanding the provisions of GS 1-294, an order for the payment of child support which has been appealed to the appellate division is enforceable in the trial court by proceedings for civil contempt during the pendency of the appeal. Upon motion of an aggrieved party, the court of the appellate division in which the appeal is pending may stay any order for civil contempt entered for child support until the appeal is decided, if justice requires.” *See Burnett v. Wheeler*, 133 N.C. App. 316 (1999).
- iii. Orders for the periodic payment of alimony. GS 50-16.7(j): Notwithstanding the provisions of GS 1-294 or 1-289, an order for the periodic payment of alimony that has been appealed to the appellate division is enforceable in the trial court by proceedings for civil contempt during the pendency of the appeal. Upon motion of an aggrieved party, the court of the appellate division in which the appeal is pending may stay any order for civil contempt entered for alimony until the appeal is decided, if justice requires.” *See Cox v. Cox*, 92 N.C. App. 702 (1989).
- iv. *See also Guerrier v. Guerrier*, 155 N.C. App. 154, n.4 (2002)(there is no similar statute authorizing enforcement of equitable distribution by contempt while ED judgment is on appeal).

V. Inappropriate interlocutory appeals do not deprive trial court of jurisdiction

- a. The court of appeals has held that only *appropriate* appeals remove jurisdiction from the trial court. If a party appeals an order that is not immediately appealable, the trial court is not divested of jurisdiction and can proceed with the merits of the case, even if the merits involve the issues on appeal. *See T&T Development Co., Inc. v. Southern National Bank*, 125 N.C. App. 600 (1997)(appeal of trial court’s decision on a motion in limine regarding an evidentiary issue did not deprive trial court of jurisdiction to proceed with trial because the appeal involved an interlocutory order that is not immediately appealable); *Harris v. Harris*, 58 N.C. App. 175, rev’d on other grounds, 307 N.C. 684 (1983)(inappropriate appeal of an interlocutory order in a separation agreement case did not deprive trial court of jurisdiction to proceed with the merits of the case).
- b. The court of appeals has held that a trial court has the authority to determine whether an appeal is appropriate or not. Therefore, the trial court can proceed after an inappropriate appeal without waiting for the court of appeals to dismiss the appeal. *See T&T Development Co., id.*, and *RPR & Assoc. v. University of North Carolina at Chapel Hill*, 153 N.C. App. 342 (2002). *But cf. Estrada v. Jacques*, 70 N.C. App. 627 (1984)(holding that a ruling on the interlocutory nature of appeals is a matter for the appellate courts rather than the trial court).

- i. However, if the trial court proceeds and the court of appeals later disagrees with the trial court and rules that the appeal was appropriate, anything the trial court did involving custody while the appeal was pending might be void. *See France v. France*, 705 S.E.2d 399 (N.C. App. 2011) (trial court order denying request to close courtroom was an order affecting a substantial right and additional orders entered in trial court after appeal were void); *Patrick v. Hurdle*, 7 NC App 44 (1969)(where trial court proceeded with jury trial despite appeal of denial of motion to change venue, the verdict and judgment in the case were “nullities” because the court of appeals held that the appeal of the venue decision was a permissible interlocutory appeal in that the decision affected a substantial right). *But cf. RPR & Associates v. University of North Carolina at Chapel Hill*, 153 N.C. App. 342 (2002)(trial court proceeded with merits of case following appeal of motion to dismiss after concluding appeal was inappropriate, but court of appeals later disagreed and held appeal affected a substantial right – court of appeals nevertheless upheld later actions of trial court citing the “reasonableness of the trial court’s decision” about the propriety of the appeal and the lack of prejudice to defendant). *See also Zaliagiris v. Zaliagiris*, 164 N.C. App. 602 (2004)(trial court proceeded to final judgment following appeal of two temporary orders and court of appeals upheld entry of final judgment by the trial court even though court of appeals had granted cert and was reviewing temporary orders at time trial court entered the final judgment – dissent on this issue).

VI. Determining whether an appeal is appropriate

- a. All final judgments are immediately appealable. *Embler v. Embler*, 143 NC App 162 (2001); see Fowler’s article, *Authority of the Trial Court After Appeal*, 81 NC Law Rev. 2332, 2337 (2003)(for thorough discussion with citations). A judgment is final when it disposes of all issues as to all parties leaving nothing to be judicially determined by the trial court. All other judgments or orders are interlocutory.
 - i. A judgment or order is not final if other claims involving the same parties remain pending in the trial court. *See Evans v. Evans*, 158 N.C. App. 533 (2003)(custody order was interlocutory where ED and alimony claims had not been resolved by trial court); *Embler v. Embler*, 143 N.C. App. 162 (2001)(ED judgment was an interlocutory order when alimony claim remained pending in the trial court); *McIntyre v. McIntyre*, 175 N.C. App. 558 (2006)(same).

- b. Appeals of interlocutory orders generally must wait and be appealed along with the final judgment. See G.S 1-278. However, there are two exceptions. An appeal of an interlocutory order is proper when:
 - i. the interlocutory order affects a substantial right (G.S 1-277 and G.S 7A-27(d)), or
 - ii. the order is final as to some but not all the claims or parties, and the trial court certifies the case for immediate appeal pursuant to Rule 54(b) of the Rules of Civil Procedure.

- c. Substantial right.
 - i. Whether the interlocutory order is one that affects a substantial right is a decision that is made on a case-by-case basis. *McCallum v. N.C. Co-op Extension Service of NC State University*, 142 N.C. App. 48 (2001). *See also Evans v. Evans*, 158 N.C. App. 533 (2003)(final custody order does not affect a substantial right). *But cf.*, *McConnell v. McConnell*, 151 N.C. App. 622 (2002)(custody order did effect a substantial right where trial court held that child’s physical welfare was at issue). *See also Musick v. Musick*, 691 S.E.2d 61 (N.C. App. 2010)(final alimony order did not affect a substantial right so appeal was an inappropriate interlocutory appeal because ED claim remained pending in the trial court); *Embler v. Embler*, 143 N.C. App. 162 (2001)(ED judgment was an interlocutory order when alimony claim remained pending in the trial court and the ED judgment did not affect a substantial right); *Wells v. Wells*, 132 N.C. App. 401 (1999)(postseparation support is an interlocutory order that does not affect a substantial right); *Dunlap v. Dunlap*, 81 N.C. App. 675 (1986)(temporary custody order does not affect a substantial right). *Cf. Ross v. Ross*, _N.C. App._ (September 20, 2011)(orders for sanctions and contempt affect a substantial right and are subject to immediate appeal).

- d. Certification pursuant to Rule of Civil Procedure 54(b).
 - i. This Rule can be used when an order is entered that is final as to some but not all of the claims or parties in a case. If the trial court certifies that there is “no just reason for delay of the appeal”, the appeal of the interlocutory order is appropriate. *See Creech v. Ranmar Properties*, 146 N.C. App. 97 (2001)(where trial court order disposed of four out of six of plaintiff’s claims, appeal was appropriate where trial court certified the judgment pursuant to Rule 54(b). *See also McConnell v. McConnell*, 151 N.C. App. 622 (2002)(dissent states that claims in domestic cases are separate causes of action that could be brought as separate lawsuits; and stating, as have several other appellate opinions, that orders on individual issues in these multi-claim cases are appropriate for certification by the trial court as final

judgments pursuant to Civil Procedure Rule 54(b) so that an immediate appeal is appropriate).

- ii. However, a trial court cannot certify an order or judgment that does not in fact finally dispose of a claim or party. *See Cagle v. Teachy*, 111 N.C. App. 244 (1993)(denial of motion for summary judgment was not an order subject to certification pursuant to Rule 54(b) so judge's certification did not make the appeal appropriate). Accordingly, the appeal of a final custody decision would be appropriate for certification while the appeal of a temporary custody order would not.
- iii. It is appropriate for a trial court to certify an order or a judgment for immediate review pursuant to Rule 54(b) even when a claim for attorney fees remains pending in the trial court, when the claim for fees "is not a substantive issue, or in any way part of the merits of the complaint." *Bumpers v. Cmty Bank of N. Va.*, 364 N.C. 195 (2010)(attorney fees under unfair and deceptive trade practice statute are not a substantive issue or in any way part of the merits of the claim under G.S. 75-16.1). *See also Lucas v. Lucas*, 706 S.E.2d 270 (N.C. App. 2011)(trial court properly certified alimony order for immediate appeal despite pending request for attorney fees because attorney fees are dependent on the resolution of the claim for alimony and therefore are not a part of the substantive claim or the merits of the action).