

## Trial Court Jurisdiction Following Appeal of an Interlocutory Order

[My last blog post](#) discussed the loss of trial court jurisdiction following an appeal. But 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 decision on a motion in limine did not deprive court of jurisdiction); *Harris v. Harris*, 58 N.C. App. 175, rev'd on other grounds, 307 N.C. 684 (1983)(appeal of an interlocutory order in a separation agreement case did not deprive court of jurisdiction).

Generally speaking, a party has the right to appeal only a final judgment. However, there are times that an interlocutory order is appropriate. So what should the court do when a party appeals an order that clearly is not a final judgment, such as a temporary custody order or a PSS order or an interim distribution in an ED case? When is the interlocutory appeal appropriate?

### First - who decides if the appeal is appropriate?

The court of appeals has held that a trial court has the authority to determine whether an appeal is appropriate. Therefore, the 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*, 153 N.C. App. 342 (2002). *But cf. Estrada v. Jacques*, 70 N.C. App. 627 (1984)(interlocutory nature of appeals is a matter for the appellate courts rather than trial court).

However, *beware*. 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 while the appeal was pending might be void. See *France v. France*, 209 NC App 406 (2011) (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 judgment in the case was a “nullity” because the court of appeals held that the venue decision affected a substantial right). *But cf. RPR & Associates v. University of North Carolina*, 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 – but there was a dissent on this issue).

## **Second – was the appeal appropriate?**

All final judgments are immediately appealable. *Embler v. Embler*, 143 NC App 162 (2001). A judgment is final when it disposes of all issues in a case as to all parties leaving nothing in the case to be judicially determined by the trial court.

A judgment or order is not final if other claims involving the same parties in the same case remain pending in the trial court. Therefore, before 2013, a final decision in a custody case could not be appealed if the ED and alimony filed in the same case remained pending, unless the court certified the appeal pursuant to Rule 54 discussed below. See *Evans v. Evans*, 158 N.C. App. 533 (2003).

However, [S.L. 2013-411](#) enacted new [GS 50-19.1](#) to provide an exception to that rule for many domestic cases. That statute provides:

"Notwithstanding any other pending claims filed in the same action, a party may appeal from an order or judgment adjudicating a claim for absolute divorce, divorce from bed and board, child custody, child support, alimony, or equitable distribution if the order or judgment would otherwise be a final order or judgment within the meaning of G.S. 1A-1, Rule 54(b), but for the other pending claims in the same action. A party does not forfeit the right to appeal under this section if the party fails to immediately appeal from an order or judgment described in this section. An appeal from an order or judgment under this section shall not deprive the trial court of jurisdiction over any other claims pending in the same action."

## **Interlocutory Orders**

Orders that are not final adjudications of the merits are interlocutory. Appeals of interlocutory orders generally must wait until after final judgment. See [G.S 1-278](#). However, there are two exceptions. An appeal of an interlocutory order is proper when:

- the order affects a substantial right ([G.S 1-277](#) and [G.S 7A-27\(d\)](#)), or
- 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](#).

## **Substantial right**

Whether the interlocutory order is one that affects a substantial right is a decision made on a case-by-case basis. *McCallum v. N.C. Co-op Extension Service*, 142 N.C. App. 48 (2001). The appellate decisions regarding temporary custody orders illustrate that the decision often is made based on

the individual case rather than on the type of order. See *Evans v. Evans*, 158 N.C. App. 533 (2003) and *Dunlap v. Dunlap*, 81 N.C. App. 675 (1986)(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 *Wells v. Wells*, 132 N.C. App. 401 (1999)(postseparation support is an interlocutory order that does not affect a substantial right); *Hunter v. Hunter*, 126 N.C. App. 705 (1997)(interim distribution in equitable distribution case does not affect a substantial right). *Cf.* *Ross v. Ross*, 215 N.C. App. 546 (2011)(orders for sanctions and contempt affect a substantial right).

**Certification pursuant to [Rule of Civil Procedure 54\(b\)](#).**

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 this particular type of 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).

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). So the Rule 54 certification process cannot be used to certify, for example, a temporary custody order or a PSS order because these are not orders that finally dispose of a claim or a party.

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).

New [GS 50-19.1](#) discussed above will reduce significantly the need for use of the Rule 54 certification process in domestic cases.