

## Trial Court Jurisdiction Following Appeal

In [Ponder v. Ponder, NC App \(May 3, 2016\)](#), the trial court conducted a lengthy hearing on plaintiff's motion to renew a DVPO. Realizing the order needed numerous findings of fact to resolve the issues litigated but wanting to give plaintiff immediate protection, the trial court entered a renewal order with no findings of fact on [AOC Form CV-314](#) and informed the parties that a more detailed supplemental order would replace the form order as soon as the court had time to complete it. Following entry of the form order, defendant appealed. The trial court then entered the supplemental order with extensive findings of fact only to have the court of appeals hold that both the form and the supplemental orders were *void ab initio*. The form order was void for a lack of findings and the supplemental order was void because it was entered after appeal was taken.

### No jurisdiction after appeal

While entering an order at the conclusion of a hearing always is the best case management practice, the court of appeals made it clear in *Buckingham v. Buckingham*, 134 NC App 82 (1999), that a writing signed by the judge and filed with the clerk is a final judgment even if it is anticipated that a more complete order will be substituted in the future. This means, as illustrated in [Ponder](#), problems can arise if an appeal is taken before the formal order is entered.

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); [G.S. 1-294](#).

After a party gives notice of appeal, the trial judge is *functus officio* and any judgment entered thereafter is void. In addition to [Ponder](#), see *Romulus v. Romulus*, 216 N.C. App. 28 (2011)(no jurisdiction to determine amount owing on a distributive award in an ED case); *France v. France*, 209 NC App 406 (2011)(no jurisdiction after appeal of denial of request to close court); and *Rosero v. Blake*, 150 N.C. App. 251(2003)(no jurisdiction to address claim for an injunction regarding child while custody order on appeal); and *Hackworth v. Hackworth*, 87 N.C. App. 284 (1987)(no jurisdiction to modify custody while custody order on appeal).

### Matters not affected by the judgment appealed can be addressed

But the 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. Therefore, for example, trial court can proceed with equitable distribution claim even though custody claim filed in same matter has been appealed. *Connell v. McConnell*, 151 N.C. App. 622 (2002). See also *Cox v. Cox*, 33 N.C. App. 73 (1977)(appeal of order in ED case did not deprive trial court of jurisdiction to hear motion to reduce child support).

## **Attorney fees**

The court of appeals consistently has held that the trial court loses jurisdiction to enter an award of attorney fees after an appeal has been filed. See *In re Johnson*, 212 N.C. App. 535 (2011)(no jurisdiction even if trial court said it “reserved” the issue of attorney fees for later hearing); *Condie v. Condie*, 51 N.C. App. 522 (1981); *In re Searce*, 81 N.C. App. 662 (1986); *Gibbons v. Cole*, 132 N.C. App. 777 (1999). *But cf. Surlles v. Surlles*, 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”); and *Whedon v. Whedon*, 58 N.C. App. 524 (1982)(same).

Attorney fee requests can be raised and/or heard following completion of the appeal. *In re Searce*, 81 N.C. App. 662 (1986); *Okwara v. Dillard Department Store*, 136 N.C. App. 587 (2000).

## **Rule 59 and 60(b) motions**

Similarly, a trial court does not have jurisdiction to act on a Rule 59 or 60 motion regarding the judgment appealed. *Wiggins v. Bunch*, 280 N.C. 106 (1971). 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).

However, the 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).

## **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. 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”). The 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).

## **Enforcement during appeal**

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](#). 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*, 216 N.C. App. 28 (2011).

But *Romulus* also held that the trial court does not have jurisdiction after appeal 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.

### Contempt

The general rule is that a trial court has no jurisdiction to enforce an order by contempt while that order is on appeal. See *Lowder v. All Star Mills*, 301 N.C. 561 (1981).

Despite the general rule, the following statutes allow custody, child support and alimony orders to be enforced through contempt while the case is on appeal:

- [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.”
- [GS 50-13.4\(f\)\(9\)](#): Same language as above for **child support**. See *Burnett v. Wheeler*, 133 N.C. App. 316 (1999).
- [GS 50-16.7\(j\)](#): Same language as above for an order for the **periodic payment of alimony**. See *Cox v. Cox*, 92 N.C. App. 702 (1989).

My next post will address jurisdiction when a party takes an inappropriate interlocutory appeal; an increasingly common occurrence in domestic cases.