

Is a parent always a ‘necessary party’ to a custody action?

Consider a custody action brought by a grandparent against the mother of a child. Grandmother is seeking primary custody, arguing that mother is unfit and has waived her constitutional right to exclusive care, custody, and control of her child. Grandmother does not name the father of the child as a defendant and makes no attempt to serve him with process. The complaint states that neither the grandmother nor the mother know the location of the father, and the father has never been involved in the life of the child. Can the court move forward on grandmother’s claim without the father named as a party?

Parents are entitled to notice.

GS 50A-205(a) states:

“Before a child-custody determination is made under this Article, notice and an opportunity to be heard in accordance with the standards of G.S. 50A-108 must be given to ... any parent whose parental rights have not been previously terminated ...”.

However, section (b) provides:

“This Article does not govern the enforceability of a child-custody determination made without notice or an opportunity to be heard.”

This means that the impact of the failure to provide notice to a parent is determined by other state laws. See Official Comment, GS 50A-205.

It seems obvious that a custody order entered without notice to a parent and without the parent being named as a party in the action will not be binding on that parent and will not affect the parental rights of that parent in any way. See GS 50A-308(d)(1)(lack of notice is defense to enforcement of custody order). See also *Ludwig v. Hart*, 40 NC App 188 (1979)(portion of judgment divesting trustee of property was invalid where trustee was not joined as a party); *Barber v. Dixon*, 62 NC App 455 (1983)(portion of judgment enjoining action by non-parties was invalid as to the non-parties); *Buncomb County Bd. Of Health v Brown*, 271 NC 401 (1967)(court has no authority to affect the rights of a person who is not a party to the proceeding).

Even if his custodial or parental rights are not affected by the custody order, does the court have jurisdiction to resolve the custody dispute between grandmother and mother without the father in the case?

When is father a ‘necessary party’?

“The term ‘necessary party’ embraces all persons who have a claim or material interest in the

subject matter of the controversy, which interest will be directly affected by the outcome of the litigation.” *Smith v. Barbour*, 154 NC App 402 (2002), quoting *Lambroia v. Peek*, 107 NC App 745, 750 (1992). “A person is a necessary party to an action when he is so vitally interested in the controversy involved in an action that a valid judgment cannot be rendered without his presence as a party. ... His interest must be such that no decree can be rendered which will not affect him. ... Necessary parties are those persons who have rights that must be ascertained and settled before the rights of the parties to the suit can be determined.” *Wall v. Sneed*, 13 NC App 719, 724 (1972).

GS 1A, Rule 19(a) requires that persons who are “united in interest” be joined as parties in a case. A ‘necessary party’ is a person who is “united in interest” with the other parties to the suit and must be joined for a valid judgment to be entered affecting the rights of that necessary party. See *Ludwig v. Hart*, 40 NC App 188 (1979)(portion of judgment divesting trustee of property was invalid where trustee was not joined as a party).

In *Smith v. Barbour*, 154 NC App 402 (2002), the court of appeals held that the trial court had no subject matter jurisdiction to enter a temporary custody order in a case between a mother and the putative father of the child because the mother’s husband was not a party to the case. According to the appellate court, because the husband was the legal father of the child born during the marriage and there had been no adjudication that he was not the father of the child, the husband was a necessary party in the custody case, and his absence deprived the court of subject matter jurisdiction to enter a custody order.

Does this mean the court can never decide custody unless both parents are parties to the case?

GS 50-13.1 was intended by the legislature to be a broad statute to provide a comprehensive process for resolving custody disputes. *Oxendine v. Catawba County Dept. of Social Services*, 303 NC 699 (1981). A custody order entered pursuant to Chapter 50 does nothing more than resolve the custody dispute between the parties. See *Kannellos v. Kanellos*, 251 NC App 149 (2016)(despite the broad discretion granted to the court, the scope of the court’s authority in custody cases is limited to determining the custodial rights of the parties). It does not impact the rights of other people who may have an interest in the future in the custody of the child. For example, a custody order can resolve a dispute between two parents, but that order will have no impact on the rights of a grandparent who may want to assert a claim for custody in the future.

In our hypothetical case, the custody dispute is between grandmother and mother. Father is not involved in the life of the child. The court can resolve the dispute between grandmother and mother without affecting the rights of the father, assuming he ever wants to assert those rights.

There have been several appellate opinions involving custody disputes between a non-parent and only one parent, and the appellate courts have not questioned the jurisdiction of the trial court to resolve those disputes. See e.g., *Price v. Howard*, 346 NC 68 (1997)(unknown father); *Ellison v.*

Ramos, 130 NC App 389 (1998)(incapacitated mother not a party); *Weideman v. Shelton*, 247 NC App 875 (2016)(unknown father).

What about *Smith v. Barbour*? The opinion is written in broad language, but in that case, the court could not resolve the custody dispute between the mother and the putative father without resolving the issue of the paternity of the child. The court would need to determine whether to treat the case as a parent vs. parent case, or a non-parent vs. parent case. The non-party husband clearly would be affected by a determination of the child's paternity because he was the legal father of the child and would remain the legal father only until a court determined someone else was the child's father. Because his parental rights would be directly affected by the custody case between mother and the putative father, the court could not proceed without him.

In custody cases that do not require a determination of paternity, I do not believe that a parent is a necessary party in the technical sense of the word. See Reynold's on North Carolina Family Law, 2021 edition, section 8.27(a) ("The only necessary parties to an action or proceeding for the custody of a child are the two parties who are disputing the custody of the child.").

I am not implying that efforts should not be made to contact and provide notice to both parents whenever a child's custody is at issue. However, I do not think the law prohibits a court from resolving a custody dispute whenever one parent is not a party in the case.