154 N.C.App. 402
Court of Appeals of North Carolina.

Tony SMITH, Plaintiff,
v.
Staci Day BARBOUR, Defendant.
Tony Smith, Plaintiff,
v.
Staci D. Barbour, Defendant.

Nos. COA01–1519, COA02–285.
|
Dec. 3, 2002.

Synopsis
Unwed mother appealed from decisions of the District Court, Wake County, Monica M. Bousman and Alice C. Stubbs, JJ., granting father temporary custody and finding mother in civil contempt for failing to submit to a mental evaluation following the paternity test results. The Court of Appeals, Greene, J., held that, where unwed father filed custody action in the District Court and legitimation action in the Superior Court, the District Court was divested of subject matter jurisdiction to decide the issue of paternity since the legitimation action took priority over paternity action.

Reversed and remanded in part.

West Headnotes (13)

[1] **Appeal and Error**
Change of venue

Venue
Convenience

Whether to transfer venue when the convenience of witnesses and the ends of justice would be promoted by the change is a matter firmly within the discretion of the trial court and will not be overturned unless the court manifestly abused that discretion. West's N.C.G.S.A. § 1–83(2).

1 Cases that cite this headnote

[2] **Venue**
Time for application

Motions for change of venue based on the convenience of witnesses must be filed after the answer is filed. West's N.C.G.S.A. § 1–83(2).

Cases that cite this headnote

[3] **Venue**
Time for application

Unwed mother who requested a change of venue based on the convenience of the witnesses prior to filing her answer was not entitled to change of venue with respect to child custody action brought by father, given that motions for change of venue based on the convenience of witnesses had to be filed after the answer was filed. West's N.C.G.S.A. § 1–83(2).

1 Cases that cite this headnote

[4] **Parent and Child**
Legitimation proceedings in general

Since legitimation vests greater rights in the parent and the child than an order adjudicating the child's paternity, the legitimation proceeding should be given preference when separate actions for both legitimation and paternity are filed. West's N.C.G.S.A. §§ 49–11, 49–13, 49–15.

Cases that cite this headnote

[5] **Courts**
Loss or divestiture of jurisdiction

Courts
Priority of jurisdiction

Where unwed father filed custody action in the District Court, which the District Court treated as including an action for paternity, and filed legitimation action in the Superior Court, the District Court was divested of subject matter jurisdiction to decide the issue of paternity since the legitimation action took priority over paternity action, and

consequently, it was error for the District Court to order a paternity test during the pendency of the legitimation action in the Superior Court.

1 Cases that cite this headnote

[6] **Child Custody**
Parties;intervention

Both parents and third parties have a right to sue for custody. West's N.C.G.S.A. § 50–13.1(a).

1 Cases that cite this headnote

[7] **Child Custody**
Parties;intervention

In a custody dispute between a parent and a non-parent, the non-parent must first establish that he has standing, based on a relationship with the child, to bring the action.

1 Cases that cite this headnote

[8] **Child Custody**
Parties;intervention

Where a third party and a child have an established relationship in the nature of a parent-child relationship, the third party has standing as an "other person" to seek custody pursuant to statute providing that any parent, relative, or other person claiming the right to custody of a minor child may institute an action or proceeding for the custody of such child. West's N.C.G.S.A. § 50–13.1(a).

1 Cases that cite this headnote

[9] **Child Custody**
Persons entitled in general

The father of a child born out of wedlock will be treated as a third party who has the right to sue for custody, unless he has either legitimated the child or had his paternity adjudicated. West's N.C.G.S.A. §§ 50–13.1(a), 49–10, 49–12, 49–12.1, 49–14.

1 Cases that cite this headnote

[10] **Child Custody**
Parties;intervention

While unwed father's legitimation action was still pending in the Superior Court at the time the District Court entered its temporary custody order, father's status for purposes of temporary custody remained that of a third party, and yet even as a third party, father had standing to bring custody action because the District Court's findings that the child shared father's last name and father had visited the child since her birth two years prior to this action indicated the existence of a sufficient parent-child relationship, and as such, District Court had the authority to enter temporary custody order. West's N.C.G.S.A. § 50–13.1(a).

1 Cases that cite this headnote

[11] **Parties**
Persons Who Must Join

Parties
Persons Who Must Be Joined

The term "necessary party," for purposes of rule governing joinder of necessary parties, 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. Rules Civ.Proc., Rule 19(b), West's N.C.G.S.A. § 1A–1.

Cases that cite this headnote

[12] **Child Custody**
Parties;intervention

In an action brought by a putative father or a non-parent claiming custody of a child born during the mother's marriage to her husband, the husband is a necessary party to the proceeding, unless he has previously been determined not to be the child's father.

Cases that cite this headnote

[13] **Child Custody**
Parties;intervention

Because wife's former husband was a necessary party in custody action, but did not receive notice of the temporary custody proceeding, the trial court erred in ordering temporary visitation to putative father; wife's former husband was child's presumed father.

Cases that cite this headnote

**874 *403 Appeals by defendant from order filed 8 August 2001 by Judge Monica M. Bousman and from orders filed 26 October 2001 by Judge Alice C. Stubbs in Wake County District Court. Heard in the Court of Appeals 8 October 2002.

As the issues presented by defendant's appeals to this Court arise out of the same action and involve common questions of law, we have consolidated the appeals pursuant to Rule 40 of the North Carolina Rules of Appellate Procedure.

Attorneys and Law Firms

Hatch, Little & Bunn, L.L.P., by Helen M. Oliver, Raleigh, for plaintiff–appellee.

Staci D. Barbour, pro se, Angier, defendant–appellant.

Opinion

GREENE, Judge.

Staci Day Barbour (Defendant) appeals an order for temporary custody filed 8 August 2001 and orders for contempt and modification of temporary custody filed 26 October 2001.[1]

On 23 February 2001, Tony Smith (Plaintiff) filed a complaint against Defendant in the Wake County District Court. The complaint alleged "Plaintiff and Defendant [were] the biological parents of one minor child, ... Kayla Olivia Smith, born November 6, 1999" and stated "[t]he parties ha[d] never been married." Plaintiff sought both temporary and permanent custody of the child. On the same day, Plaintiff initiated a legitimation action in the Wake County Superior Court.

Defendant responded on 26 April 2001 by filing a motion for change of venue to Johnston County, where she and the child resided, based on the convenience of the witnesses. On 21 May 2001, Plaintiff filed a motion for a mental examination of Defendant alleging Defendant had "exhibited numerous mental conditions in the past, including ... agoraphobia and extreme anxiety." On 20 July 2001, *404 Defendant filed an amended **875 motion to dismiss the complaint.[2] In her motion, Defendant noted: the minor child's father was Bilal Kanawati; Plaintiff had not previously been adjudicated the child's father; Plaintiff did not have legal standing to bring a custody action; and Plaintiff had filed a separate action for legitimation in the Wake County Superior Court.

The hearing on Plaintiff's request for temporary custody and his motion for a mental evaluation revealed Plaintiff believed himself to be the biological father of Defendant's daughter. Plaintiff was paying child support and had visited with the child until May 2001 "when [D]efendant stopped all visitation." Plaintiff requested the district court allow him visitation pending the outcome of the legitimation proceeding in the superior court.

In an order entered 8 August 2001, the district court treated Plaintiff's complaint as initiating an action for paternity in addition to custody and found in pertinent part that:

> 4. Defendant is the biological mother of the minor child of this action.... Defendant was married to Bilal Kanawati at the time of the child's birth.
>
> 5. Plaintiff believes himself to be the father of the minor child of this action. Plaintiff had visitation with the minor child from [her] birth ... until May 2001, the minor child shares Plaintiff's last name, and ... Defendant never indicated to Plaintiff that he may not be the biological father of the minor child until after the institution of this action.
>
> ....

15. At the time of this hearing, Defendant had not filed an [a]nswer to the [c]omplaint. In order for the [district] [c]ourt to permit a hearing on [the] [m]otion to [c]hange [v]enue for convenience of witnesses and promoting the ends of justice, an [a]nswer must have been filed prior to the filing of the [m]otion to [c]hange [v]enue.

....

22. There are two pending actions filed in Wake County, this action and the action to legitimate the minor child.

....

*405 24. Wake County is a proper and convenient forum to hear this matter.

25. Plaintiff has standing to pursue this action at the present time.

26. Defendant has suffered from anxiety disorders and ... it is in the best interest of the minor child of this action and there is good cause to [o]rder a [m]ental [e]valuation of ... [D]efendant.

27. It appears to the [district] court, on its own motion[,] that a paternity test would resolve the issue of whether Plaintiff is the biological father of the minor child....

28. It is in the best interest of the minor child that Plaintiff be permitted visitation....

The district court concluded "[t]he best interest of the minor child will be served by the provisions contained in the [o]rder ..., and the parties are fit and proper persons to have the[ir] [assigned] roles." The district court then denied both Defendant's motion for a change of venue and her motion to dismiss and granted Plaintiff temporary visitation. The district court also ordered the parties to submit to a paternity test. In the event the paternity test resulted in a finding that Plaintiff was the child's biological father, the district court further ordered Defendant to undergo a mental evaluation. Defendant appealed from this order on 14 August 2001. She filed her answer to Plaintiff's complaint on 28 August 2001.

On 1 October 2001, Plaintiff filed a motion for an order to show cause because, although the results of the court-ordered paternity test indicated Plaintiff was the child's biological father, Defendant had not undergone a mental evaluation. The district court granted Plaintiff's motion and entered an order to show cause why Defendant was not in contempt **876 of the 8 August 2001 order. Also, on 1 October 2001, Plaintiff filed a motion for modification of the 8 August 2001 temporary custody order based on the paternity test results.

Defendant responded on 12 October 2001 by filing an "Objection and Motion to Dismiss Contempt of Court Action" and a "Motion to Dismiss Motion for Modification of Temporary Custody Order." Defendant argued in both motions that due to the pendency of her appeal from the 8 August 2001 order, the district court did not have continuing jurisdiction to rule on Plaintiff's motions.

*406 In an order entered 26 October 2001, the district court found that:

4. Plaintiff and Defendant are the biological parents of the minor child....

....

7. Plaintiff desires additional time with his minor child.

....

10. This matter will not be set for a permanent custody hearing for some time, as Defendant was ordered to undergo a mental evaluation which has not commenced as of the date of this hearing.

....

12. Plaintiff and Defendant are fit and proper persons to share joint legal custody of their minor child, ... with Defendant having primary physical custody and Plaintiff having secondary physical custody.

The district court then denied Defendant's motion to dismiss and increased Plaintiff's visitation rights. In a concurrent order, the district court found Defendant in civil contempt of the 8 August 2001 order for failing to submit to a mental evaluation following the paternity test results. The district court sentenced Defendant to thirty days custody with the opportunity to purge herself of contempt by obtaining a mental evaluation within thirty days of the entry of the contempt order.

The issues are whether: (I) the district court erred in denying Defendant's motion for a change of venue; (II) Plaintiff's filing of a legitimation action in the superior court divested the district court of subject matter jurisdiction to adjudicate the issue of paternity; and (III) the district court erred in granting Plaintiff temporary visitation.

I

Defendant first argues the district court erred in denying her motion for a change of venue because Defendant and her daughter live in Johnston as opposed to Wake County.

[1] [2] [3] Pursuant to N.C. Gen.Stat. § 1–83(2) "[t]he court may change the place of trial ... [w]hen the convenience of witnesses and the ends of justice would be promoted by the change." N.C.G.S. § 1–83(2) (2001). ***407** "Whether to transfer venue for this reason, however, is a matter firmly within the discretion of the trial court and will not be overturned unless the court manifestly abused that discretion." *Centura Bank v. Miller,* 138 N.C.App. 679, 683, 532 S.E.2d 246, 249 (2000). Moreover, "motions for change of venue based on the convenience of witnesses, pursuant to section 1–83(2), must be filed after the answer is filed." *McCullough v. Branch Banking & Tr. Co.,* 136 N.C.App. 340, 350, 524 S.E.2d 569, 575–76 (2000). In this case, Defendant, prior to filing her answer, requested a change of venue based on the convenience of the witnesses. Because we see no abuse of discretion, the district court properly denied her request.

II

Defendant next asserts Plaintiff's filing of a legitimation action in the superior court divested the district court of subject matter jurisdiction to adjudicate the issue of paternity. We agree.

[4] In a legitimation action, upon the putative father's verified, written petition to the clerk of the superior court and the clerk's determination that petitioner is the father of the child, "the [clerk] may ... declare and ****877** pronounce the child legitimated."[3] N.C.G.S. § 49–10 (2001). The legitimation serves to confer onto

> the father and mother all of the lawful parental privileges and rights, as well as all of the obligations which parents owe to their lawful issue, and to the same extent as if said child had been born in wedlock, and to entitle such child by succession, inheritance or distribution, to take real and personal property by, through, and from his or her father and mother as if such child had been born in lawful wedlock.

N.C.G.S. § 49–11 (2001); *see also* N.C.G.S. § 49–13 (2001) (right to have child's surname changed to father's). An adjudication of paternity, on the other hand, only serves to equalize between the child's father and mother "the rights, duties, and obligations ... with regard to support and custody of the child." N.C.G.S. § 49–15 (2001). As legitimation thus vests greater rights in the parent and the child than an order ***408** adjudicating the child's paternity,[4] *see* N.C.G.S. §§ 49–11, 49–13, 49–15, the legitimation proceeding should be given preference when separate actions for both legitimation and paternity are filed.[5] *See Lewis v. Stitt,* 86 N.C.App. 103, 105, 356 S.E.2d 398, 399 (1987) (holding that once a child has been legitimated, an action for paternity can no longer be maintained).

[5] In this case, Plaintiff filed both the custody action in the district court, which the district court treated as including an action for paternity, and the legitimation action in the superior court. Because the issue of paternity is central to both actions and the legitimation action takes priority over a paternity action, the district court was divested of subject matter jurisdiction to decide the issue of paternity. Consequently, it was error for the district court to order a paternity test in this case.

III

While the district court erred in considering the issue of paternity during the pendency of the legitimation action, we also need to determine whether the district court nevertheless had the authority to enter a temporary custody order. Defendant argues the district court lacked jurisdiction to do so because Plaintiff, in the absence of an adjudication of paternity, was a third party without standing. We disagree.

[6] [7] [8] [9] Both parents and third parties have a right to sue for custody. *See* N.C.G.S. § 50–13.1(a) (2001) ("[a]ny parent, relative, or other person ... claiming the right to custody of a minor child may institute an action or proceeding for the custody of such child"). In a custody dispute between a parent and a non-parent, the non-parent must first establish that he has standing, based on a relationship with the child, to bring the action. *See Ellison v. Ramos,* 130 N.C.App. 389, 394, 502 S.E.2d 891, 894 (1998). Thus, "where a third party and a child have an ***409** established relationship in the nature of a parent-child relationship, the third party does have standing as an 'other person' under ****878** N.C. Gen.Stat. § 50–13.1(a) to seek custody." *Id.* at 395, 502 S.E.2d at 895. The father of a child born out of wedlock will be treated as a third party unless he has either legitimated the child pursuant to sections 49–10, 49–12, or 49–12.1 or had his paternity adjudicated under section 49–14. *See Rosero v. Blake,* 150 N.C.App. 251, 255–56, 563 S.E.2d 248, 252–53 (2002).

[10] While Plaintiff's legitimation action was still pending at the time the district court entered its temporary custody order in this case, Plaintiff's status for purposes of temporary custody remained that of a third party under *Ellison.* Yet even as a third party, Plaintiff had standing to bring this action because the district court's findings that the child shared Plaintiff's last name and Plaintiff had visited the child since her birth two years prior to this action indicated the existence of a sufficient relationship.[6] As such, the trial court had the authority to enter a temporary custody order.

[11] [12] [13] It was, however, error for the trial court to order temporary visitation to Plaintiff in the absence of any notice to the child's presumed father, Bilal Kanawati, who was a necessary party to the action. "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." *Lombroia v. Peek,* 107 N.C.App. 745, 750, 421 S.E.2d 784, 787 (1992); N.C.G.S. § 1A–1, Rule 19(b) (2001). In an action brought by a putative father or a non-parent claiming custody of a child born during the mother's marriage to her husband, the husband is thus a necessary party to the proceeding, unless he has previously been determined not to be the child's father. *See Lombroia,* 107 N.C.App. at 750, 421 S.E.2d at 787. Because Bilal Kanawati, Defendant's former husband, was a necessary party in this case but did not receive notice of the temporary custody proceeding, the trial court erred in entering its 8 August 2001 order in its entirety.[7]

***410** As the trial court lacked subject matter jurisdiction to hear either the paternity or the custody action, this case must be reversed as to the paternity portion and reversed and remanded as to the custody portion[8] of the district court's 8 August 2001 order. Furthermore, all orders in this case entered after 8 August 2001 based on the results of the paternity test ordered by the district court are void. This includes the district court's order holding Defendant in civil contempt.[9]

Reversed and remanded in part.

Judges WYNN and McGEE, concur.

All Citations

154 N.C.App. 402, 571 S.E.2d 872

Footnotes

1 These orders are clearly interlocutory. Assuming without deciding that they do not implicate a substantial right, we exercise our discretion and grant *certiorari* to hear this appeal. *See* N.C.R.App. P. 21(a)(1).

2 The record does not include the initial motion to dismiss.

3 When paternity is disputed in a legitimation action, the clerk is required to "transfer the proceeding to the appropriate court." N.C.G.S. § 1–301.2(b) (2001). With respect to the issue of paternity, the appropriate court is the district court. *See* N.C.G.S. § 49–14 (2001); *e.g., Davis v. N.C. Dept. of Human Resources,* 126 N.C.App. 383, 485 S.E.2d 342 (1997) (paternity action brought in district court), *aff'd and rev'd in part,* 349 N.C. 208, 505 S.E.2d 77 (1998); *see also* N.C.G.S. § 7A–244 (district court proper division for domestic relations cases).

4 Although greater in number, because the rights granted upon legitimation of a child vary only slightly from the rights conveyed upon an action of paternity, it would not only be good public policy but also further judicial efficiency if the legislature amended section 49–14 so that an adjudication of paternity would constitute a *per se* legitimation of the child. *See* Homer H. Clark, Jr., *The Law of Domestic Relations in the United States* § 4.3, at 174 (2d ed.1988) (proposing

that in states where this is not yet the case "the statute should be phrased to include the paternity suit as a source of legitimation for all purposes").

5 Without such a preference, we would simply be promoting a race to the courthouse based on assumptions as to which judge will best decide the issue of paternity.

6 As Defendant did not assign error to these findings, they are deemed to be supported by competent evidence. *See Anderson Chevrolet/Olds v. Higgins,* 57 N.C.App. 650, 653, 292 S.E.2d 159, 161 (1982).

7 We note the trial court has the authority under the appropriate circumstances to enter *ex parte* temporary custody orders. *See* N.C.G.S. § 50–13.5(d)(2)–(3) (2001). The record in this case, however, reflects no circumstances warranting suspension of the notice requirement.

8 The district court's temporary custody order in this case cannot survive absent notice to all necessary parties. Although N.C. Gen.Stat. § 50–13.5(e)(3) provides that "[i]n the discretion of the court, failure of ... service of notice shall not affect the validity of any order or judgment entered," N.C.G.S. § 50–13.5(e)(3) (2001), this section applies only to orders entered with respect to support actions, *see* N.C.G.S. § 50–13.5(e) (2001); *see also Broaddus v. Broaddus,* 45 N.C.App. 666, 263 S.E.2d 842 (1980) (applying former version of section 50–13.5(e)(3) to custody action where section specifically referred to custody as opposed to child support proceedings).

9 The order for contempt necessarily fails because the district court's order of a mental evaluation of Defendant was premised on its order of a paternity test.

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195 N.C.App. 278
Court of Appeals of North Carolina.

In re Michael G. PAPATHANASSIOU.

No. COA08–95.
|
Feb. 3, 2009.

Synopsis

Background: Putative father filed a petition to legitimate child. A Superior Court Clerk entered an order to legitimate. Mother's former husband appealed. The Superior Court, Mecklenburg County, Timothy S. Kincaid, J., granted father summary judgment and declared him to be the biological father of child. Former husband appealed.

Holdings: The Court of Appeals, Stephens, J., held that:

[1] trial court was not required to consider the best interests of the child before entering order in legitimation proceeding, and

[2] evidence supported finding that putative father was the biological father of child.

Affirmed.

West Headnotes (2)

[1] Parent and Child
Formalization of Relation;Legitimation

The trial court was not required to consider the best interests of the child before entering order in legitimation proceeding; statutes did not require consideration of the best interests of the child in a legitimation proceeding. West's N.C.G.S.A. §§ 49–10, 49–12.1(a).

Cases that cite this headnote

[2] Parent and Child
Particular cases

Evidence in legitimation proceeding supported finding that putative father was the biological father of child; DNA testing established with a 99.99 percent probability that putative father was the biological father child. West's N.C.G.S.A. §§ 49–10, 49–12.1(a).

Cases that cite this headnote

****573** Appeal by Respondent Andrew Papathanassiou from orders entered 18 August 2005 by the Honorable Martha H. Curran, Clerk of Mecklenburg County Superior Court, and 14 February 2007 by the Honorable Timothy S. Kincaid in Mecklenburg County Superior Court. Heard in the Court of Appeals 22 September 2008.

Attorneys and Law Firms

James, McElroy & Diehl, P.A., by Jonathan D. Feit and Sarah M. Brady, Charlotte, for Petitioner–Appellee.

Todd Cline, P.A., by Todd W. Cline, Charlotte, for Respondent–Appellee.

Cheshire, Parker, Schneider, Bryan & Vitale, by Jonathan McGirt, and Sandlin & Davidian, PA, by Deborah Sandlin, Raleigh, for Respondent–Appellant.

No brief filed for Guardian ad Litem for the minor child.

Opinion

STEPHENS, Judge.

***279** The paramount question presented by this appeal is whether the sole factual issue before the court in a legitimation proceeding pursuant to N.C. Gen.Stat. §§ 49–10 and 49–12.1 is the determination of whether the petitioner is the biological father of the minor child. We hold that it is.

Background and Procedure

On 25 June 1995, Andrew Papathanassiou ("Respondent") and Altona Dee Jetton Papathanassiou ("Ms. Jetton") were married. On 23 December 1997, Ms. Jetton gave birth to Michael Gray Papathanassiou ("the

child"). Respondent and Ms. Jetton were listed as the child's father and mother on the child's birth certificate. At the time the child was conceived and born, Respondent was unaware that he was not the biological father of the child. In the spring of 1998, Respondent obtained a DNA test which indicated that he was not the child's biological father. Nevertheless, Respondent continued to regard and conduct himself as the child's father in every other way. On 12 January 2000, Ms. Jetton gave birth to William Garret Papathanassiou, who is Respondent's biological child.

On or about 1 February 2002, Respondent and Ms. Jetton separated. On 4 June 2003, Ms. Jetton filed a complaint against Respondent in Mecklenburg County District Court seeking, *inter alia,* ***280** custody and child support for the two minor children "born during the parties' marriage[.]" On 30 July 2002, Ms. Jetton filed an amended complaint, alleging that only "[o]ne child was born of the marital relationship," namely William.

On 1 August 2003, a consent order was entered, finding as fact that Ms. Jetton and Respondent were "the biological parents of one child," William, and resolving the issues of child custody and child support with respect to William only. On 6 October 2003, Respondent and Ms. Jetton were divorced.

On 11 May 2005, Gordon B. Grigg ("Petitioner") filed a Petition to Legitimate in a special proceeding before the Mecklenburg County Clerk of Superior Court. The petition sought to legitimate the child pursuant to N.C. Gen.Stat. § 49–10. On 9 June 2005, Respondent, although not yet a party to the proceeding, filed a motion to dismiss, alleging that the petition was fatally defective for failing to name him as a necessary party, for insufficiency of service of process, and for failing to request or obtain appointment of a guardian *ad litem* for the child, as required by N.C. Gen.Stat. § 49–12.1(a).

Respondent's motion was heard on 14 June 2005 by the Honorable Martha H. Curran, Mecklenburg County Clerk of Superior Court. The Clerk granted a continuance to allow for personal service on Respondent and appointed a guardian *ad litem* for the child.

On 2 August 2005, the Clerk convened a hearing on the Petition to Legitimate. On 18 August 2005, the Clerk entered an Order to Legitimate decreeing that "[t]he minor child, Michael Gray Papathanassiou, is declared legitimate, Petitioner is declared the biological ****574** father[ ]," and "[t]he minor child's name is changed to Michael Gray Grigg[.]"

From this order, Respondent appealed to the Superior Court of Mecklenburg County for a hearing *de novo* pursuant to N.C. Gen.Stat. § 1–301.2(e). On 20 February 2006, Petitioner filed a Motion *in Limine* and Citation of Authority, requesting that the trial court dismiss Respondent's appeal on grounds that Respondent was not a necessary party to the action and requesting that Respondent be precluded from using any pleading, testimony, remarks, questions, or argument regarding the best interest of the child. On 26 October 2006, Petitioner filed a Motion for Summary Judgment. On 31 October 2006, Petitioner filed an Amended Motion for Summary Judgment.

On 2 November 2006, Petitioner filed another Motion *in Limine,* requesting that the trial court exclude any evidence regarding the ***281** child's best interest or public policy concerns of legitimating the child, and seeking to limit the evidence solely to the issue of biological paternity. On 6 February 2007, Petitioner filed a Second Amended Motion for Summary Judgment.

On 13 February 2007, Respondent filed responses to Petitioner's motions *in limine.* A hearing on Petitioner's motion for summary judgment and motions *in limine* was held on 14 February 2007 before the Honorable Timothy S. Kincaid. On that day, the trial court entered an Order Granting Summary Judgment, declaring the child to be legitimate, declaring Petitioner to be the child's biological father, and allowing the child's last name to remain Grigg.

From the Order to Legitimate and the Order Granting Summary Judgment, Respondent appeals.

Discussion

[1] Respondent argues that the trial court improperly granted summary judgment in favor of Petitioner. Specifically, Respondent asserts the trial court erroneously considered DNA evidence of Petitioner's biological parentage of the child as conclusive evidence that the child should be legitimated as the child of Petitioner, without consideration of the child's best interest. Petitioner further argues that summary judgment

was inappropriate as there is a genuine issue of material fact regarding the child's best interest.

"North Carolina courts have long recognized that children born during a marriage ... are presumed to be the product of the marriage." *Jones v. Patience,* 121 N.C.App. 434, 439, 466 S.E.2d 720, 723, *appeal dismissed and disc. review denied,* 343 N.C. 307, 471 S.E.2d 72 (1996). "The presumption is universally recognized and considered one of the strongest known to the law." *In re Legitimation of Locklear,* 314 N.C. 412, 419, 334 S.E.2d 46, 51 (1985). However, "[t]he presumption of legitimacy can be overcome by clear and convincing evidence." N.C. Gen.Stat. § 49–12.1(b) (2005).

Pursuant to N.C. Gen.Stat. § 49–12.1, "[t]he putative father of a child born to a mother who is married to another man may file a special proceeding to legitimate the child." N.C. Gen.Stat. § 49–12.1(a) (2005). The putative father

> may apply by a verified written petition, filed in a special proceeding in the superior court of the county in which the putative father resides or in the superior court of the county in which the child resides, praying that such child be declared legitimate.

***282** N.C. Gen.Stat. § 49–10 (2005). The mother, if living, the child, and the spouse of the mother of the child shall be necessary parties to the proceeding. N.C. Gen.Stat. § 49–10; N.C. Gen.Stat. § 49–12.1(a). "A guardian ad litem shall be appointed to represent the child if the child is a minor." N.C. Gen.Stat. § 49–12.1(a).

> If it appears to the court that the petitioner is the father of the child, the court may thereupon declare and pronounce the child legitimated; and the full names of the father, mother and the child shall be set out in the court order decreeing legitimation of the child.

N.C. Gen.Stat. § 49–10.

"[O]ur General Assembly has continually enacted and modified legislation to establish legal ties binding illegitimate children to their biological fathers and to acknowledge the rights and privileges inherent in the relationship ****575** between father and child." *Rosero v. Blake,* 357 N.C. 193, 201, 581 S.E.2d 41, 46 (2003), *cert. denied,* 540 U.S. 1177, 124 S.Ct. 1407, 158 L.Ed.2d 78 (2004). Legitimation of a child under Chapter 49

> impose[s] upon the father and mother all of the lawful parental privileges and rights, as well as all of the obligations which parents owe to their lawful issue, and to the same extent as if said child had been born in wedlock, and to entitle such child by succession, inheritance or distribution, to take real and personal property by, through, and from his or her father and mother as if such child had been born in lawful wedlock. In case of death and intestacy, the real and personal estate of such child shall descend and be distributed according to the Intestate Succession Act as if he had been born in lawful wedlock.

N.C. Gen.Stat. § 49–11 (2005). By specifying the manner in which an illegitimate child's paternity may be established, the legislature has attempted to grant to illegitimate children rights of inheritance on par with those enjoyed by legitimate children. *Mitchell v. Freuler,* 297 N.C. 206, 216, 254 S.E.2d 762, 768 (1979). Accordingly, the inquiry in Sections 49–10 and 49–12.1 is whether the petitioner is the biological father of the minor child such that the rights and responsibilities inherent in the relationship between father and child may be acknowledged.

Citing N.C. Gen.Stat. §§ 50–13.2, 7B–1110, and 48–1–101, Respondent asserts that "[i]t is implicit in all of North Carolina's statutes regarding minor children that the court should consider the best ***283** interest of the child before making any decision regarding the child[,]" and argues that the permissive language in N.C. Gen.Stat. §§ 49–10 and 49–12.1 implies that the court must consider the best interest of the child before entering an order of legitimation.

N.C. Gen.Stat. § 50–13.2 provides that "[a]n order for [child] custody must include findings of fact which support the determination of what is in the best interest of the child." N.C. Gen.Stat. § 50–13.2(a) (2005). N.C. Gen.Stat.

§ 7B–1110 provides that "[a]fter an adjudication that one or more grounds for terminating a parent's rights exist, the court shall determine whether terminating the parent's rights is in the juvenile's best interest." N.C. Gen.Stat. § 7B–1110(a) (2005). N.C. Gen.Stat. § 48–1–101 is a list of definitions applicable to Chapter 48 of the General Statutes which governs adoptions. Although the definitions section does not mention the best interest of the child, specific provisions in Chapter 48 do require that the court consider a child's best interest when considering adoptive placement for the child. *See, e.g.*, N.C. Gen.Stat. § 48–2–501(a) (2005) ("Whenever a petition for adoption of a minor is filed, the court shall order a report to the court made to assist the court to determine if the proposed adoption of the minor by the petitioner is in the minor's best interest."); N.C. Gen.Stat. § 48–2–603(a) (2005) ("At the hearing on, or disposition of, a petition to adopt a minor, the court shall grant the petition upon finding by a preponderance of the evidence that the adoption will serve the best interest of the adoptee...."); N.C. Gen.Stat. § 48–2–606(a)(7) (2005) ("A decree of adoption must state ... [t]hat the adoption is in the best interest of the adoptee."). Contrary to Respondent's assertion, the above-referenced statutes explicitly, not implicitly, require the court to consider the best interest of the child.

In *In re Change of Name of Crawford to Crawford Trull,* 134 N.C.App. 137, 517 S.E.2d 161 (1999), petitioner alleged that the court committed reversible error in failing to consider the minor child's best interest in determining whether to allow the child's mother to change the child's surname over the biological father's objections. This Court rejected petitioner's argument, explaining:

> Our General Assembly ... has not required a "best interest[ ] of the child" inquiry in the context of naming a child under G.S. § 130A–101(f)(4), nor in the changing of a child's name under G.S. § 101–2. While the General Assembly has specifically required such an inquiry in contexts such as termination of parental rights, child custody and placement, parental visitation ***284** rights, and even in the context of a change in surname on a birth certificate following legitimation, *see* ****576** N.C. Gen.Stat. § 130A–118, its failure to require a best interest[ ] inquiry in connection with G.S. § 101–2 and G.S. § 130A–101(f)(4) is clear evidence of its intent that no such inquiry is required in this context.

Id. at 142–43, 517 S.E.2d at 164.

Similar to the statutes at issue in *Crawford,* our General Assembly has not required a "best interest of the child" inquiry in the context of a legitimation proceeding. While the General Assembly has specifically required such an inquiry under N.C. Gen.Stat. §§ 50–13.2 and 7B–1110, and Chapter 48, its failure to mandate a best interest inquiry in connection with N.C. Gen.Stat. §§ 49–10 and 49–12.1 is clear evidence of its intent that no such inquiry is required in this context. *See Elec. Supply Co. v. Swain Elec. Co.,* 328 N.C. 651, 656, 403 S.E.2d 291, 294 (1991) ("Legislative purpose is first ascertained from the plain words of the statute.").

Respondent additionally argues that requiring the husband of the mother of the child be made a party to the legitimation proceeding implies that the court must consider the best interest of the child. Respondent contends that if "the biological parentage of the child [i]s the only issue to be determined in a legitimation proceeding, and upon proof of biological parentage, [Petitioner] [i]s entitled to summary judgment as a matter of law[,]" then there is no purpose for the joinder of the mother's husband as a necessary party. We disagree.

Pursuant to Rule 19 of the North Carolina Rules of Civil Procedure, all those with an interest in an action or proceeding must be joined as necessary parties to the action. A necessary party is one "who ha[s] a claim or material interest in the subject matter of the controversy, [whose] interest will be directly affected by the outcome of the litigation." *Lombroia v. Peek,* 107 N.C.App. 745, 750, 421 S.E.2d 784, 787 (1992); N.C. Gen.Stat. § 1A–1, Rule 19(b) (2005).

The husband of the mother of a child born during the parties' marriage is presumed to be the father of that child and, thus, enjoys all the parental rights and privileges, as well as obligations, to that child. A determination that a petitioner in a legitimation action, and not the husband, is the biological father of the child terminates the husband's rights to the child, conferring them onto petitioner. N.C. Gen.Stat. § 49–11. Thus, unless the husband has

previously been determined not to be the child's father, he is a necessary party to the ***285** proceeding. *Lombroia,* 107 N.C.App. at 751, 421 S.E.2d at 787. As "a potentially adverse party in this special proceeding," *Locklear,* 314 N.C. at 422, 334 S.E.2d at 52, the husband is permitted to file pleadings and motions, *see* N.C. Gen.Stat. 1A–1, Rule 7 (2005), obtain discovery, *see* N.C. Gen.Stat. § 1A–1, Rule 26 (2005), and present evidence. *See* N.C. Gen.Stat. § 8C–1, Rule 101 *et seq.* (2005). Accordingly, Respondent could have introduced evidence of his paternity and/or rebutted or discredited evidence of paternity presented by Petitioner. Although Respondent in this case could accomplish neither, his presence was not "obviously, utterly immaterial," as it afforded him an opportunity to defend the presumption that he was the child's father and discredit Petitioner's evidence to the contrary.

Respondent further argues that the requirement that the court appoint a guardian *ad litem* for the minor child during a legitimation proceeding implies that, similar to a termination of parental rights proceeding, the court must employ a two-step process before entering an order of legitimation: first, the court must determine whether grounds exist that would allow for legitimation, and then the court must determine whether legitimation is in the best interest of the child.

Section 49–10 specifies the procedures to be followed in a proceeding pursuant to Section 49–12.1, and provides that the child is a necessary party to the legitimation proceeding. Section 49–12.1 states specifically that if the child is a minor, a guardian *ad litem* must be appointed to represent the child. N.C. Gen.Stat. § 49–12.1(a). However, regardless of whether Section 49–12.1 required this, appointment of a guardian *ad litem* for the minor child is mandated by Rule 17 of the North Carolina Rules of Civil Procedure. [1]

****577** Guardians *ad litem* are appointed to stand in place of minor children in all civil actions and proceedings as minors are presumed by law not to have the requisite capacity to handle their own affairs. *See In re Clark,* 303 N.C. 592, 281 S.E.2d 47 (1981). The role of the guardian *ad litem* is to defend on behalf of the minor child, N.C. Gen.Stat. § 1A–1, Rule 17(b)(2) (2005), and to "protect the interest of the [minor] defendant at every stage of the proceeding." *Clark,* 303 N.C. at 598, 281 S.E.2d at 52 (quotation marks and citation omitted). Thus, contrary to Respondent's assertion, the appointment of a guardian ***286** *ad litem* does not dictate the form and inquiry of the proceeding; rather, the duties of the guardian *ad litem* are dictated by the action or proceeding in which the guardian *ad litem* has been appointed. In the context of a legitimation proceeding, where the inquiry of the court is whether the petitioner is the biological father of the minor child, the guardian *ad litem* must defend on behalf of the child in a manner that assures that the child's interest in the determination of his or her biological father is protected.

Respondent finally asserts that requiring the trial court to consider the best interest of the child is consistent with other statutes regarding the well-being of the child, such as N.C. Gen.Stat. §§ 48–3–603 and 48–3–601(2)(b). Respondent correctly states that pursuant to N.C. Gen.Stat. § 48–3–603, prior to legitimating the child, Petitioner's consent would not have been required for the child to have been placed for adoption. Additionally, Respondent correctly states that pursuant to N.C. Gen.Stat. § 48–3–601(2)(b), prior to Petitioner's legitimating the child, Respondent's consent would have been required for the child to have been placed for adoption. However, pursuant to N.C. Gen.Stat. § 48–3–603, Respondent's consent would *not* be required after Petitioner's petition to legitimate the child was granted. N.C. Gen.Stat. § 48–3–603(a)(2) (2005).

Having carefully considered Respondent's arguments, and not being unsympathetic to his position, we are constrained to hold that the only issue to be decided in a legitimation proceeding pursuant to N.C. Gen.Stat. §§ 49–10 and 49–12.1 is whether the putative father who has filed a petition to legitimate is the biological father of the child. Respondent contends that this "oversimplified interpretation of N.C. Gen.Stat. §§ 49–10 and 49–12.1 [could lead to] many absurd results[.]" [2] However, the legitimation of a child is a separate and distinct issue from who shall have custody and control of the child. The concerns raised by Respondent can be, and properly are, addressed in other proceedings, such as custody, adoption, or termination of parental rights, where the best interest of the child is paramount.

[2] ***287** Normally, the factual issue of paternity, when premised on a presumption of legitimacy, should be presented to and resolved by a jury. *Locklear,* 314 N.C. at 421, 334 S.E.2d at 52. However, summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the

affidavits, if any, show that there is no genuine issue as to any material fact and that [a] party is entitled to a judgment as a matter of law." N.C. Gen.Stat. § 1A–1, Rule 56(c) (2005). "A 'genuine issue' is one that can be maintained by substantial evidence." *Dobson v. Harris,* 352 N.C. 77, 83, 530 S.E.2d 829, 835 (2000). On appeal of a trial court's grant of a motion for summary judgment, we consider whether, on the basis of materials supplied to the trial court, there was a genuine issue of material fact and whether the moving party is entitled to judgment as a matter of law. *Id.* Evidence presented by the parties is viewed in the light most favorable to the non-movant. *Id.*

****578** In this case, DNA tests indicated a 99.99 percent probability that Petitioner is the biological father of the child. Furthermore, Respondent offered no evidence to the contrary, and admitted that he is not the biological father of the child. Petitioner, having provided conclusive evidence that he is the child's biological father, established that there was no remaining issue of fact to be determined in the legitimation proceeding. Therefore, the trial court did not err in entering summary judgment in Petitioner's favor. [3]

AFFIRMED.

Chief Judge MARTIN and Judge McGEE concur.

All Citations

195 N.C.App. 278, 671 S.E.2d 572

Footnotes

1 "The Rules of Civil Procedure and the provisions of this Chapter on civil procedure are applicable to special proceedings, except as otherwise provided." N.C. Gen.Stat. § 1–393 (2005).

2 For example, Respondent poses a hypothetical scenario where a petitioner is a convicted murderer who has never contributed any support to the minor child but who presents genetic testing results that show a 99.99 percent probability that he is the child's biological father, and all of the parties to the proceeding acknowledge that he is the biological father of the child. Respondent argues that if the convicted murderer were entitled to summary judgment granting his petition to legitimate, "[s]urely, that result is not what our legislature intended[.]"

3 Although Respondent additionally argues that the Clerk erred in ordering legitimation upon Petitioner's Petition to Legitimate, for the reasons stated above, we conclude that the Clerk did not err in entering the 18 August 2005 Order to Legitimate.