

Scope of Authority in Custody cases

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What are you trying to do in these cases??

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GS 50-13.2

"An order for custody ... shall award the custody of such child to such person, agency, organization or institution as will best promote the interest and welfare of the child."

"An order for custody of a minor child may grant joint custody to the parents, exclusive custody to one person, agency, organization, or institution, or grant custody to two or more persons, agencies, organizations, or institutions."

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GS 50-13.2

"Any order for custody shall include such terms, including visitation, as will best promote the interest and welfare of the child."

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What is custody?

"Physical custody" means the physical care and supervision of a child

- GS 50A-102(14)
- "Visitation" simply is a lesser form of physical custody
 - *Davis v. Davis*, 229 NC App 494 (2013)
- Physical custody allows party to make decisions about the child's routine but not matters with "long-range consequences"
 - *Diehl v. Diehl*, 177 NC App 642 (2006)

"Legal custody" means the right and responsibility to make decisions with important and long-term implications for a child's best interest and welfare. *Diehl*

"Joint custody" means "a relationship where each party has a degree of control over , and a measure of responsibility for, the child's best interest and welfare." *Diehl*

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It really is just about *custody*.....

While GS 50-13.2 gives the court broad discretion –

"In proceedings involving the custody ... of a minor child, the ... judge is authorized to determine the party or parties to whom custody of the child shall be awarded, whether and to what extent a noncustodial person shall be allowed visitation privileges, ... whether an order for child custody or support shall be modified or vacated based on a change in circumstances, and certain other related matters."

- *Appert v. Appert*, 80 NC App 27 (1986)
- *Kanellos v. Kanellos*, 795 NC App 225 (NC App 2016)

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Kanellos

"Put simply, a district court must consider the pros and cons of ordering primary custody with each parent, contemplating the two options *as they exist*, and then choose which is in the child's best interest. ... However, a court cannot ... create a "new and improved" third option, even if the district court sincerely believes it would be in the child's best interest."

"A judgment awarding custody is *based upon the conditions found to exist at the time it is entered*," quoting [Stanback v. Stanback](#), 266 N.C. 72, 76, 145 S.E.2d 332, 335 (1965)

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Other stuff in GS 50-13.2

"An order for custody of a minor child may provide visitation rights for any grandparent of the child as the court, in its discretion, deems appropriate"

"Any order for custody, including visitation, may, as a condition of such custody or visitation, require either or both parents, or any other person seeking custody or visitation, to abstain from consuming alcohol and may require submission to a continuous alcohol monitoring system."

"An order for custody of a minor child may provide for such child to be taken outside of the State"

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Other stuff in GS 50-13.2

"If the court finds that domestic violence has occurred, the court shall enter such orders that best protect the children and party who were the victims of domestic violence, in accordance with the provisions of G.S. 50B-3(a1)(1), (2), and (3)."

"An order for custody of a minor child may provide for visitation rights by electronic communication."

"Absent an order of the court to the contrary, each parent shall have equal access to the records of the minor child involving the health, education, and welfare of the child."

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What else has been approved

Provisions to facilitate the custody and visitation plan

- Location of supervised visitation
- Payment of visitation expenses
- Order party to deliver child to other for visitation

Provisions to resolve disputes that "directly implicate a child's relationship with each parent or academic or other activities"

- Prohibit use of specific babysitter when babysitter interfered with parent's relationship with child
- Prohibit home schooling when home schooling amounts to neglect or significantly interferes with other parent's ability to visit

It's also okay to order parties not to make negative comments about the other

Watkins, 120 NC App 475 (1995)

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Custody provision or allocation of decision-making authority???

Burger v. Smith, 776 SE2d 886 (2015)

- Visitation to dad
- Dad can decide whether to take child to Africa during visits
- Okay for judge to allow dad to make this decision
- Judge did not decide child should go to Africa

MacLagan v. Smith, 123 NC App 557 (1996)

- Order that Dad decides religious training for child is allocation of legal custody
- Judge did not decide religion of child

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Allocation of Legal Custody

Legal custody includes:

- Authority to make decisions about child's education, health care, and religious training
- Authority to make decisions as to discipline and matters of major significance concerning child's life and welfare

Joint Legal Custody

- Parties share authority to make major decisions
- Cannot split joint legal absent compelling reason related to best interest of child
 - *Diehl*, 177 NC App 642 (2006)
 - Inability to effectively communicate is not compelling reason
 - Inability to communicate supports allocation of sole legal to one parent. *Thomas v. Thomas*, 233 NC App 736 (2014)
- *MacLagan*, 123 NC App 557 (1996)
 - Emotional harm to child resulting from disagreement over religion was compelling reason
- *Hall v. Hall*, 188 NC App 527 (2008)
- "mere tumultuous relationship" is not sufficient

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What we know you can't do.....

Order a parent to relocate or not to relocate

- *Kanellos*

Order child support placed in escrow if child doesn't comply with visitation schedule.

- *Appert v. Appert*, 80 NC App 27 (1986)

Prohibit father from possessing firearms absent evidence of threat to safety of children

- *Martin v. Martin*, 167 NC App 365 (1995)

Order psychological testing or treatment of a party in a permanent custody order

- *Jones v. Patience*, 121 NC App 434 (1996)
- *But cf. Maxwell v. Maxwell*, 212 NC App 614 (2011)(okay when dad committed domestic violence)
- *And cf. Sneed v. Sneed*, 261 NC App 448 (2018)(mom's visitation suspended until she completed workshop for "troubled and alienated parent-child relationships").

STATE OF NORTH CAROLINA
COUNTY OF CUMBERLAND

IN THE GENERAL COURT OF JUSTICE
DISTRICT COURT DIVISION
FILE NO.

ADMINISTRATIVE ORDER

JOINT CUSTODY PROVISIONS

This order updates the previous administrative orders filed on July 30, 2009 and on May 18, 2011 reference the use of standard provisions in orders of joint custody.

It is ordered that temporary and permanent joint custody orders entered in Cumberland County should include the following 'standard' provisions unless the Court or parties specifically elect to add, delete or modify the provisions.

JOINT CUSTODY PROVISIONS

1. The Plaintiff and Defendant shall each provide to the other party a current address and phone number and notice of any change of the address and/or phone number. Each party may maintain regular phone contact with the minor child(ren) but no phone call shall be made to the child(ren) between the hours of 9:00pm and 7:00am.

2. The Plaintiff and Defendant shall have full and complete access to the school/day care and medical records of the minor child(ren). Each shall have the right to converse with the medical providers, counselors, teachers, and other school/day care personnel of the minor child(ren).

3. Each party shall have the right to authorize medical treatment for the minor child(ren). Each party shall keep the other informed of the general health and well-being of the minor child(ren), to include illnesses, medical treatments, and appointments. Each shall notify the other as soon as possible of any hospitalizations.

4. Subject to school rules, each party shall have the right of access to the child at school including scheduled lunches with the child and attending parent-teacher conferences, award assemblies and other events at the schools/day cares or extra-curricular activities of the minor child(ren) and the parties shall keep each other notified and informed of these events and activities.

5. The primary custodial parent shall provide to the secondary custodial parent the web address of the child(ren)'s schools/day cares so that the secondary custodial parent may access the school/day care schedule and activities and shall provide the password necessary to access the child(ren)'s information. The primary custodial parent shall provide the secondary custodial parent a copy of the child(ren)'s report cards within

five days of receiving them and information about school/day care pictures in a timely manner.

6. Only the primary custodian may check the child(ren) out of school during the school day. The secondary custodian may check the child(ren) out of school during the school day only when that party has written permission to do so. If the visitation schedule provides that the visitation begins at the end of the school day, the secondary custodian may pick up the child(ren) from school but only at the end of the school day.

7. Only the primary custodian may withdraw the child(ren) from the school where the child(ren) are enrolled.

8. Any plans, arrangements, or disagreements that may arise between the parties, in regard to the minor child(ren), will be discussed between the parties and not in the presence of the minor child(ren). Both parents will refrain from making any disparaging remarks about the other parent to or in the presence of the minor child(ren). Both parents shall discourage others from making disparaging remarks about the other parent to or in the presence of the minor child(ren).

9. No party shall post any derogatory remarks or pictures about a parent, other relative or significant other on any social media site or allow others to do so in their place. Each party shall limit placement of pictures of the minor children on any social media site.

This the day of January, 2012.

A. Elizabeth Keever
Chief District Court Judge

Child Custody Order Cannot Tell a Parent Where to Live

Many appellate opinions explain that judges are vested with wide discretion in matters concerning child custody. [G.S. 50-13.2\(a\)](#) gives the court broad authority to allocate physical and legal custody of a child as the court believes will “best promote the interest and welfare of the child” and [GS 50-13.2\(b\)](#) allows the court to include in any custody order “such terms, including visitation, as will best promote the interest and welfare of the child”. Recently, however, the North Carolina Court of Appeals made it clear that there are limits on the court’s authority in custody cases. In [Kanellos v. Kanellos, 795 S.E.2d 225 \(N.C. App., 2016\)](#), the court reminded us that custody cases are primarily about determining who has physical care and control of a child and who has decision-making authority regarding a child and not as much about controlling the details of the lives of the child or the parties.

[Kanellos](#)

Before they separated, Stacie and John Kanellos lived with their children in Union County. After separation, Stacie and the children moved to Forsyth County and John moved to Mecklenburg County, but the parties continued to own the marital residence in Union County at the time of the custody trial. The trial court awarded joint legal custody to Stacie and John and awarded primary physical custody to Stacie with John having visitation on alternate weekends. In addition, the trial court determined that it was in the best interest of the children to live in Union County and therefore ordered Stacie and the children to move back to the marital residence. Stacie appealed, arguing that the trial court abused its discretion in ordering her to move. The court of appeals agreed with Stacie, holding that compelling a parent to reside in a specific county and house fell “outside the scope of authority granted to the district court in a child custody action.”

Statutory Authority

Acknowledging that [GS 50-13.2](#) vests judges with broad discretion, the appellate court quoted *Appert v. Appert*, 80 N.C. App. 27, 34, 341 S.E.2d 342, 346 (1986), to explain that the discretion is not unlimited:

[t]he . . . judge’s discretion . . . can extend no further than the bounds of the authority vested in the . . . judge. *In proceedings involving the custody . . . of a minor child, the . . . judge is authorized to determine the party or parties to whom custody of the child shall be awarded, whether and to what extent a noncustodial person shall be allowed visitation privileges, . . . , and certain other related matters.*

[Kanellos](#). (emphasis in original).

The court further explained that the trial court’s authority to determine “certain other related matters” comes from the provision in [G.S. 50-13.2\(b\)](#) allowing the court to include in custody orders

“such terms, including visitation as will best promote the interest and welfare of the child.” Such “certain other provisions,” therefore, must be supported by findings of fact sufficient to show why the provisions are necessary for the child’s welfare.

Court generally must take the parties as they are

To support the conclusion that ordering a parent to live in a certain place exceeded this authority to order “certain other related matters,” the court in [Kanellos](#) explained that courts are required to determine custody based upon the circumstances of the parties that exist at the time of the custody hearing.

“Our courts may consider *where each parent lives*, along with any other pertinent circumstances, in determining which parent should be awarded primary custody to facilitate the child’s best interest. (citations omitted). Put simply, a district court must consider the pros and cons of ordering primary custody with each parent, contemplating the two options as *they exist*, and then choose which one is in the child’s best interest. (citations omitted). However, a court cannot order a parent to relocate in order to create a “new and improved” third option, even if the district court believes it would be in the child’s best interest.”

[Kanellos](#) (emphasis in original)

So what is included in “certain other related matters”?

The [Kanellos](#) opinion does not provide clear guidance about how to determine whether a particular provision is one that can be included in a custody order. The court states that just as a parent cannot be ordered to move, a court also cannot order a parent to refrain from relocating. However, the court acknowledged existing case law approving provisions that:

- Facilitate the ordered custody and visitation plan. For example, the court has approved orders of supervised visitation and orders that specify where the visitation will take place; orders that allocate responsibility for the payment of visitation expenses; and orders allowing a parent to take a child out of the country during visitation.
- Resolve disputes “that directly implicate a child’s relationship with each parent or academic and other activities.” For example, the court has approved orders barring a parent from using a specific babysitter who had been interfering with child’s relationship with other parent, prohibiting home schooling when home schooling interfered with visitation with the other parent, and allocating responsibility for the religious training of a child and prohibiting the other parent from providing religious training that conflicted with that provided by the other parent.

[GS 50-13.2](#) specifically authorizes the court to:

- Protect children and parties who have been victims of domestic violence by including as part of the custody order any of the relief provisions authorized in GS 50B-3(a)(1), (2) or (3).
- Require any party to abstain from consuming alcohol and require a party to submit to a continuous alcohol monitoring system.
- Provide that a child can be taken out of the state and require that a person allowed to take a child out of the state post a bond or other security conditioned upon the return of the child to the state; and
- Provide for visitation by electronic communication and allocate the cost between the parties.

In addition to the case law cited in the [Kanellos](#) opinion, there also is case law upholding reciprocal provisions ordering both parties to refrain from making negative comments about the other and interfering with the other's relationship with the child. See e.g. *Watkins v. Watkins*, 120 NC App 475 (1995);

However, there also are opinions other than [Kanellos](#) wherein the appellate court concluded the trial court exceeded its authority. For example:

- In *Martin v. Martin*, 167 NC App 365 (2004), a trial court order prohibiting father from owning or possessing firearms was vacated due to lack of findings indicating that the safety of the children was affected by father's possession or ownership of guns; and
- In *Jones v. Patience*, 121 NC App 434 (1996), the court held that a trial court does not have authority to order the appointment of experts or to order psychological testing or treatment of a parent as part of a permanent custody order, concluding that these provisions are allowed only in temporary orders. *But cf. Maxwell v. Maxwell*, 212 NC App 614 (2011)(upholding provision in permanent custody order that father submit to a mental health evaluation when court concluded that he had committed acts of domestic violence). [See also GS 50-91](#)(authorizing the appointment of a parenting coordinator as part of any temporary or permanent custody order).

Should Little Johnny Play Football or Take Piano Lessons? Allocating Legal Custody

All custody orders in cases between parents must allocate custody rights and responsibilities in a way that meets the best interest of the child. [GS 50-13.2](#). “Custody” is a term that is not well-defined in North Carolina law but clearly refers to both physical care and control of a child as well as to the authority to make decisions regarding the child. Physical care and control is referred to as physical custody while decision-making authority is referred to as legal custody. [GS 50-13.2\(a\)](#) requires the court to consider “joint custody” whenever requested by a parent. What does joint legal custody mean? What can a court do when the parents simply cannot agree on whether little Johnny will play football or take piano?

What is Legal Custody?

“Legal custody” is not defined in the general statutes, but the court of appeals has held that it refers generally to the right and responsibility to make decisions with important and long-term implications for a child’s best interest and welfare. *Hall v. Hall*, 188 N.C. App. 527, 655 S.E.2d 901 (2008); *Diehl v. Diehl*, 177 N.C. App. 642, 630 S.E.2d 25 (2006).

Examples of decisions a parent with legal custody can make include:

- (1) The child’s education, health care, and religious training *Patterson v. Taylor*, 140 N.C. App. 91, 535 S.E.2d 374 (2002); and
- (2) Discipline and other matters of major significance concerning the child’s life and welfare. *Diehl*.

What is Joint Legal Custody?

While [GS 50-13.2 \(a\)](#) requires the court to consider ‘joint custody’ if requested by either parent, the statute contains no definition of ‘joint custody,’ nor does it distinguish between ‘joint legal custody’ and ‘joint physical custody’. *Patterson*.

The statute does not create a presumption in favor of joint legal custody. *Hall*.

The court of appeals has stated that “[w]ithout further definition ... joint custody implies a relationship where each party has a degree of control over, and a measure of responsibility for, the child’s best interest and welfare,” *Patterson*, and that [G.S. § 50-13.2\(a\)](#) allows the court substantial latitude in fashioning a ‘joint custody’ arrangement. *Diehl*.

If awarded joint legal custody, the parties share the right to make major decisions affecting the child’s life or certain decisions are allocated between the custodians by the court. *Diehl*; *Patterson*

(because the General Assembly chose not to define “joint custody”, the court, or parties to a custody agreement, are free to define the term to fit the needs of a particular situation).

Must a Court Award Joint Legal Custody of A Parent Requests It?

No. In the recent case [Oltmanns v. Oltmanns, NC App June 2, 2015](#), the court of appeals rejected father’s argument on appeal that the trial court was required to award joint legal custody after finding that both parents had been significantly involved in the lives of the children before separation. The trial court awarded primary legal custody to mom after concluding it was in the best interest of the children to do so. The court of appeals upheld the trial court, pointing to the findings that because the parents:

“have some differing belief systems, values and priorities, there are numerous areas where they might disagree on what is best for the children. Ongoing tension between them over decisions about the children’s upbringing would have a more damaging effect on the children than the unilateral decisions of either parent.due to the lack of trust between the parents, the differing values and the parenting styles between them, and the fact that both parents are extremely intelligent, the court finds that the parties are unable to make decisions of significance for the children together and that the power struggles between them is more detrimental to the children that unilateral decision making authority to one parent would be.”

The trial court supported the decision to give defendant mother primary legal custody with findings that she had demonstrated more willingness than had father to support and foster the relationship between the children and the other parent and to consider father’s opinions when making decisions about the children.

See also *Dixon v. Gordon*, 223 NC App 365 (2012) and *Thomas v. Thomas*, 757 SE2d 375 (2014)(both upholding primary legal to one parent based on parents’ inability to communicate and resolve conflict).

Can the Court Split Joint Legal Custody?

When the parents can’t agree on much of anything but dad feels strongly about whether Johnny plays football, can the court award joint legal custody except with regard to decisions about extracurricular activities and then give final say to dad on those issues? The court of appeals has said no. If the court decides to award joint legal custody, it must be “true” joint legal – evidently meaning both parties decide everything together. The court can ‘split’ joint legal only with specific findings as to why such a ‘deviation’ is necessary and in the best interest of the child.

So in *Diehl*, the court of appeals reversed the trial court order of split joint legal that allowed mom to make most decisions but allowed dad to decide whenever a decision would have a significant financial impact on him. The court of appeals held that the trial court’s findings that the parties

were unable to “effectively communicate” regarding the needs of the children did not support that order and questioned whether an award of joint legal was appropriate at all given the general inability of the parties to communicate.

There was a similar decision in *Hall v. Hall*, 188 NC App 527 (2008), but in dicta, the court indicated that a history of disagreements between the parties as to a specific issue, such as school or religion, would be sufficient to support a split of joint legal. And in *MacLagan v. Klein*, 123 NC App 557 (1996), the court upheld a decision to award joint legal except with regard to the child's religious upbringing. Findings by the trial court that the child had been raised Jewish by agreement of the parties but the mother had decided the child needed to convert to Christianity when the parents separated supported the conclusion that it would be in the child's best interest for one parent to make that decision.

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.

