

1 This memorandum opinion was not selected for publication in the New Mexico Reports. Please
2 see Rule 12-405 NMRA for restrictions on the citation of unpublished memorandum opinions.
3 Please also note that this electronic memorandum opinion may contain computer-generated
4 errors or other deviations from the official paper version filed by the Court of Appeals and does
5 not include the filing date.

6 **IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO**

7 **YOLANDA DERRYBERRY,**

8 Petitioner-Appellee,

9 v.

NO. 29,747

10 **THURMAN DERRYBERRY,**

11 Respondent-Appellant.

12 **APPEAL FROM THE DISTRICT COURT OF SOCORRO COUNTY**

13 **Kevin R. Sweazea, District Judge**

14 Filosa & Filosa

15 Mark A. Filosa

16 Truth or Consequences, NM

17 for Appellee

18 Don Klein, Jr.

19 Socorro, NM

20 for Appellant

21 **MEMORANDUM OPINION**

22 **KENNEDY, Judge.**

23 Respondent-Appellant Thurman Derryberry (Appellant) appeals an order of

24 summary judgment in favor of his ex-wife, Petitioner-Appellee Yolanda Derryberry

1 (Appellee). The district court's order of summary judgment allowed the foreclosure
2 of Appellant's real property located in Socorro County (the property) to satisfy a
3 judgment lien in favor of Appellee for back child support. The district court based its
4 decision on the fact that when Appellee's *lis pendens* was filed against the property,
5 Appellant was the sole owner of record.

6 Appellant's central contention is that summary judgment was improper because
7 his current wife, Jenny Derryberry (Jenny), owned a perfected interest in the property
8 predating Appellee's *lis pendens*. As such, Appellant contends that Jenny was a
9 necessary party that must be joined to the litigation. For the reasons set forth below,
10 we hold that the district court erred in evaluating Appellant's contention that Jenny
11 was a necessary party and we reverse.

12 **BACKGROUND**

13 The parties do not dispute the relevant facts. In 2003 Appellee obtained a
14 judgment against Appellant for back child support in the amount of \$69,358.76 at an
15 annual interest rate of 8.75%. For the next several years, Appellant made payments
16 of \$100 per month to satisfy the debt. He also married Jenny, his second wife.

17 In 2006 Appellant's friend, Joe Gibson (Gibson), died. In his will, Gibson
18 appointed Appellant his personal representative and stated that, "I, [GIBSON], hereby
19 give, devise[,] and bequeath all my property, whether real, personal, mixed, tangible

1 or intangible, to my good friends, to wit: [APPELLANT], and [JENNY], husband and
2 wife, share and share alike.” The next year while acting as Gibson’s personal
3 representative, Appellant conveyed the property to himself via warranty deed. That
4 deed makes no mention of Jenny and was recorded on January 22, 2007.

5 Appellee filed a complaint to foreclose on the property in July 2008 to satisfy
6 the 2003 judgment. As an attachment to her complaint she included a copy of the
7 warranty deed from Appellant to himself, filed in 2007. The next month, she filed a
8 *lis pendens* with the district court and filed and recorded it with the county clerk. In
9 September, she filed a motion for summary judgment on her foreclosure claim.

10 Appellant answered the complaint for foreclosure and motion to dismiss that
11 same month, arguing both should be denied because Appellee failed to join Jenny, a
12 necessary party who owned a perfected interest in the property. Around that time, in
13 September 2008, Appellant also recorded a correction warranty deed naming Jenny
14 and himself as joint tenants with rights of survivorship in the property. The district
15 court considered Appellee’s motion for summary judgment in an October 2008
16 hearing.

17 The district court entered summary judgment in favor of Appellee. The court
18 directed a foreclosure sale of the property to satisfy the debt and concluded that,

19 [Appellant] and all persons claiming under them subsequent to the
20 execution of said judgment owned by [Appellee] on the said real estate

1 . . . either as purchasers, encumbrancers or otherwise, be barred and
2 foreclosed of all right, title, interest, lien or claims in and to the said real
3 estate and every part thereof.

4 In April 2009 the property was sold to Appellee at the foreclosure sale.

5 Appellant challenges the district court's order of summary judgment and cites
6 several errors in the proceedings below. We only discuss Appellant's contention that
7 the court erred in failing to join Jenny, a necessary party.

8 **DISCUSSION**

9 Appellant argued that because Appellee failed to join Jenny, a necessary party
10 to the litigation, the case should be dismissed under Rule 1-019 NMRA. We review
11 the district court's determination of whether Jenny was a necessary party de novo, as
12 it is a legal conclusion. *Shearton Dev. Co., L.L.C. v. Town of Chilili Land Grant*,
13 2003-NMCA-120, ¶ 16, 134 N.M. 444, 78 P.3d 525. "Rule 1-019 has been
14 synthesized into a three-part analysis: (1) whether a party is necessary to the
15 litigation; (2) whether a necessary party can be joined; and (3) whether the litigation
16 can proceed if a necessary party cannot be joined." *Little v. Gill*, 2003-NMCA-103,
17 ¶ 4, 134 N.M. 321, 76 P.3d 639.

18 When a party meets the first two parts of the above analysis and is deemed
19 necessary and joinable, the court "shall" join the party. Rule 1-019(A)(2). Joinder in
20 such a situation is mandatory, not discretionary. If the necessary and joinable party

1 is not joined, the case must be dismissed. *G.E.W. Mech. Contractors, Inc. v. Johnston*
2 *Co.*, 115 N.M. 727, 731, 858 P.2d 103, 107 (Ct. App. 1993).

3 **I. Jenny is a Necessary Party**

4 According to Rule 1-019(A)(2)(a), a necessary person is someone who “claims
5 an interest relating to the subject of the action and is so situated that the disposition
6 of the action in [her] absence may: . . . as a practical matter impair or impede [her]
7 ability to protect that interest.” The Supreme court has held “[t]here is a general rule
8 that all persons, whose interests will necessarily be affected by any decree [in] a given
9 case, are necessary.” *Am. Trust & Sav. Bank of Albuquerque v. Scobee*, 29 N.M. 436,
10 453, 224 P. 788, 790 (1924). “The determination that a party is necessary involves
11 a functional analysis of the effects of the person’s absence upon the existing parties,
12 the absent person, and the judicial process itself.” *Gallegos v. Pueblo of Tesuque*,
13 2002-NMSC-012, ¶ 42, 132 N.M. 207, 46 P.3d 668 (internal quotation marks and
14 citation omitted). The inquiry is fact specific and done on a case by case basis. *Id.*
15 “Courts demonstrate a willingness to bring in an absent person whenever there exists
16 a reasonable possibility that the person’s interests will be affected by the conclusion
17 of an action to which he has not been made a party.” *Strader v. Verant*,
18 1998-NMSC-025, ¶ 22, 125 N.M. 521, 964 P.2d 82. “[J]oinder of an indispensable
19 or necessary party is favored in order to avoid multiplicity of suits.” *G.E.W. Mech.*

1 *Contractors*, 115 N.M. 727, 730-31, 858 P.2d 103, 106-07 (Ct. App. 1993).

2 In this case, Jenny had a one-half interest in the property at issue, as half of it
3 was devised to her. Allowing this case to proceed without her jeopardized her ability
4 to protect that interest. *See* NMSA 1978, § 45-3-101(B)(1) (1975) (stating that a
5 decedent’s property devolves “to the persons to whom the property is devised by his
6 last will”). As a practical matter, Jenny would have had difficulty recovering from
7 Appellant for his failure to place her name on the deed. Appellant was insolvent and
8 if Jenny did obtain a judgment against Appellant in a separate case, she would not be
9 able to recover any damages from Appellant. Thus, the litigation substantially
10 impaired her ability to protect her interest in the property and recover from
11 Appellant’s improper actions in a subsequent lawsuit. In addition, “it is well settled
12 that land is assumed to have special value not replaceable in money.” *Beaver v.*
13 *Brumlow*, 2010-NMCA-033, ¶ 33, 148 N.M. 172, 231 P.3d 628. Jenny’s interest in
14 the real property itself was unique, and would be impossible to replace with money
15 damages even if they were available to be obtained from Appellant.

16 Moreover, nonjoinder would subject Appellant to multiple suits. Functionally,
17 the failure to join Jenny had a negative effect on the judicial process itself. The
18 nonjoinder inhibited the protection of property interests, created a multiplicity of
19 lawsuits, and left an innocent party without recourse. The effect of Jenny’s exclusion

1 from the lawsuit burdened both her interest and Appellant's. Thus, Jenny was a
2 necessary party to litigation.

3 **II. Jenny was Joinable**

4 Rule 1-019(A)(2)(b) then requires that if “[the necessary party] has not been so
5 joined, the court shall order that [s]he be made a party.” There is no evidence
6 presented indicating that Jenny was not joinable; in fact, evidence indicates that Jenny
7 was physically present in court and likely a resident of this state. Appellant's brief
8 states that “[Jenny] appeared twice in open court . . . , came with her husband, and [the
9 district judge] noted this, and refused to transfer possession, and the two were present
10 in open court when [Appellant] asserted that exemptions of the homestead were still
11 at issue.” Additionally, Appellant describes the Socorro County property in question
12 as the “marital abode” of both Appellant and Jenny. As Jenny was present within the
13 state and there is some indication that she resided in the state, it is probable that Jenny
14 was joinable during the litigation.

15 **III. The District Court Must Join Jenny if Joinable or Dismiss the Case**

16 Because Jenny was necessary and likely joinable, and the court failed to
17 determine whether she was joinable and to subsequently join her, we must reverse.
18 Rule 1-019 gives the court no discretion on this issue, as it states that when the party
19 is necessary and joinable, the court “shall order that [s]he be made a party.” We stated

1 in *G.E.W. Mechanical Contractors*, “[i]f a timely objection is made for non-joinder
2 of a necessary party, when joinder is feasible, the claimant should be given an
3 opportunity to add the non-joined person and if he fails to do so the claim should be
4 dismissed.” 115 N.M. 727, 731, 858 P.2d 103, 107 (internal quotation marks and
5 citation omitted).

6 The district court never determined if Jenny was joinable, even though she was
7 a necessary party. Moreover, it appears likely that the court would have personal
8 jurisdiction over Jenny so as to join her. In the event that Jenny was joinable, the
9 court should have ordered that Jenny be joined, allowed Appellee to join Jenny, or
10 ordered the case be dismissed for failure to join a necessary party. Thus, we reverse
11 and hold that the district court erred in failing to find that Jenny was necessary and in
12 not evaluating whether Jenny was a joinable party, when ruling upon Appellant’s
13 motion to dismiss.

14 **CONCLUSION**

15 For these reasons, we reverse the district court’s order of summary judgment.
16 We remand to the district court to determine whether Jenny is joinable and to join
17 Jenny to the litigation if she is in fact joinable.

18 **IT IS SO ORDERED.**

1
2

RODERICK T. KENNEDY, Judge

1 **WE CONCUR:**

2

3 _____
3 **MICHAEL D. BUSTAMANTE, Judge**

4

5 _____
5 **MICHAEL E. VIGIL, Judge**