Enjoy the Season!

An overview of Nebraska Child Support Law

William P. MacKenzie
Statewide District Court Child Support Referee

Child Support Enforcement
Noteworthy statutes, cases, info & commentary

(Compiled by William P. MacKenzie, Statewide District Court Child Support Referee)

The support of one's children is a fundamental obligation that takes precedence over almost everything else. -- Rauch v. Rauch; 256 Neb. 257 (1999)

The following compendium of case law, statutes, court rules and other resources relating to paternity establishment and child support establishment and enforcement is not exhaustive, but it does contain the most important appellate cases on the general subject of "child support," as well as a limited listing of other legal resources. Except as noted, cases listed are from the Nebraska Supreme Court as well as those cases from the Nebraska Court of Appeals that are designated as for "permanent publication." Note that practice often differs from county to county, and even from courtroom to courtroom. It's always advisable to follow local practice.

If you discover an error in citation or a case that has been overruled or modified by a subsequent opinion, please call 402.593.4464 or email bill.mackenzie@nebraska.gov to report your findings.

For 22 years William P. MacKenzie was the Supervising Attorney with the Sarpy County Attorney's Child Support Services office. In April 2015 he assumed his current duties as Statewide District Court Child Support Referee. He is based out of Papillion, and conducts hearings in Adams, Buffalo, Cass, Hall, Madison, Platte and Sarpy Counties.

~ ~ ~

Dedicated to my Mother, Mary Clare MacKenzie (1927-2012)

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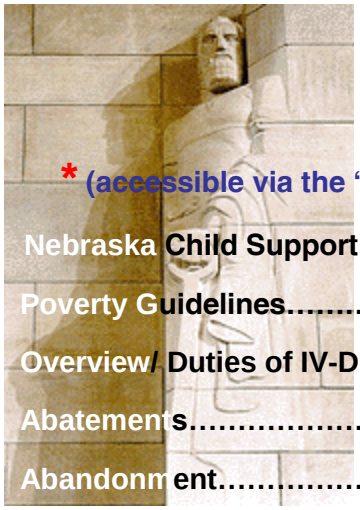
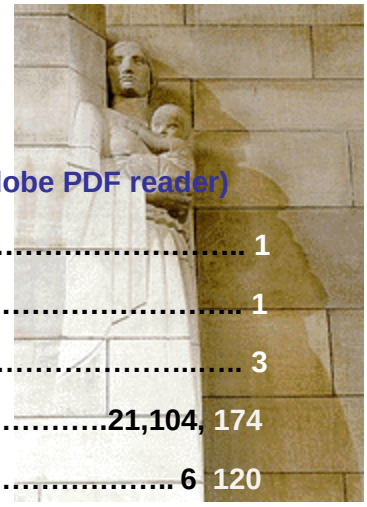
Available online at → http://www.sarpy.com/childsupport/
(Then scroll to the bottom of the "Information" page, to "Appellate Caselist")





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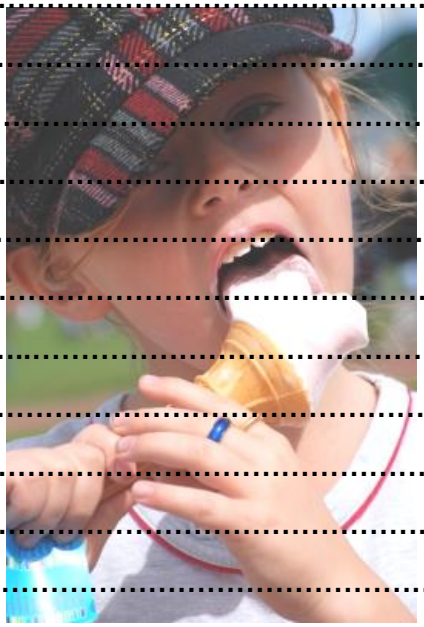


William MacKenzie accepts a ceremonial gavel from retiring district court referee Sue Symonds, March 2015

A Note for Legal Practitioners:

Members of the Nebraska Bar Association who subscribe to the Casemaker™ service may access virtually all Nebraska appellate case law online, as well as appellate cases from the federal court system and reported cases in most of the other 49 states.

In addition, many references to statutes include links to the complete statute on the Nebraska Unicameral website. These links are to the *most recent version* of the statute. Please note, the managers of the Unicameral web site are constantly tinkering with the site, and URL links seem to change annually. I try my best to keep the links up-to-date.

A new (at least to the author) feature of the Unicameral web site is the ability of anyone to download a complete and updated set of the Nebraska statutes *FREE of CHARGE*. To access this service go to: http://nebraskalegislature.gov/laws/laws.php .

The web site for the Nebraska Court System is https://supremecourt.nebraska.gov/

Practice Note: The most recent appellate cases are captioned in **Purple**.

Nebraska Child Support Guidelines Online: *Click Here* or *here*

Poverty Guidelines

The Federal Poverty Guidelines were last updated in January 2016. The base 2016 guidelines for a single adult are **$11,880/yr,** or **$990 per month**. The Nebraska Supreme Court adopted this figure soon thereafter. See **§4-218** of the Nebraska Child Support Guidelines reads:

> **§ 4-218**. ***Basic Subsistence Limitation***. A parent's support, child care, and health care obligation shall not reduce his or her **net** income below the minimum of **$981** net monthly **for one person**, or the poverty guidelines updated annually in the Federal Register by the U.S. Department of Health and Human Services under authority of 42 U.S.C. § 9902(2), except minimum support may be ordered as defined in paragraph I above. **Source:** http://aspe.hhs.gov/poverty/15poverty.cfm
>
> **View the Federal HHS Poverty Guideline Home Page:** http://aspe.hhs.gov/poverty/index.cfm

Practice Note: § 4-218 is typically changed annually each February to reflect the updated federal poverty guidelines adjustment. **If more than one person lives in the household, the poverty guideline amount is adjusted as per the chart below:**

2016 Federal Poverty Guidelines & Commentary

(Note, if the parent obligated to pay support resides in Alaska or Hawaii, use the appropriate column to determine the correct poverty guideline for your case, where applicable)

Persons in Family or Household	48 Contiguous States and D.C.	Alaska	Hawaii
1	**$11,880 ($990 x 12 months)**	$14,840 ($1,236.67 x 12 mo)	$13,670 ($1,139.17 x 12 mo)
2	**16,020**	20,200	18,430
3	**20,090**	25,200	23,190
4	**24,300**	30,380	27,950
5	**28,440**	35,560	32,710
6	**32,580**	40,740	37,470

7	**36,730**	45,920	42,230
8	**40,890**	51,120	47,010
For each additional person, add…	4,160	5,200	4,780

SOURCE: *Federal Register*, https://aspe.hhs.gov/poverty-guidelines

Lasu v. Issak, 23 Neb. App. 83, ___ N.W.2d ___ (July 2015)

Holding: Where an obligated parent lives with others in his or her household, you must consider the federal poverty guidelines support amount that corresponds to the number of people in that parent's household. It isn't just $981 per month!

- A parent's support, childcare, and health care obligation shall not reduce his or her net income below the minimum net monthly obligation for one person, or the poverty guidelines updated annually in the Federal Register by the U.S. Department of Health and Human Services under authority of 42 U.S.C. § 9902(2), except minimum support may be ordered as defined in Neb. Ct. R. § 4-209.

Molczyk v. Molczyk, 285 Neb. 96, 825 N.W.2d 435, (2013)

- Under the Nebraska Child Support Guidelines, unless the minimum support rule applies, a parent's total support, child care, and health care obligations cannot reduce the obligor's net income below the minimum net monthly income for one person that will exceed the federal poverty threshold.

I am struck, after all my years in child support, by the tremendous connection between education and income. Here are some startling statistics, which when interpreted through a child support prism show how difficult it is for us to establish and enforce meaningful child support orders when obligated parents lack adequate educational skills necessary to succeed in a 21st Century economy.

Age Range	No diploma or GED	H.S. diploma, no col.	< 4 yrs college	4 yrs+ col. With degree
18 – 24	25.7% live < poverty	19.4% live < poverty	13.7%<poverty	11.4% live < poverty
25 – 34	29.2% " "	15.9% " "	10.0% " "	4.2% " "
35 – 44	27.0% " "	11.8% " "	7.0% " "	2.9% " "
45 – 54	21.8% " "	9.2% " "	5.9% " "	2.8% " "

Source: http://pubdb3.census.gov/macro/032007/pov/new29_100_01.htm

Sadly, the national poverty rate increased in 2009 to the highest level in 15 years – 14.3%, (that's 43.6 million people), due to the nationwide recession. Nationally, 50.7 million Americans lack health insurance coverage. Nebraska had 211,000 residents (11.9% of our population) without health insurance coverage as of 2008. The good news on this front is that recently enacted health care reform should dramatically increase the number of children and families who will be able to obtain health care. It will take several years for all provisions of health care reform to take effect, however.

Source: www.census.gov/hhes/www/poverty/data/incpovhlth/2009/highlights.html

An extensive report on the status of poverty and the lack of health insurance in America and the various individual states is available at: www.census.gov/prod/2009pubs/p60-236.pdf
See www.census.gov/hhes/www/poverty/data/incpovhlth/2009/state.xls for state-by-state rates.

These statistics show that a parent who lacks an adequate education is up to *9 times* more likely to be living BELOW the federal poverty level as compared with a parent who has a college education. A significant percentage of the noncustodial parents we work with have less than a high school diploma or GED. Huge numbers of these parents are basically beyond the reach of the child support system, due to their extremely low incomes. While many have criminal records, and/or addiction related problems with illegal drugs, alcohol, or gambling, the one common link I have noted is the lack of a basic education. These statistics also hold true for many of our custodial parents, particularly in paternity settings.

I mention this relationship for two reasons. First, many court "customers" are unsophisticated. Everything they know about the law comes from viewing episodes of *"Judge Judy"* and similar programs. They often find it difficult at best to understand "legalese". It is important for you and your staff to simplify to the greatest extent possible your legal pleadings, instructions, service guides and other documents, in order to facilitate better comprehension and understanding of the legal process involved in their particular cases. Generally, the better informed the parent, the more cooperative they will be. A suggestion might be to try some of your pleadings out on high school students, in order to gauge whether they are written at a proper level. Your aim is not to be condescending to your customers, but merely to be as "user friendly" as possible. As a bonus, taking this approach will save you and your staff countless hours not having to explain complex text to parents.

Secondly, as a prosecutor I took the approach where I thought it appropriate of asking the court to order a parent to take GED classes as part of a purge plan, and to present the CSE office and the court with progress reports. Often a noncustodial parent will report no steady income, and no high school diploma. With all that time on their hands they ought to be doing something constructive to get their lives on track.

Gangwish v. Gangwish, 267 Neb. 901, 678 N.W.2d 503 (2004)

- Support of one's children is a fundamental obligation which takes precedence over almost everything else.

Duties of the County or Authorized Attorney with regard to paternity establishment and child support enforcement are generally set forth in Neb. Rev. Stat. §§ 43-512.01, 43-512.02, 43-512.03, 43-512.05 (explains the business relationship between county attorneys and HHS), as well as 43-512.08, 43-512.12 and 43-512.15 (modification actions). See also §43-1411. (The State's

right to sue under §43-1411 is not conditioned upon the payment of public assistance benefits for the minor child. *See* **State on Behalf of Hopkins v. Batt**, 253 Neb. 852 (1998))

Also see: §**42-358. Attorney for minor child; appointment; powers; child or spousal support; records; income withholding; contempt proceedings; fees; evidence; appeal.**
(1) The court may appoint an attorney to protect the interests of any minor children of the parties. Such attorney shall be empowered to make independent investigations and to cause witnesses to appear and testify on matters pertinent to the welfare of the children. The court shall by order fix the fee, including disbursements, for such attorney, which amount shall be taxed as costs and paid by the parties as ordered. If the court finds that the party responsible is indigent, the court may order the county to pay the costs.
(2) Following entry of any decree, the court having jurisdiction over the minor children of the parties may at any time appoint an attorney, as friend of the court, to initiate contempt proceedings for failure of any party to comply with an order of the court directing such party to pay temporary or permanent child support. The county attorney or authorized attorney may be appointed by the court for the purposes provided in this section, in which case the county attorney or authorized attorney shall represent the state.
(3) . . .

43-512.02. Child, spousal, and medical support collection; paternity determination; services available; application; fees; costs.
(1) Any child or any relative, lawful custodian, guardian, or next friend of a child may file with the county attorney, authorized attorney, or other office designated by the Department of Health and Human Services an application for the same child, spousal, and medical support collection or paternity determination services as are provided to dependent children and their relatives under sections 43-512 to 43-512.10 by the department, the county attorney, the authorized attorney, and the clerk of the district court.
(2) If an office other than the office of the county attorney or authorized attorney is authorized by the department to accept such applications and if the application discloses that such child has a parent or stepparent who is able to contribute to the support of such child and has failed to do so, a copy of the application shall immediately be filed with the county attorney or authorized attorney.
. . .

§ 43-512.03**. County attorney or authorized attorney; duties; enumerated; department; powers; actions; real party in interest; representation; section, how construed.**
(1) The county attorney or authorized attorney shall:
(a) On request by the Department of Health and Human Services as described in subsection (2) of this section or when the investigation or application filed under section 43-512 or 43-512.02 justifies, file a complaint against a nonsupporting party in the district, county, or separate juvenile court praying for an order for child or medical support in cases when there is no existing child or medical support order. …
. . .

State ex rel. Cammarata v. Chambers, 6 Neb. App. 467, 574 N.W.2d 530 (1998)

- The nonexistence of a support order is a prerequisite to an action by the State to establish support under this section [§ 43-512.03], and a dissolution decree or modification order which addresses the issue of support, even if ordering that no support is due from either party, constitutes a support order which precludes the State from instituting such an action.

43-504. Terms, defined; pregnancy; effect.

(1) The term dependent child shall mean a child under the age of nineteen years who is living with a relative or with a caretaker who is the child's legal guardian or conservator in a place of residence maintained by one or more of such relatives or caretakers as his, her, or their own home, or which child has been removed from the home of his or her father, mother, grandfather, grandmother, brother, sister, stepfather, stepmother, stepbrother, stepsister, uncle, aunt, first or second cousin, nephew, or niece as a result of judicial determination to the effect that continuation in the home would be contrary to the safety and welfare of the child and such child has been placed in a foster family home or child care institution as a result of such determination, when the state or any court having jurisdiction of such child is responsible for the care and placement of such child and one of the following conditions exists: (a) Such child received aid from the state in or for the month in which court proceedings leading to such determination were initiated; (b) such child would have received assistance in or for such month if application had been made therefor; or (c) such child had been living with such a relative specified in this subsection at any time within six months prior to the month in which such proceedings were initiated and would have received such aid in or for the month that such proceedings were initiated if in such month the child had been living with, and removed from the home of, such a relative and application had been made therefor.

. . .

§ 43-512.08. Intervention in matters relating to child, spousal, or medical support; when authorized.

The county attorney or authorized attorney, acting for or on behalf of the State of Nebraska, may intervene without leave of the court in any proceeding for dissolution of marriage, paternity, separate maintenance, or child, spousal, or medical support for the purpose of securing an order for child, spousal, or medical support, modifying an order for child or medical support, or modifying an order for child support as the result of a review of such order under sections 43-512.12 to 43-512.18. Such proceedings shall be limited only to the determination of child or medical support. Except in cases in which the intervention is the result of a review under such sections, the county attorney or authorized attorney shall so act only when it appears that the children are not otherwise represented by counsel.

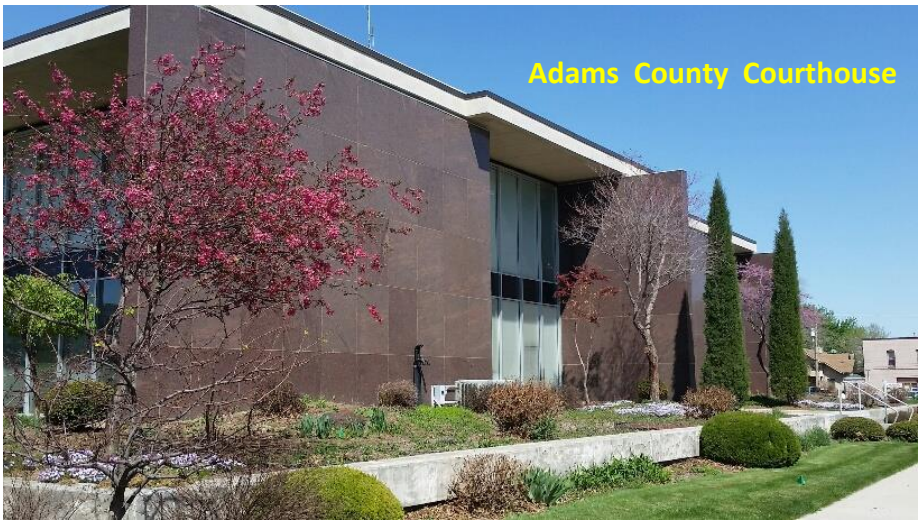
Source: Laws 1976, LB 926, § 10; Laws 1985, Second Spec. Sess., LB 7, § 72; Laws 1991, LB 457, § 12; Laws 1991, LB 715, § 11; Laws 1994, LB 1224, § 54; Laws 2007, LB554, § 41.

Hopkins v. Stauffer, 18 Neb. App. 116, 775 N.W.2d 462 (2009)

- Neb. Rev. Stat. § 7-105(2) (Reissue 2007) imposes upon an attorney the duty "to counsel or maintain no other actions, proceedings or defenses than those which appear to him [or her] legal and just, except the defense of a person charged with a public offense."

Nebraska o/b/o Garcia v. Garcia, 238 Neb. 455, 471 N.W.2d 388 (1991)

- Neb. Rev. Stat. § 43-512.01...mandates that it is the duty of the county attorney to take action against a nonsupporting parent of a dependent child and to initiate either a criminal or a civil child support enforcement action against this parent. Neb. Rev. Stat. §43-512.03 ...makes more explicit the duties of the county attorney in obtaining and enforcing orders for child support, including establishing paternity and obtaining support for children born out of wedlock, enforcing child support orders through income withholding, and petitioning for a support order when no such order exists.
- The county attorney's obligation is to proceed on behalf of dependent children due child support from a nonsupporting parent. We agree with the Nebraska State Bar Association's advisory opinion that the county attorney may not represent both the interests of the child and the interests of a parent when the issue of custody of the child is raised. The county attorney's duties are clearly set forth in the statutes above. These duties do not include involvement in the determination of custody of a dependent child.



Abandonment

In re Interest of Chance J., 279 Neb. 81, 776 N.W.2d 519 (2009)

- paternal uncertainty based on physical appearance of a child or suspicions of infidelity is not just cause or excuse for abandoning a child born into wedlock, especially when there are ample means to verify one's paternity.

In Re Interest of Gabriella H., 289 Neb. 323, ___ N.W.2d ___ (October 2014)

- An appellate court reviews juvenile cases de novo on the record and reaches its conclusions independently of the juvenile court's findings.
- For purposes of Neb. Rev. Stat. § 43-292(1) (Cum. Supp. 2012), "abandonment" is a parent's intentionally withholding from a child, without just cause or excuse, the parent's presence, care, love, protection, maintenance, and the opportunity for the display of parental affection for the child.
- "Just cause or excuse" for a parent's failure to maintain a relationship with a minor child has generally been confined to circumstances that are, at least in part, beyond the control of the parent.

- Whether a parent has abandoned a child within the meaning of Neb. Rev. Stat. § 43-292(1) (Cum. Supp. 2012) is a question of fact and depends upon parental intent, which may be determined by circumstantial evidence.
- To prove abandonment in determining whether parental rights should be terminated, the evidence must clearly and convincingly show that the parent has acted toward the child in a manner evidencing a settled purpose to be rid of all parental obligations and to forgo all parental rights, together with a complete repudiation of parenthood and an abandonment of parental rights and responsibilities.
- Parental obligation requires a continuing interest in the child and a genuine effort to maintain communication and association with that child.
- A parent's abandonment of his or her child for 6 months or more immediately prior to the filing of a petition to terminate parental rights is a ground for termination of such rights.
- The 6-month statutory period for determining abandonment need not be considered in a vacuum.
- Incarceration does not insulate an inmate from the termination of his or her parental rights if the record contains the clear and convincing evidence that would support the termination of the rights of any other parent. Incarceration does not excuse a parent's obligation to provide the child with a continuing relationship. ... Simply put, incarceration does not excuse a parent's obligation to provide the child with a continuing relationship.
- Abandonment is not an ambulatory thing the legal effects of which a parent may dissipate at will by token efforts at reclaiming a discarded child.

Administrative Law

Melanie M. v. Winterer, 290 Neb. 764, 862 N.W.2d 76 (2015)

- Agency regulations properly adopted and filed with the Secretary of State of Nebraska have the effect of statutory law.
- Regulations bind the agency that promulgated them just as they bind individual citizens, even if the adoption of the regulations was discretionary.
- An agency does not generally have the discretion to waive, suspend, or disregard a validly adopted regulation.

Merie B. on Behalf of Brayden O. v. State, 290 Neb. 919, 863 N.W.2d 171 (2015)

- A judgment or final order rendered by a district court in a judicial review pursuant to the Administrative Procedure Act may be reversed, vacated, or modified by an appellate court for errors appearing on the record. When reviewing an order of a district court under the Administrative Procedure Act for errors appearing on the record, the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable.

See **§43-1401 et seq.**

(Now retired) Judge Jack Ott holds a newly adopted boy

Request for Notification of Intended Adoption

This Nebraska Biological Father Registry option allows the father of a child to file for notification of paternity without indicating that he is seeking immediate custody of the child.

If a man has reason to believe that he is the father of a child born out of wedlock and he wants to preserve his legal rights of notice in order to prevent the child from being adopted by others, he may file the notice at any Nebraska Department of Health and Human Services office. The law requires that the filing be done in person or by mail, only on forms provided by the Department. http://www.hhs.state.ne.us/adoption/biofatherclaim.htm

Notice of Objection to Adoption and Intent to Obtain Custody

In order to file with Nebraska's Biological Father Registry, a *Notice of Objection to Adoption and Intent to Obtain Custody* form is required. It indicates a father's intention to seek custody of the child within thirty (30) days of the filing.

D.E.M. V. P.A.M., 218 Neb. 319, 352 N.W.2d 916 (1984)

- [T]he satisfactions and discharges of accrued child support obligations, or the termination of future responsibility for the same, do not constitute an unwarranted payment of consideration which will vitiate a child relinquishment (for adoption).

Gomez v. Savage ; 254 Neb. 836**,** 580 N.W.2d 523 (1998)

(Discusses difference between agency related adoptions and private adoptions, as pertains to relinquishment of parental rights)

- A relinquishment of parental rights, given voluntarily, is not revocable.
- The Legislature, as well as this court, has long recognized a distinction between agency adoptions and private adoptions. In the case of an agency adoption, the relinquishing parent surrenders all rights to the child in favor of the state or a licensed child placement agency. *Yopp v. Batt*, supra. This court has treated an adoption as an agency adoption when a natural parent personally chose the adoptive parents with the help of an agency. See ***Kellie v. Lutheran Family & Social Service***, 208 Neb. 767, 305 N.W.2d 874 (1981). Under §43-106.01, the rights of the relinquishing parent are terminated when the agency accepts responsibility for the child in writing. It is the agency that finds and investigates the prospective parents. If the adoptive parents are unsuitable or decline to go through with the adoption, the agency retains custody over the child until such time as the child is adopted by another family.

- In private adoptions, by contrast, under §43-111, the relinquishing parent's rights are not totally extinguished until the child has been formally adopted by the prospective parents.

In re Adoption of Corbin J., 278 Neb. 1057, 775 N.W.2d 404 (2009)

***Holding**: A temporary order for child support does not adjudicate paternity.*

- [The] consent of the father of a child born out of wedlock who has been adjudicated to be the father by a court is required for an adoption to proceed unless the Nebraska court having jurisdiction over the custody of the child determines otherwise pursuant to § 43-104.22. See § 43-104.01(7). An adjudicated father is an individual determined to be the father by a court of competent jurisdiction.
- The only court order entered addressing [the father's] paternity was a temporary order in the district court ...requiring [the father] to pay child support and to provide medical insurance and designating visitation. **This temporary order was not a final court-ordered determination that [the biological father] was [the child's] father.**
- See ***Lehr v. Robertson***, 463 U.S. 248, 103 S. Ct. 2985, 77 L. Ed. 2d 614 (1983), regarding the constitutionally protected rights of unwed fathers under the 14th Amendment's Due Process Clause.
- "the Court draws a distinction between unmarried biological fathers who have developed a relationship with their child and fathers without such a relationship." – citing *Heart of Adoptions, Inc. v. J.A.*, 963 So. 2d 189, 204 (Fla. 2007)
- We conclude that for an adoption to proceed, the consent of the biological father who has established a familial relationship with his child is required unless, under § 43-104(2), the party seeking adoption has established that the biological parent:
  (2) has relinquished the child for adoption by a written instrument, (b) has abandoned the child for at least six months next preceding the filing of the adoption petition, (c) has been deprived of his or her parental rights to such child by the order of any court of competent jurisdiction, or (d) is incapable of consenting.

Jeremiah J. v. Dakota D., 287 Neb. 617, 843 N.W.2d 820 (2014)

- Appeals in adoption proceedings are reviewed by an appellate court for error appearing on the record.

- The interest of parents in the care, custody, and control of their children is perhaps the oldest of the fundamental liberty interests recognized by the U.S. Supreme Court. Recognizing these constitutional interests, the foundation of Nebraska's adoption statutes is the consent of a biological parent to the termination of his or her parental rights.
- in order to terminate a father's rights through an adoption procedure, the consent of the adjudicated father of a child born out of wedlock is required for the adoption to proceed unless the Nebraska court having jurisdiction over the custody of the child determines otherwise, pursuant to § 43-104.22.

  The court shall determine that such father's consent is not required for a valid adoption of the child upon a finding of one or more of the following:

  (1) The father abandoned or neglected the child after having knowledge of the child's birth;
  (2) The father is not a fit, proper, and suitable custodial parent for the child;
  (3) The father had knowledge of the child's birth and failed to provide reasonable financial support for the mother or child;
  (4) The father abandoned the mother without reasonable cause and with knowledge of the pregnancy;
  (5) The father had knowledge of the pregnancy and failed to provide reasonable support for the mother during the pregnancy.

  Because § 43-104.22 can effectively terminate the parental rights of the father, the exceptions under § 43-104.22 must be proved by clear and convincing evidence.
- Parental unfitness must be proven by clear and convincing evidence, in order to support a termination of parental rights, leading to an adoption.
- the adoption statutes do not allow a mother to singlehandedly sever a relationship between a father and child, no matter what the quality of that relationship is. [See *In re Application of S.R.S. and M.B.S.*, 225 Neb. 759, 408 N.W.2d 272 (1987).]

Monty S. & Teresa S. v. Jason W. & Rebecca W., 290 Neb. 1048, 863 N.W.2d 484 (2015)

Rule: "Open adoptions" between private parties are not permitted in Nebraska, and attempts to create them will serve to invalidate the consent for adoption. Exceptions are only allowed in foster care cases managed by the State.

- A natural parent who relinquishes his or her rights to a child by a valid written instrument gives up all rights to the child at the time of the relinquishment.
- A valid relinquishment of parental rights is irrevocable. A change of attitude subsequent to signing a relinquishment of parental rights is insufficient to invalidate the relinquishment.
- In the absence of threats, coercion, fraud, or duress, a properly executed relinquishment of parental rights and consent to adoption signed by a natural parent knowingly, intelligently, and voluntarily is valid.
- The burden is on the natural parent challenging the validity of a relinquishment of a child for adoption to prove that the relinquishment was not voluntarily given.
- After a decree of adoption has been entered in a private adoption case, the natural parents of an adopted child shall be relieved of all parental duties and responsibilities for the child and shall have no rights over the child.
- Where the relinquishment of rights by a natural parent is found to be invalid for any reason, a best interests hearing is nevertheless held: "The court shall not simply return the child to the

natural parent upon a finding that the relinquishment was not a valid instrument." Citing *Yopp v. Batt*, 237 Neb. 779, 467 N.W.2d 868 (1991)

Smith v. Smith, 201 Neb. 21, 265 N.W.2d 855 (1978)

- Mother who secures consent to adoption from father cannot later seek child support from the biological father after she does not go through with the adoption.
- The securing of the consent of the father to an adoption by another of his child is such action which by its nature should terminate further liability for child support.

But see…

Williams v. Williams, 206 Neb. 630, 294 N.W.2d 357 (1980)

- We do **not** believe that the mere execution of a document **consenting to the adoption** of a child, standing alone, is sufficient to justify imposing the doctrine of equitable estoppel and denying to a parent with custody of a child the benefits of a previously entered order of a court. To the extent that our holding in **Smith v. Smith**, is to the contrary, it is modified.

In Re Adoption of David C., 280 Neb. 719, 790 N.W.2d 205 (2010)

- The issue of abandonment in an adoption proceding must be established by clear and convincing evidence.
- The question of abandonment is largely one of intent to be determined in each case from all the facts and circumstances.
- "Willful abandonment has been defined as 'a voluntary and intentional relinquishment of the custody of the child to another, with the intent to *never again* claim the rights of a parent or perform the duty of a parent; or, second, an intentional withholding from the child, without just cause or excuse, by the parent, of his presence, his care, his love and his protection, maintenance, and the opportunity for the display of filial affection . . . .'. . ." *In re Application of S.R.S. and M.B.S.*, 225 Neb. 759, 765, 408 N.W.2d 272, 276 (1987), quoting *In re Adoption of Simonton*, 211 Neb. 777, 320 N.W.2d 449 (1982).
- The parental obligation "requires continuing interest in the child and a genuine effort to maintain communication and association with that child. Abandonment is not an ambulatory thing the legal effects of which a parent may dissipate at will by token efforts at reclaiming a discarded child." – *citing In re Adoption of Simonton, supra.*
- See § 43-104.22. The effect of a finding of abandonment is that the putative biological father has no further standing to raise objections in the matter of the adoption.

Afterborn Children

Brooks v. Brooks, 261 Neb. 289, 622 N.W.2d 670 (2001)

- There is no precise mathematical formula for calculating child support when sub-sequent children are involved.
- The calculation is left to the discretion of the court as long as the court considered the obligations to both families and the income of the other parent of the subsequent children.

Crawford v. Crawford, 263 Neb. 37, 638 N.W.2d 505 (2002)

- in considering whether to deviate from the child support guidelines based on an order of support for a subsequent child, the trial court must have before it the calculations and any worksheets used to determine the child support order for the subsequent child. Without the actual figures, a court cannot properly determine whether application of the guidelines would be unjust or inappropriate in a given case, nor can it determine the best interests of the children.

Prochaska v. Prochaska, 6 Neb. App. 302, 573 N.W.2d 777 (1998)

- Very good discussion of the relationship between an obligor's child support obligation to children of his first marriage and his obligation to after born children of his present marriage, and a roadmap for how to properly give credit for those children.

Appellate Practice/Standard of Review

(see also *Civil Procedure, Jurisdiction)*

25-1902 Final order, defined.

An order affecting a substantial right in an action, when such order in effect determines the action and prevents a judgment, and an order affecting a substantial right made in a special proceeding, or upon a summary application in an action after judgment, is a final order which may be vacated, modified or reversed, as provided in this chapter.

Source: R.S.1867, Code § 581, p. 496; R.S.1913, § 8176; C.S.1922, § 9128; C.S.1929, § 20-1902.

See generally **§ 25-1912 Appeal; civil and criminal actions; procedure; notice of appeal; docketing fee; filing of transcript.**

(3) The proceedings to obtain a reversal, vacation, or modification of judgments and decrees rendered or final orders made by the district court, including judgments and sentences upon convictions for felonies and misdemeanors, shall be by filing in the office of the clerk of the district court in which such judgment, decree, or final order was rendered, within thirty days after the entry of such judgment, decree, or final order, a notice of intention to prosecute such appeal signed by the appellant or appellants or his, her, or their attorney of record and, except as otherwise provided in sections 25-2301 to 25-2310, 29-2306, and 48-641, by depositing with the clerk of the district court the docket fee required by section 33-103.

(2) A notice of appeal or docket fee filed or deposited after the announcement of a decision or final order but before the entry of the judgment, decree, or final order shall be treated as filed or deposited after the entry of the judgment, decree, or final order and on the date of entry.

…

§ 43-1613. Findings and recommendations; exceptions; review by district court.
In any and all cases referred to a child support referee by the district court, the parties shall have the right to take exceptions to the findings and recommendations made by the referee and to have a further hearing before the district court for final disposition. The district court upon receipt of the findings, recommendations, and exceptions shall review the child support referee's report and may accept or reject all or any part of the report and enter judgment based on the district court's own determination.
Source: Laws 1989, LB 265, § 6

See also: **§25-1916. Appeal; supersedeas; cash or bond; effect; undertakings; amount, terms, and conditions; effect of having corporate surety.**

ADT Security Servs. V. A/C Security Systems, 15 Neb. App. 666, 736 N.W.2d 737 (2007)

- To determine the appropriate standard of review for [an] appeal, it is necessary to determine whether a claim or a counterclaim is an action at law or an action sounding in equity.
- The nature of an action, whether legal or equitable, is determinable from its main object, as disclosed by the averments of the pleadings and the relief sought.
- Although in many contexts the traditional distinctions between law and equity have been abolished, whether an action is one in equity or one at law controls in determining an appellate court's scope of review.
- An appellate court reviews a claim or counterclaim that sounds in equity de novo on the record, subject to the rule that where credible evidence is in conflict on material issues of fact, the appellate court considers and may give weight to the fact that the trial court observed the witnesses and accepted one version of the facts over another. ... The appellate court does not reweigh the evidence but considers the judgment in a light most favorable to the successful party and resolves evidentiary conflicts in favor of the successful party, who is entitled to every reasonable inference deducible from the evidence.

Christiansen v. County of Douglas, 288 Neb. 564, 849 N.W.2d 493 (2014)

- Although in many contexts the traditional distinctions between law and equity have been abolished, whether an action is one in equity or one at law controls in determining an appellate court's scope of review.

Currie v. Chief School Bus Serv., 250 Neb. 872, 553 N.W.2d 469 (1996),

- Although an extrajurisdictional act of a lower court cannot vest an appellate court with jurisdiction to review the merits of an appeal, the appellate court has jurisdiction and, moreover, the duty to determine whether the lower court had the power, that is, the subject matter jurisdiction, to enter the judgment or other final order sought to be reviewed.

Drew on Behalf of Reed v. Reed, 16 Neb. App. 905, 755 N.W.2d 420 (2008)

- While a paternity action is one at law, the award of child support in such an action is equitable in nature.
- A trial court's award of child support in a paternity case will not be disturbed on appeal in the absence of an abuse of discretion by the trial court.

- In a paternity action, attorney fees are reviewed de novo on the record to determine whether there has been an abuse of discretion by the trial judge.
- In a dissolution action, an appellate court reviews an award of expert witness fees de novo on the record to determine whether there has been an abuse of discretion by the trial judge. The same standard applies to an award of expert witness fees in a paternity action.

Ferer v. Aaron Ferer & Sons, 278 Neb. 282, 770 N.W.2d 608 (2009)

- The doctrine of ***res judicata*** bars relitigation not only of those matters actually litigated, but also of those **matters which might have been litigated** in the prior action.

Fitzgerald v. Fitzgerald, 286 Neb. 96, 835 N.W.2d 44 (2013)

- In civil cases, a court of general jurisdiction has inherent power to vacate or modify its own judgment at any time during the term in which the court issued it.
- An untimely motion for new trial is ineffectual, does not toll the time for perfection of an appeal, and does not extend or suspend the time limit for filing a notice of appeal.
- Similarly, in cases involving a motion to alter or amend the judgment, a critical factor is whether the motion was filed within 10 days of the final order, because a timely motion tolls the time for filing a notice of appeal.
- Permission to amend a pleading is addressed to the discretion of the trial court, and the trial court's decision will not be disturbed absent an abuse of discretion. Amendment of a complaint is not a matter of right.
- The proper filing of an appeal shall vest in an appellee the right to a cross-appeal against any other party to the appeal.
- When the Legislature fixes the time for taking an appeal, the courts have no power to extend the time directly or indirectly.
- [W]e hold that where the time for appeal from a final order has expired without any appeal having been taken and thereafter a timely appeal is taken from a second final order in the same proceeding, a party to the timely appeal cannot use a cross-appeal to seek review of the first order.

Gangwish v. Gangwish, 267 Neb. 901, 678 N.W.2d 503 (2004)
Metcalf v. Metcalf, 278 Neb. 258, 769 N.W.2d 386 (2009)
Pickrel v. Pickrel, 14 Neb. App. 792, 717 N.W.2d 479 (2006)

- The standard of review of an appellate court in child support cases is ***de novo*** **on the record**, and the decision of the trial court will be affirmed in the absence of an abuse of discretion. [see also ***Gress v. Gress***, 257 Neb. 112, 596 N.W.2d 8 (1999); ***State v. Smith***, 231 Neb. 740, 437 N.W.2d 803 (1989); ***Hanson v. Rockwell***, 206 Neb. 299, 292 N.W.2d 786 (1980).]
- A judicial abuse of discretion exists when a judge, within the effective limits of authorized judicial power, elects to act or refrains from acting, and the selected option results in a decision which is untenable and unfairly deprives a litigant of a substantial right or a just result in matters submitted for disposition through a judicial system.

Hall v. Hall, 176 Neb. 555, 126 N. W. 2d 839 (1964)

- The trial court in a divorce action may in its discretion grant **supersedeas**. An absolute right to supersedeas does not exist except when it is allowable under the express provisions of section 25-1916.

- Where the divorce decree awarding custody of a minor child has not been superseded, such award may be enforced by the trial court, as in the case of any other nonsuperseded judgment (during pendency of an appeal to the appellate court). The trial court is invested with authority to enforce its nonsuperseded judgment awarding the custody of a minor child by contempt proceedings notwithstanding an appeal to this court.
- Temporary orders in the district court allowing alimony, child support, or the custody of minor children terminate with the rendition of a final decree of divorce.

Molina v. Salgado-Bustamonte, 21 Neb. App. 75, 837 N.W.2d 553 (2013)

- While a paternity action is one at law, the award of child support in such an action is equitable in nature.
- The standard of review of an appellate court in child support cases is de novo on the record, and the decision of the trial court will be affirmed in the absence of an abuse of discretion.
- A motion for new trial is addressed to the discretion of the trial court, whose decision will be upheld in the absence of an abuse of that discretion.
- After receiving a mandate, a trial court is without power to affect rights and duties outside the scope of the remand from an appellate court.
- the district court's mathematical correction to the retroactive support did not violate our mandate.

Spady v. Spady, 284 Neb. 885, 824 N.W.2d 966 (2012)

- Section 42-351 provides:
  (1) In proceedings under sections 42-347 to 42-381, the court shall have jurisdiction to inquire into such matters, make such investigations, and render such judgments and make such orders, both temporary and final, as are appropriate concerning the status of the marriage, the custody and support of minor children, the support of either party, the settlement of the property rights of the parties, and the award of costs and attorney's fees. The court shall determine jurisdiction for child custody proceedings under the Uniform Child Custody Jurisdiction and Enforcement Act.
  (2) When final orders relating to proceedings governed by sections 42-347 to 42-381 are on appeal and such appeal is pending, the court that issued such orders shall retain jurisdiction to provide for such orders regarding support, custody, parenting time, visitation, or other access, orders shown to be necessary to allow the use of property or to prevent the irreparable harm to or loss of property during the pendency of such appeal, or other appropriate orders in aid of the appeal process. Such orders shall not be construed to prejudice any party on appeal.
- The word "support" in § 42-351(2) is not by its terms limited to child support. Further, we look to the immediately preceding provision, § 42-351(1), which refers to "support of minor children [and] the support of either party." Section 42-351(1) shows that the word "support" is used statutorily in § 42-351 to refer to child support and spousal support, i.e., alimony.

State v. Biernacki, 237 Neb. 215, 217, 465 N.W.2d 732, 734 (1991)

- The failure of a party to submit a brief which complies with [its] rules may result in our treating the case as one in which no brief has been filed by that party. Review would thus be limited to "plain error" consideration.

State ex rel. Lemon v. Gale, 272 Neb. 295, 721 N.W.2d 347 (2006)

- In order to be considered by an appellate court, an alleged error must be both specifically assigned and specifically argued in the brief of the party asserting the error. [See also **Jeremiah J. v. Dakota D**., 287 Neb. 617, ___ N.W.2d ___ (March 2014)

J & H Swine v. Hartington Concrete*, 12 Neb. App. 885, 687 N.W.2d 9 (2004)

Rule: Timing is everything. This case, if anything, may teach the necessity for patience.

- For an appellate court to acquire jurisdiction of an appeal, there must be a final order entered by the court from which the appeal is taken; conversely, an appellate court is without jurisdiction to entertain appeals from nonfinal orders.
- A notice of appeal filed before the trial court announced a "decision or final order" within the meaning of Neb. Rev. Stat. § 25-1912(2) (Cum. Supp. 2002) in final determination of an issue of costs cannot relate forward.
- An award of costs in a judgment is considered a part of the judgment.
- The failure of a trial court to rule on a motion for costs in its judgment leaves a portion of the judgment unresolved, and consequently, an order entering such judgment is not final for the purpose of appeal.

**See also the Civil Procedure section of this outline*

Smeal Fire Apparatus Co. v. Kreikemeier *(Smeal II)*, 279 Neb. 661, 782 N.W.2d 848 (2010)

Court might say that the fire truck has upset the apple cart. The Supreme Court uses this opinion to reverse course and overturn an entire series of earlier court opinions relating to civil contempt of court as well as the burden of proof needed to sustain a finding of civil contempt.

- Although there is no graceful way of retreating from this court's previous rulings, some of our troubling contempt cases have created needless difficulties at both the trial and the appellate levels. An untangling of the snarls was long overdue. Our decision changes the legal landscape of our present contempt law. We overrule a long line of cases affecting a trial court's jurisdiction, an appellate court's jurisdiction, and the standard of proof in civil contempt cases.

1. *May a contemnor appeal a civil contempt order from a separate postjudgment proceeding? Yes.*
2. *We hold that in a civil contempt proceeding, a district court has inherent power to order compensatory relief when a contemnor has violated its order or judgment. We further hold that whether a contempt sanction is civil or criminal is relevant only when a party appeals from*

an interlocutory order of contempt. An interlocutory contempt order is an order that a court issues during an ongoing proceeding before the final judgment in the main action.

3. Finally, we conclude that for future cases, *the standard of proof in civil contempt proceedings is clear and convincing evidence*, unless the Legislature has mandated another standard.

- A jurisdictional issue that does not involve a factual dispute presents a question of law, which an appellate court independently decides.
- [B]oth an original marital dissolution pro eding and proceedings for modification of dissolution decrees are equitable in nature. Because of the court's continuing equity jurisdiction over the decree, the power to provide equitable relief in a contempt proceeding is particularly appropriate. But there are limits to a court's power to order equitable relief in a contempt proceeding. We have held that a court cannot **modify a dissolution decree** in a contempt proceeding absent an application for a modification and notice that a party seeks modification. ... So, if a complainant seeks, or a court is considering, a modification of the underlying decree as an equitable sanction for contempt of the court's decree, the alleged contemnor must first have notice that a modification and a finding of contempt will be at issue. But when the alleged contemnor has notice and an opportunity to be heard, a court can modify the underlying decree as a remedy for contempt if the violation cannot be adequately remedied otherwise.
- Civil contempt proceedings are remedial and coercive in their nature.
- [O]nly civil contempt orders issued **before** a final judgment in the main action are interlocutory (and unappealable).
- A court that has jurisdiction to issue an order also has the power to enforce it. A court can issue orders that are necessary to carry its judgment or decree into effect.
- Nebraska courts, through their inherent judicial power, have the authority to do all things reasonably necessary for the proper administration of justice. And this authority exists apart from any statutory grant of authority. The power to punish for contempt is incident to every judicial tribune. It is derived from a court's constitutional power, without any expressed statutory aid, and is inherent in all courts of record.
- A court of equity has the power to interpret its own injunctive decree if a party later claims that a provision is unclear. The critical question for appeal purposes is whether a clarification order merely interprets an injunctive decree or whether it modifies the decree in a way that affects a party's substantial right.
- An appellate court, reviewing a final judgment or order in a contempt proceeding, reviews for errors appearing on the record. When reviewing a judgment for errors appearing on the record, the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable.
- Under Nebraska law, an order of contempt in a postjudgment proceeding to enforce a previous final judgment is properly classified as a **final order**; the contempt order affects a substantial right, made upon a summary application in an action after judgment.
- For appeal purposes, the distinction between criminal and civil contempt sanctions has no relevance to whether a party may appeal from a final order in a supplemental postjudgment contempt proceeding.
- A trial court's factual finding in a contempt proceeding will be upheld on appeal unless the finding is clearly erroneous.
- When a party to an action fails to comply with a court order made for the benefit of the opposing party, such act is ordinarily a civil contempt, which **requires willful disobedience as an**

essential element. "Willful" means the violation was committed intentionally, with knowledge that the act violated the court order.

- A court cannot hold a person or party in contempt unless the order or consent decree gave clear warning that the conduct in question was required or proscribed.
- In civil cases, when a party's interests are substantial and involve more than the mere loss of money, but obviously do not involve a criminal conviction, due process is satisfied by an intermediate **"clear and convincing" standard of proof.** Proof beyond a reasonable doubt is a criminal trial protection that does not apply to civil contempt proceedings.
- As of the date of this opinion (April 16, 2010), outside of statutory procedures imposing a different standard, it is the complainant's burden to prove civil contempt by **clear and convincing evidence**.

State v. Collins, 281 Neb. 927, 799 N.W.2d 693 (2011)

- [A]n issue not presented to or decided on by the trial court is not an appropriate issue for consideration on appeal. [W]e have applied those principles to find waiver of statutory and even constitutional rights when a defendant fails to raise them.

Szawicki v. Szawicki, 17 Neb. App. 820, 770 N.W.2d 676 (2009)

Briefly speaking….

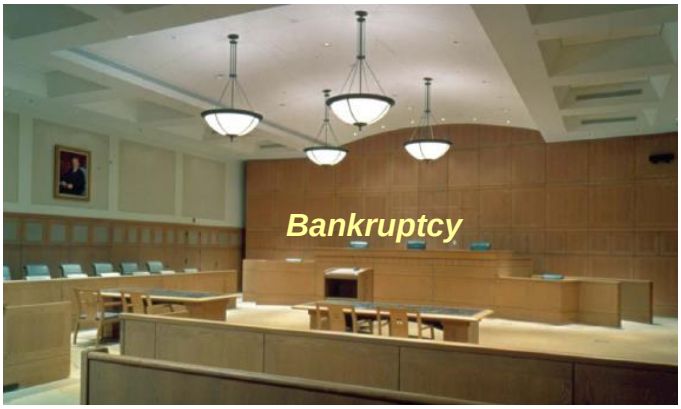
- A party filing a cross-appeal must set forth a separate division of the brief prepared in the same manner and under the same rules as the brief of appellant. See, Neb. Ct. R. App. P. § 2-109(D)(4); ***Vokal v. Nebraska Acct. & Disclosure Comm.***, 276 Neb. 988, 795 N.W.2d 75 (2009)
- the cross-appeal section of a party's brief must set forth a separate title page, a table of contents, a statement of the case, assigned errors, propositions of law, and a statement of facts. See, § 2-109(D)(1)

Walsh v. State, 276 Neb. 1034, 759 N.W.2d 100 (2009)

- A judgment or final order rendered by a district court in a judicial review pursuant to the **Administrative Procedure Act** may be reversed, vacated, or modified by an appellate court for errors appearing on the record. When reviewing an order of a district court under the Administrative Procedure Act for errors appearing on the record, the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable. ***Nothnagel v. Neth,*** 752 N.W.2d 149 (2008).
- To be considered by (the appellate) court, an alleged error must be both specifically assigned and *specifically argued* in the brief of the party asserting the error. ***Malchow v. Doyle***, 275 Neb. 530, 748 N.W.2d 28 (2008).

Wharton v. Jackson, 107 Neb. 288, 185 N.W. 428 (1921)

- [J]urisdiction of the court in matters relating to divorce and alimony is given by statute, and every power exercised by the court in reference thereto must look to the statute or it does not exist. [Citation omitted.] We cannot change it; we must therefore take the decree as we find it, inasmuch as the interested parties have made no move to change it but have treated it as final.



Changes to federal bankruptcy laws that took effect in October 2005 have streamlined the process for enforcing child support orders against obligated parents who have filed for protection under federal bankruptcy law. Generally, any enforcement action you are able to utilize against an obligated parent who is not in bankruptcy court may also be utilized against an obligated parent who has filed for bankruptcy protection.
Please see www.acf.hhs.gov/programs/cse/pol/AT/2006/at-06-05.htm for more information. A useful "Q & A" series on the relationship between child support and bankruptcy may be found at: http://www.acf.hhs.gov/programs/cse/pol/AT/2006/at-06-05a.pdf

By letter from Nebraska's HHSS' Administrator of the Office of Economic and Family Support, county and authorized attorneys are asked to file Proofs of Claim with bankruptcy courts for all cases where you are notified that an obligated parent has filed for bankruptcy protection, regardless under which Chapter (7, 12 or 13) the filing took place. This recommendation recognizes that child support debt is not dischargeable under federal bankruptcy law, and that even if a Proof of Claim is not filed child support is absolutely protected from discharge. However by filing a proof of claim you are serving notice on the court and the trustee of the exact amount of the child support (and spousal support, where applicable) debt, and this should increase the likelihood that enough assets will be set aside in a Chapter 13 case to allow for the repayment of the support obligation in a timely manner. An exception would be if the "Notice of Chapter __ Bankruptcy Case" instructs you *not* to file a proof of claim.

The federal judiciary has posted a primmer on "Bankruptcy Basics" at http://www.uscourts.gov/bankruptcycourts/bankruptcybasics.html

The link for the **U.S. Bankruptcy Court for the District of Nebraska** is: http://www.neb.uscourts.gov/. Court may access sample completed forms, as well as complete Proof of Claim and other forms online via the website, under the "Resources" tab. A helpful link to the U.S. Trustee Program may be found here.

Nebraska's HHSS office has listed Sam Kaplan as a contact for those with questions, or needing information. His phone number is 402-471-9263.

Erica J. v. Dewitt, 265 Neb. 728, 659 N.W.2d 315 (2003)

Facts: In modification action the child support referee gave the noncustodial parent a dollar for dollar deduction against his newly recalculated child support amount on account of a bankruptcy repayment plan he was paying on. The referee compared the bankruptcy repayment plan to a student loan that the noncustodial parent could not escape paying, and which credit can be given for according to case law. The district court affirmed the referee and the State appealed. *Held*: this was error.

- The guidelines allow deductions for taxes, Social Security, health insurance, mandatory retirement contributions, and child support for other children. Payments to a bankruptcy plan are not specifically provided for in the guidelines as a deduction or credit. See paragraph C(5).
- The Court of Appeals has held that a payment to a bankruptcy plan in and of itself is not sufficient to rebut the presumption that the guidelines should be applied or to require a deviation from the guidelines to avoid an unjust result. See ***Lebrato v. Lebrato***, 3 Neb. App. 505, 529 N.W.2d 90 (1995).
- From our de novo review of the referee's report, we conclude that the referee erred in allowing a $100 credit for the payments to Dewitt's bankruptcy plan. The referee was not justified in crediting $100 of the bankruptcy plan payment directly against the child support

Child Care

Dworak v. Fugit, 1 Neb. App. 332, 495 N.W.2d 47 (1992)

- child-care costs may be awarded as an incident to child support in a paternity action.

Hamm v. Hamm, 228 Neb. 294, 422 N.W.2d 336 (1988)

- The child support guidelines specify that day care expenses are to be considered independently of the child support amount.

Child Support & Related

(see also Earning Capacity, Equity, Guidelines, Modification Issues, Temporary Support)

Temporary child support – see § 42-357.
§ 42-364 (4) states in part that "Child support paid to the party having custody of the minor child shall be the property of such party except as provided in section 43-512.07."

With regard to requests for an ***accounting*** of child support monies spent by a custodial parent, see:

42-364. Dissolution or legal separation; decree; parenting plan; children; custody determination; rights of parents; child support; termination of parental rights; court; duties; modification proceedings.

…

(6) In determining the amount of child support to be paid by a parent, the court shall consider the earning capacity of each parent and the guidelines provided by the Supreme Court pursuant to section 42-364.16 for the establishment of child support obligations. Upon application, hearing, and presentation of evidence of an abusive disregard of the use of child support money paid by one party to the other, the court may require the party receiving such payment to file a verified report with the court, as often as the court requires, stating the manner in which such money is used.

§42-358.01. Delinquent support order payments; records.
Records of delinquencies in support order payments shall be kept by the Title IV-D Division of the Department of Health and Human Services or by the clerks of the district courts pursuant to their responsibilities under law.
Source: Laws 1975, LB 212, § 3; Laws 2000, LB 972, § 10; Laws 2007, LB296, § 57.

See § 42-364.13 for required contents of child support orders.

§42-369 Support or alimony; presumption; items includable; payments; disbursement; enforcement; health insurance.

(1) All orders, decrees, or judgments for temporary or permanent support payments, including child, spousal, or medical support, and all orders, decrees, or judgments for alimony or modification of support payments or alimony shall direct the payment of such sums to be made commencing on the first day of each month for the use of the persons for whom the support payments or alimony have been awarded. Such payments shall be made to the clerk of the district court (a) when the order, decree, or judgment is for spousal support, alimony, or maintenance support and the order, decree, or judgment does not also provide for child support, and (b) when the payment constitutes child care or day care expenses, unless payments under subdivision (1)(a) or (1)(b) of this section are ordered to be made directly to the obligee. All other support order payments shall be made to the **State Disbursement Unit**. In all cases in which income withholding has been implemented pursuant to the Income Withholding for Child Support Act or sections 42-364.01 to 42-364.14, support order payments shall be made to the State Disbursement Unit. The court may order such payment to be in cash or guaranteed funds.

. . .

(4) Orders, decrees, and judgments for temporary or permanent support or alimony shall be filed with the clerk of the district court and have the force and effect of judgments when entered. The clerk and the State Disbursement Unit shall disburse all payments received as directed by the court and as provided in sections 42-358.02 and 43-512.07. Records shall be kept of all funds received and disbursed by the clerk and the unit and shall be open to inspection by the parties and their attorneys.

§ 43-513.01. Judgment for child support; death of judgment debtor.

A judgment for child support shall not abate upon the death of the judgment debtor.

Source: Laws 1984, LB 657, § 1.

§ 43-1404 Child support; liability of parents; discharge.

The liability of the father or mother of a child for its support shall be discharged by compliance with the terms of a judicial decree for support or the terms of a judicially approved settlement or by the adoption of the child by some other person or persons.

Source: Laws 1941, c. 81, § 4, p. 323; C.S.Supp.,1941, § 43-704; **:** R.S.1943, (1983), § 13-104

§ 43-1405. Child support; liability of father; discharge by settlement; requirements.

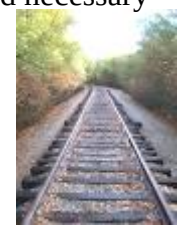
A settlement provided for in section 43-1404 means a voluntary agreement between the father of the child and the mother or some person authorized to act in her behalf, or between the father and the next friend or guardian of the child, whereby the father promises to make adequate provision for the support of the child. In the event that such a settlement is made it shall be binding on all parties and shall bar all other remedies of the mother and child and the legal representatives of the child so long as it shall be performed by the father, if said settlement is approved by the court having jurisdiction to compel the support of the child. The court shall approve such settlement only if it shall find and determine that adequate provision is made for the support of the child and that the father shall have offered clear evidence of his willingness and ability to perform the

agreement. The court, in its discretion, may require the father to furnish bond with proper sureties conditioned upon the performance of the settlement.
Source: Laws 1941, c. 81, § 5, p. 323; C.S.Supp.,1941, § 43-705; ; R.S.1943, (1983), § 13-105.

§ 43-1410 Child support; decree or approved settlement; effect after death of parent.
Any judicially approved settlement or order of support made by a court having jurisdiction in the premises shall be binding on the legal representatives of the father or mother in the event of his or her death, to the same extent as other contractual obligations and judicial judgments or decrees.
Source: Laws 1941, c. 81, § 10, p. 325; C.S.Supp.,1941, § 43-710; R.S.1943, (1983), § 13-110.

§ 43-1705 Child support, defined.
Child support shall mean support for one or more children.
Source: Laws 1985, Second Spec. Sess., LB 7, § 25

§ 43-1716. Support, defined.
Support shall mean the providing of necessary shelter, food, clothing, care, medical support, medical attention, education expenses, funeral expenses, or any other reasonable and necessary expense.
Source: Laws 1985, Second Spec. Sess., LB 7, § 36; Laws 1991, LB 457, § 24.



Railroad Retirement Board (RRB) – https://secure.rrb.gov/

Barth v. Barth, 22 Neb.App. 241, 851 N.W.2d 104 (2014)
Facts: *Mom had child by previous relationship. Divorce court took that other child into consideration, without being asked to, in deviating downward in setting child support.*
Held*: That is impermissible.*

- The child support guidelines are to be applied as a rebuttable presumption to both temporary and permanent support, and any deviation from the guidelines must take into consideration the best interests of the children.
- A court may deviate from the guidelines when one or both of the parties have provided sufficient evidence to rebut the presumption.
- When there was insufficient evidence to rebut the presumption that the guidelines should be applied, the district court abuses its discretion when it entered a child support order that deviated from the child support guidelines without good cause.

Bird v. Bird, 205 Neb. 619, 288 N.W.2d 747 (1980)
Hamm v. Hamm, 228 Neb. 294, 422 N.W.2d 336 (1988)

- While the cost of caring for a child is an important consideration in determining child support, equally important is the father's ability to make the payments. It is not advantageous to either party to place the payments for child support beyond the reach or capability of the father.

Cammarata v. Chambers, 6 Neb. App. 467, 574 N.W.2d 530 (1998)

- A child support order may consist merely of an order for "no support." Even if a court order provides that no support is due from either parent, that does not change the fact that there is an existing support order.

- County Attorney may not in such cases seek to obtain a support order for custodial parent under provisions of §43-512.03 (authorizing county attorney intervention to establish an order for child support where no order presently exists.)

Caniglia v. Caniglia, 285 Neb. 930, 830 N.W.2d 207 (Sarpy County, 2013)

- [T]he language of § 42-364(6) is broad enough to encompass extraordinary expenses of a child.
- "Support" is commonly defined as "a means of livelihood, sustenance, or existence." The common meaning of "support" clearly includes all of the incidents of a child's needs. Of course, one incident of "support" is the regular monthly payment established under the guidelines. But the guidelines recognize other incidents of "support" that are wholly or partly outside of the monthly installment. The expenses stated in §42-364.17 — including, among others, extracurricular, education, and other extraordinary expenses — merely represent other incidents of "support" to be addressed in a dissolution decree.
- [T]he child support guidelines contemplate that extraordinary or unusual expenses will be addressed outside the guidelines' framework.
- Under our case law, provisions of a divorce decree relating to children can always be modified. As we have stated, "A decree in a divorce case, insofar as minor children are concerned, is never final in the sense that it cannot be changed."
- [T]here is no persuasive reason for treating extraordinary expenses any differently from other issues relating to children. Thus, *we hold that* a party's responsibility under § 42-364.17 for reasonable and necessary medical, dental, and eye care; medical reimbursements; daycare; extracurricular activity; education; and other extraordinary expenses of the child to be made in the future may be modified if the applicant proves that a material change in circumstances has occurred since entry of the decree or a previous modification.

Collins v. Collins, 19 Neb. App. 529, 808 N.W.2d 905 (2012)

- Under the Nebraska Child Support Guidelines, if applicable, earning capacity may be considered in lieu of a parent's actual, present income and may include factors such as work history, education, occupational skills, and job opportunities.
- In the initial determination of child support, earning capacity may be used *where evidence is presented that the parent is capable of realizing such capacity through reasonable effort*.
- The party seeking the modification has the burden to produce sufficient proof that a material change of circumstances has occurred that warrants a modification.
- For a court to modify child support, the material change of circumstances must exist at the time of the modification trial.
- Temporary unemployment is not a material change of circumstances.

Davis v. Davis, 275 Neb 944, 750 N.W.2d 696 (2008)

Facts: Post divorce, CP filed motion to force ex-husband to submit to a physical exam for purposes of CP obtaining a life insurance policy on NCP's life, to ensure future child support/spousal support would be paid in event of NCPs death. Ex objected. Held: CP's motion must fail as against public policy

- CP has an insurable interest in the NCP's life. But an insurable interest does not give her the right to *own* a policy on Henry's life without his consent. Section 44-704 specifically requires adult insureds to consent to insurance policies on their lives unless they or their spouses are the owners of the policies.

- Citing ***Hopkins v. Hopkins***, 328 Md. 263, 614 A.2d 96 (1992): the consent requirement serves two purposes: (1) It prevents wagering on human lives and (2) it protects human lives by removing the temptations and risks associated with other persons' having an interest in both the insured's life and death. "Policies issued in violation of this rule 'are not dangerous because they are illegal: they are illegal because they are dangerous.'"

Deterding v. Deterding, 18 Neb. App. 922, 797 N.W.2d 33 (2011)

Facts: During marriage, mom conceives child through artificial insemination. Child is not biologically related to the husband. Upon divorce 5 years after the child's birth, the trial court does not order husband to pay child support because child is not biologically related to him. Mother apparently consents to this arrangement. Other issues were appealed and the Court of Appeals comes down hard on everyone for the lack of a child support order.

- [W]e conclude that the district court committed plain error in failing to award child support on behalf of the minor child without receiving any evidence concerning the circumstances surrounding the child's birth or the child's relationship with [the husband] prior to the dissolution proceedings.
- Parties in a proceeding to dissolve a marriage cannot control the disposition of matters pertaining to minor children by agreement. *Weinand v. Weinand*, 260 Neb. 146, 616 N.W.2d 1 (2000).
- [W]e recognize that because the child was conceived through artificial insemination, this is not a situation where the child has a readily identifiable biological father who is responsible for her care and support.
- If [the husband] consented to [the wife's] being artificially inseminated, he made a decision to bring a child into the world, and he should not be permitted to abandon his responsibility to that child simply because he is not the biological father. Both the Legislature and the Nebraska Supreme Court have recognized that there are situations where a person who is not a biological parent may still have a responsibility to support a child.
- The Nebraska dissolution statutes do not impose a duty upon any individual other than a parent to pay for the support of minor children. See Neb. Rev. Stat. § 42-364 (Supp. 2009). However, the term "parent" is not specifically defined in the statutes. See *Weinand v. Weinand, supra*. Assuming, without deciding, that Buckley would not be considered a "parent" pursuant to § 42-364, he still may be responsible for supporting the child if he has assumed, in loco parentis, the obligations incident to a parental relationship. See *Weinand v. Weinand, supra*.

Drew on Behalf of Reed v. Reed, 16 Neb. App. 905, 755 N.W.2d 420 (2008)

- **Joint physical custody** means the child lives day in and day out with both parents on a rotating basis.
- Numerous parenting times with a child do not constitute joint physical custody. Liberal parenting time does not justify a joint custody child support calculation.

See § 4-212 for the Guidelines rule on Joint Custody, and what exactly the term means.

Dworak v. Fugit, 1 Neb. App. 332, 495 N.W.2d 47 (1992)

Holding: *Earning capacity, and not mere income, is what a court should focus on*

- The amount of child support awarded is a function of the status, character, and situation of the parties.... The primary consideration in determining the level of child support payments is the best interests of the child.

Emery v. Moffett, 269 Neb. 867, 697 N.W.2d 249 (2005);
Hall v. Hall, 238 Neb. 686, 472 N.W.2d 217 (1991).

- A tax dependency exemption is nearly identical in nature to an award of child support or alimony.
- The general rule is that a custodial parent is presumptively entitled to the federal tax exemption for a dependent child.

Gress v. Gress, 257 Neb. 112, 596 N.W.2d 8 (1999)

- "We have clearly established that a noncustodial parent is entitled to credit against a monthly child support obligation for Social Security benefits paid to his or her minor child as a result of the noncustodial parent's disability."

Gress v. Gress, 274 Neb. 686, 743 N.W.2d 67 (2007)

*Issue: How many years back should a court go in **averaging income** of parents with fluctuating income.*

- As a general matter, in the determination of child support, income from a self-employed individual is determined by looking to that person's tax returns.
- (Reviewing) a 3-year average (income) tends to be the most common approach in cases where a parent's income tends to fluctuate. It is not necessary for a court to look back more than three years.
- A daycare obligation is also subject to paragraph R's basic subsistence limitation.

See also **Bussell v. Bussell**, 21 Neb. App. 280, 837 N.W.2d 840 (2013), okaying 5 year income averaging for farm income.

Henderson v. Henderson, 264 Neb. 916, 653 N.W.2d 226 (2002)

- A district court has no authority to include a child who is more than 19 years of age in its child support calculations.

Henke v. Guerrero, 13 Neb. App. 337, 692 N.W.2d 762 (2005)

- An award of child support is *equitable* in nature. A trial court's award of child support in a paternity case will not be disturbed on appeal in the absence of an abuse of discretion by the trial court. Also see ***Weaver v. Compton***, 8 Neb. App. 961, 605 N.W.2d 478 (2000)
- Child support in a paternity action is to be determined in the same manner as in cases of children born in lawful wedlock. See Neb. Rev. Stat. §43-1402 (Reissue 2004). The resulting duty of a parent to provide such support may, under appropriate circumstances, require the award of retroactive child support. ***State o/b/o Joseph F. v. Rial***, 251 Neb. 1, 554 N.W.2d 769 (1996)
- The requirement of support begins at the time of the birth of the child, whether the child is born in lawful wedlock or otherwise.
- Clearly, retroactive support is included in the "support" that the trial court may order under §43-1412 (3).

Hildebrand v. Hildebrand, 239 Neb. 605, 477 N.W.2d 1 (1991)
In case this point wasn't self evident….

- Citing ***In re Marriage of Root***, 774 S.W.2d 521 (Mo. App. 1989):

  > It would be absurd to hold that once **parents remarry** each other and the family is again intact and residing in the same household, the former noncustodial parent must pay future installments of child support to the other parent per the past divorce decree. That is to say, the remarriage should terminate the former noncustodial parent's duty to pay any child support that would have become due after the remarriage.

- [O]nce parties remarry, the former **child support order is moot**, while any deficiencies prior to the marriage are collectible.

Jensen v. Jensen, 275 Neb. 921, 750 N.W.2d 335 (2008)

- [W]e have never held that the absence of a child support **worksheet** provides a basis for a collateral attack on a final judgment. Once the [child support] order became final, even without a worksheet, it was enforceable.
- **[P]ublic policy** forbids enforcement of a private agreement that purports to discharge a parent's liability for child support, if the agreement does not adequately provide for the child.

Johnson v. Johnson, 215 Neb. 689, 340 N.W.2d 393 (1983)

- Where an award for child support is made in one amount for each succeeding month for more than one child, it will be presumed to continue in force for the full amount until the youngest child reaches his majority. The proper remedy, if this be deemed unjust, is to seek a modification of the decree in the court which entered it, on the basis of the changed circumstances.
- A single amount to be paid periodically for the support of more than one child is not subject to an automatic *pro rata* **reduction**.

Lainson v. Lainson, 219 Neb. 170, 362 N.W.2d 53 (1985)

- When the court is cognizant of the amount of Social Security benefits being paid and awards an amount in addition thereto, an appellate court will not reverse the award absent an abuse of discretion.

Lasu v. Issak, 23 Neb. App. 83, 868 N.W.2d 79 (July 2015)
Holding: Among other things, this case stands for the proposition that the Nebraska child support guidelines must utilize the federal poverty guidelines in determining what constitutes an obligated parent's poverty level, below which only minimum child support can be ordered. See page 1 of this outline.

- All orders for child support obligations shall be established in accordance with the provisions of the Nebraska Child Support Guidelines unless the court finds that one or both parties have produced sufficient evidence to rebut the presumption that the guidelines should be applied.
- If the district court fails to indicate that a deviation from Neb. Ct. R. § 4-218 (rev. 2014) is warranted, it abuses its discretion if its child support order drives the obligor's income below the poverty line set forth in § 4-218.
- There is no precise mathematical formula for calculating child support when subsequent children are involved.

- Calculation of child support when subsequent children are involved is left to the discretion of the court as long as the court considered the obligations to both families and the income of the other parent of the subsequent children.
- When a deviation from the Nebraska Child Support Guidelines is appropriate, the trial court should consider both parents' support obligations to all children involved in the relationships.
- In considering the obligation to subsequent children, the trial court should take into consideration the income of the other parent of these children as well as any other equitable considerations.
- The specific formula for making calculations for the obligation to subsequent children is left to the discretion of the trial court, as long as the basic principle that both families are treated as fairly as possible is adhered to.
- In ordering child support, a trial court has discretion to choose if and how to calculate the deviation, but must do so in a manner that does not benefit one family at the expense of the other.
- A parent's support, childcare, and health care obligation shall not reduce his or her net income below the minimum net monthly obligation for one person, or the poverty guidelines updated annually in the Federal Register by the U.S. Department of Health and Human Services under authority of 42 U.S.C. § 9902(2), except minimum support may be ordered as defined in Neb. Ct. R. § 4-209.
- When an obligor's combined household income is below the poverty guidelines as updated annually in the Federal Register, the district court should order minimum support pursuant to Neb. Ct. R. § 4-209 or otherwise set forth specific reasons for deviating from the basic subsistence requirement.
- When determining child support in a complex multifamily situation, trial courts should be careful not to order a disproportionate amount of a child support obligor's net income to go to the children at issue and the goal must be for fairness for all the children for whom a parent must provide support.

Mehne v. Hess, 4 Neb. App. 935, 553 N.W.2d 482 (1996)

- The trial court's award of child support after a determination of paternity will not be disturbed on appeal absent an abuse of discretion. State v. Smith, 231 Neb. 740, 437 N.W.2d 803 (1989); Hanson v. Rockwell, 206 Neb. 299, 292 N.W.2d 786 (1980).

Muller v. Muller, 3 Neb. App. 159, 524 N.W.2d 78 (1994)

- The paramount concern and question in determining child support, whether in an initial marital dissolution action or in proceedings for modification of a decree, is the best interests of the child. See also **Phelps v. Phelps**, 239 Neb. 618, 477 N.W.2d 552 (1991)
- Neb. Rev. Stat. §42-371(5) authorizes the posting of security to insure the payment of child support. Reasonable security to insure payment of child support should be invoked only when compelling circumstances require it.
- The fact that a *custodial* parent is not ordered to remit a monthly dollar amount for child support does not release him or her from the obligation to contribute to the support of the children. Earning capacity of *each* parent, and not merely the actual income, is to be considered in determining the amount of child support to be paid by a parent.

Sellers v. Sellers, 23 Neb.App. 219, 869 N.W.2d 703 (2015) (See the ***Guidelines*** and ***Modification*** sections of this outline for treatment of this important case.)

Shiers v. Shiers, 240 Neb. 856, 485 N.W.2d 574 (1992)

- There is statutory and judicial authority for considering a parent's net earning capacity rather than his or her actual net income in determining child support. *See,* Neb.Rev.Stat. § 42-364(6), *Ristow v. Ristow,* 152 Neb. 615, 41 N.W.2d 924 (1950).

Simpson v. Simpson, 275 Neb. 152, 744 N.W.2d 410 (2008)

After determining that ***expatriate compensation*** *IS income for purposes of calculating a child support award….*

- Under the facts of this case [where the NCP lived abroad and had much higher living expenses than he would have if he lived in the U.S.], we cannot say that the district court abused its discretion when it determined that [the obligated parent's] expatriate compensation is not reasonably available for child support payments.

State on Behalf of Andrew D. v. Bryan B., 22 Neb. App. 914, 864 N.W.2d 249 (2015)

Held: 1. If a parent wants the trial court to consider the cost of dependent health insurance, they need to offer specific evidence as to those costs, or the trial court should not include a health insurance deduction in the worksheet support calculation.

2. When a parent fails to file income tax returns, the trial court is given wide discretion in determining that parent's income for child support calculation purposes.

- While a paternity action is one at law, the award of child support in such an action is equitable in nature.
- A trial court's award of child support in a paternity case will not be disturbed on appeal in the absence of an abuse of discretion by the trial court.
- As a general matter, parties' current earnings are to be used in calculating child support.
- Bryan put himself in the position in which he now claims error. There was no clear evidence of his income because he voluntarily failed to file tax returns since 2008 and does not keep reliable or complete business records. Accordingly, the court had to piece together the evidence it had the best it could to determine Bryan's income.
- If there is substantial fluctuation in income from year to year, the trial court may use income averaging to calculate income for child support purposes.

State on Behalf of Kayla T. v. Risinger, 273 Neb. 694, 731 N.W.2d 892 (2007)

Facts: *Dad learned of unmarried Mom's pregnancy, but had no contact with child for 17 years, until state filed paternity action. Dad admitted paternity but did not want to have to pay $60,000+ in retro support for 17 years, citing mother's promise not to come after him for support in return for him staying away from his child.* ***Held:*** *Dad must pay the retro support.*

- A private agreement between parents that would deprive a child of support from one parent contravenes the public policy of this state.
- [B]ecause the right to support belonged to [the child], any agreement made or actions taken by [the mother] would not be the basis for equitable *estoppel* in this paternity and child support action brought by the State on the child's behalf.

Welch v. Welch, Jr., 246 Neb. 435, 519 N.W.2d 262 (1994)

- The power of a court to **suspend child support** should be exercised only as a last resort or where it is apparent that to do so affords the only remedy that can reasonably be expected to fit the mischief.
- A court may suspend child support payments when the custodial parent **deprives the noncustodial parent of visitation** and there is no showing that the children are in need.

Wood v. Wood, 266 Neb. 580, 667 N.W.2d 235 (2003)

- Although this section does not permit a district court in a dissolution action to order child support beyond the age of majority, the district court has the authority to enforce the terms of an approved settlement which may include an agreement to support a child beyond the age of majority.

Choice of Law – UIFSA

A good discussion on the issue of Choice of Law under UIFSA is had in the case of

Groseth v. Groseth, 257 Neb. 525, 600 N.W.2d 159 (1999)

- Once Nebraska assumes continuing, exclusive jurisdiction and becomes the issuing state under § 42-746, the substantive law of Nebraska governs the nature, extent, amount and duration of current payments and other obligations of support.
- Under the choice-of-law provision in the Uniform Interstate Family Support Act, Neb.Rev.Stat. § 42-739(a) (Reissue 1998), the substantive law of an issuing state applies to petitions filed in a responding state to enforce the existing child support orders of the issuing state; at the same time, the substantive law of the issuing state does **not** apply to petitions filed in a responding state to modify the existing child support orders of the issuing state.

But see: **Wills v. Wills,** 16 Neb.App. 559, 745 N.W.2d 924 (2008)

The age of emancipation is never modifiable

- Under Neb.Rev.Stat. § 42-746(d) (Reissue 2004), the law of the state which issued the initial controlling order governs the duration of the obligation of support.
- Section 42-746 states, in pertinent part:

  > Except as otherwise provided in section 42-747.03 , a tribunal of this state shall not modify any aspect of a child support order that cannot be modified under the law of the issuing state, including the duration of the obligation of support....
  > (d) In a proceeding to modify a child support order, the law of the state that is determined to have issued the initial controlling order governs the duration of the obligation of support. The obligor's fulfillment of the duty of support established by that order precludes imposition of a further obligation of support by a tribunal of this state.

Civil Procedure, Civil Process & Related

(See also *Appellate Practice, Jurisdiction* and *Miscellaneous*. Visit the Supreme Court website's Rules link for updates on court rules for all courts)

§ 25-217 Action; commencement; defendant not served; effect.

An action is commenced on the date the complaint is filed with the court. The action shall stand dismissed without prejudice as to any defendant not served within six months from the date the complaint was filed.

§25-309. Suit against infant; guardian for suit; when appointed; exception.
Except as provided by the Nebraska Probate Code, the defense of an infant must be by a guardian for the suit, who may be appointed by the court in which the action is prosecuted, or by a judge thereof, or by a county judge. The appointment cannot be made until after service of the summons in the action as directed by this code.
Source: R.S.1867, Code § 38, p. 399; R.S.1913, § 7590; C.S.1922, § 8533; C.S.1929, § 20-309; R.S.1943, § 25-309; Laws 1975, LB 481, § 12.

§ 25-503.01 Summons
(1) The summons shall be directed to the defendant or defendants, and contain the names of the parties and the name and address of the plaintiff's attorney, if any, otherwise the address of the plaintiff. It shall notify defendant that in order to defend the lawsuit an appropriate written response shall be filed with the court within thirty days after service, and that upon failure to do so the court may enter judgment for the relief demanded in the complaint.

(2) A judgment by default shall not be different in kind from that demanded in the complaint. If only special damages are demanded a judgment by default shall not exceed the amount demanded in the complaint.
Source: Laws 1983, LB 447, § 20; Laws 2002, LB 876, § 13

§ 25-2211
…If the defendant fails to answer, the cause for the purpose of this section shall be deemed to be at issue upon questions of fact, but in every such case the plaintiff may move for and take such judgment as he or she is entitled to, on the defendant's default, on or after the day on which the action is set for trial. …

§ 48-802 – Statutes, General Rules of Construction.
Explains what "may" and "shall" and other fun words mean when used in the law.

The **"divisibility doctrine"**…
A decree of divorce granted on constructive or substituted service of process may be divisible, that is, entitled to full faith and credit in other jurisdictions as far as it affects the marital status, and ineffective on other issues; but a decree based on personal service of process must be recognized as valid for all purposes.
27C C.J.S. Divorce § 787 at 465 (1986)

See also: **Harvey v. Harvey**, 6 Neb. App. 524, 575 N.W.2d 167 (1998)
Starr v. King, 234 Neb. 339, 451 N.W.2d 82 (1990)
State on Behalf of A.E. v. Buckhalter, 273 Neb. 443, 730 N.W.2d 340 (2007)

Supreme Court Rule § 6-1504. Domestic relations cases.

4. All applications for temporary custody, support, and maintenance shall comply with Nebraska statutes.

(B) All applications for temporary support and allowances shall be determined without testimony upon argument and affidavits setting forth information required by Nebraska Child Support Guidelines and Nebraska statutes.

Court A properly completed Department of Health Bureau of Vital Statistics form shall be filed with each petition for dissolution of marriage, and no decree will be entered unless each form is completed in full.

(D) If any case contains an order or judgment for child or spousal support, or for the payment of medical expenses, the order shall include the following statements:

(1) Delinquent child or spousal support shall accrue interest at the following rate: (insert the rate in effect on judgments as published in the applicable issue of the Nebraska Advance Sheets).

(2) If immediate income withholding is not required by law to be ordered in a case and is not so ordered, the following statement shall be included:

In the event the obligor fails to pay any child support, spousal support, or other payment ordered to be made through the clerk of the district court, as such failure is certified each month by said clerk in cases in which court-ordered support is delinquent in an amount equal to the support due and payable for a one-month period of time, the obligor shall be subject to income withholding and may be required to appear in court and show cause why such payment was not made. In the event the obligor fails to pay and appear as ordered, a warrant shall be issued for his or her arrest.

(3) If, regardless of whether payments are in arrears, the court orders income withholding pursuant to Neb. Rev. Stat. § 43-1718.01 or § 43-1718.02, the statement specified in § 6-1504(D)(2) shall be altered to read as follows:

In the event the obligor fails to pay any child, spousal support, or medical payment, as such failure is certified each month by the district court clerk in cases in which court-ordered support is delinquent in an amount equal to the support due and payable for a one-month period of time, the obligor may be required to appear in court and show cause why such payment was not made. In the event the obligor (respondent or petitioner) fails to pay and appear as ordered, a warrant shall be issued for his or her arrest.

(E) Any order for support presented to the court shall require the obligor to furnish to the clerk of the court his or her address, telephone number, social security number, the name of his or her employer, and the name of his or her health insurance carrier, if any, together with the number of the policy and the address at which claims are to be submitted. The order shall further require the obligor to advise the clerk of any changes in such information until the judgment has been fully paid. If both parents are parties to the action, such order shall provide that each be required to furnish to the clerk of the court whether he or she has access to employer-related health insurance coverage and, if so, the health insurance policy information.

(F) A worksheet showing calculations under the Nebraska Child Support Guidelines shall be attached to every child support application, order, or decree and shall be prepared by the party requesting child support, except that in a contested matter the worksheet shall be prepared by the court and attached to the order or decree.

Rule 4(D)(2) and (3) amended April 17, 1996; Rule 4(F) amended January 3, 1997; Rule 4 amended May 19, 2004; Rule 4(D) deleted and (4)(E)-(G) renumbered to (4)(D)-(F)). Renumbered and codified as § 6-1504, effective July 18, 2008.

Belitz v. Belitz, 17 Neb. App. 53, 756 N.W.2d (2008)

Oh what a tangled web a court weaves, when it seeks to please unpleasant people…

The trial court in a protracted, messy divorce attempted to extend the appeal time for one of its earlier orders by incorporating terms of the 6 week old order into a later order, then stating that the new order only became effective 14 days after it was signed. Only the 14 day delay was disapproved by the Court of Appeals.

This case includes an excellent summary of other similar and dissimilar cases determining just what constitutes a "final order" for purposes of appeal. See also the Appellate Practice section of this outline for additional discussion.

- There is no more fundamental jurisdictional precept than the doctrine that appeals can only be taken from final orders.
- Citing ***Huffman v. Huffman,*** 236 Neb. 101, 459 N.W.2d 215 (1990)... Generally, when multiple issues are presented to a trial court for simultaneous disposition in the same proceeding and the court decides some of the issues, while reserving some issue or issues for later determination, the court's determination of less than all the issues is an interlocutory order and is not a final order for the purpose of an appeal.
- The trial's court attempted 14-day extension of the time in which to appeal was error as a matter of law and is of no force and effect on the question of whether this court has appellate jurisdiction.

See also ***Kilgore v. Nebraska Dept. of Health & Human Servs.*** And ***Wagner v. Wagner,*** below.

Burns v. Burns, 293 Neb. 633, 879 N.W.2d 375 (May 2016)

- It does not take much to make a general appearance. A party will be deemed to have appeared generally if, by motion or other form of application to the court, he or she seeks to bring its powers into action on any matter other than the question of jurisdiction over that party.
- a summons is required to be served on the defendant in a modification proceeding. Section 42-364(6) provides: "Modification proceedings relating to support, custody, parenting time, visitation, other access, or removal of children from the jurisdiction of the court shall be commenced by filing a complaint to modify. . . . Service of process and other procedure shall comply with the requirements for a dissolution action." And a dissolution action requires summons to be served upon the other party by personal service or in the manner provided in Neb. Rev. Stat. § 25-517.02 (Reissue 2008).

Carlson v. Allianz Versicherungs-AG, 287 Neb. 628, 844 N.W.2d 264 (2014)

- A proceeding to vacate a judgment on grounds contained in Neb. Rev. Stat. § 25-2001(4) (Reissue 2008) shall be by complaint, and on such complaint, a summons shall issue and be served as in the commencement of an action.
- The methods of service prescribed by the Hague Convention are mandatory where service abroad to a person in a signatory country is required.
- a voluntary appearance is the equivalent to service that waives a defense of insufficient service or process if the party requests general relief from the court on an issue other than sufficiency of service or process, or personal jurisdiction.
- When a motion to dismiss raises a defense under Neb. Ct. R. Pldg. § 6-1112(b)(6) and any combination of § 6-1112(b)(2), (4), and (5), the court should consider dismissal under § 6-1112(b)(2), (4), and (5) first and should consider dismissal under § 6-1112(b)(6) only if it determines that it has jurisdiction and that process and service of process were sufficient.

- Equitable remedies are generally not available where there exists an adequate remedy at law.
- a dismissal based upon a failure to join a necessary party is a dismissal of the action without prejudice.
- In civil cases, a court of general jurisdiction has inherent power to vacate or modify its own judgment at any time during the term in which the court issued it. The applicable district court rule provides that the term of the court is the calendar year. ... Section 25-2001(1) provides for the exercise of the inherent power to vacate after the end of the term upon a motion filed within 6 months after the entry of the judgment.
- A proceeding to vacate a judgment on grounds contained in § 25-2001(4) "shall be by complaint," and "[o]n such complaint a summons shall issue and be served as in the commencement of an action.
- Section 6-1112(b) explicitly provides that "[n]o defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion.

Conaty v. Boelhower, 218 Neb. 193, 352 N.W.2d 619 (1984)

- a personal money judgment could not be supported on the basis of substituted service.

Friedman v. Friedman, 290 Neb. 973, 863 N.W.2d 153 (2015)

- A pro se litigant will receive the same consideration as if he or she had been represented by an attorney, and, concurrently, that litigant is held to the same standards as one who is represented by counsel.
- A party will be deemed to have appeared generally if, by motion or other form of application to the court, he or she seeks to bring its powers into action on any matter other than the question of jurisdiction over that party.
- A general appearance waives any due process objection based on inadequate service of process.
- Neb. Rev. Stat. § 25-516.01 (1) (Reissue 2008) pertains to service of a summons in a civil action. As relevant here, § 25-516.01(1) states that "[t]he voluntary appearance of the party is equivalent to service." Section 25-516.01(2) elaborates that participation in the proceedings on any issue other than the defenses of lack of jurisdiction over the person, insufficiency of process, or insufficiency of services of process, waives all such issues except as to the objection that the party is not amenable to process issued by a court of this state.
- Collateral attacks on a final, foreign judgment are thus generally limited to claims that the judgment was void, such as for lack of jurisdiction over the person or the subject matter.

Hagelstein v. Swift-Eckrich, 257 Neb. 312, 597 N.W.2d 394 (1999).
In re Interest of Tabitha J., 5 Neb. App. 609, 561 N.W.2d 252 (1997)

- *Evidence presented* in a prior related hearing is not the proper subject of judicial notice. Only adjudicative facts are properly the subject of judicial notice.

Hayes v. County Of Thayer, 21 Neb. App. 836, 844 N.W.2d 347 (2014)

- Neb. Ct. R. Pldg. § 6-1115(a) provides, in relevant part, as follows:

  > A party may amend the party's pleading once as a matter of course before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted, the party may amend it within 30 days after it is served.

Otherwise a party may amend the party's pleading only by leave of court or by written consent of the adverse party, and leave shall be freely given when justice so requires.

- In *Bailey v. First Nat. Bank of Chadron*, 16 Neb. App. 153, 741 N.W.2d 184 (2007), we discussed the appropriate standard to be used in assessing whether the proposed amendment should be denied on the basis of its futility. We adopted the rationale expressed by the First and Second Circuit Courts of Appeals that if leave to amend is sought before discovery is complete and neither party has moved for summary judgment, futility is judged by a liberal standard and an amendment is not deemed futile as long as the proposed amended complaint sets forth a general scenario which, if proven, would entitle the plaintiff to relief on some cognizable theory.

Helter v. Williamson, 239 Neb. 741, 478 N.W.2d 6 (1991)

Private paternity action filed by boyfriend of married woman, against woman. Her husband was not named as a party. This proved fatal to the plaintiff's efforts to be named dad.

- [T]he presumption that children born during the marriage are rebuttably deemed to be legitimate is a tenet of our common law that perseveres for reasons that are as sound today as they were in the 18th century. The presumption prevents nonparents from arriving on the scene, either during or after the marriage, and staking claims, parental visitation rights, and responsibilities without the knowledge or consent of the true parent.
- the testimony or declaration of a husband or wife is not competent to bastardize a child.
- [As the husband is an indispensible party], notice of a paternity proceeding and an opportunity to appear must be served upon the husband of the mother of the child when the child was born into the marriage of the mother and husband, regardless of whether the mother agrees that the husband is not the biological father of the minor child.

Hohertz v. Estate of Hohertz, 19 Neb. App. 110, 802 N.W.2d 141 (2011)

- The meaning of a decree presents a question of law, in connection with which an appellate court reaches a conclusion independent of the determination reached by the court below.
- Once a decree for dissolution becomes final, its meaning is determined as a matter of law from the four corners of the decree itself.
- If the contents of a dissolution decree are unambiguous, the decree is not subject to interpretation and construction, and the intention of the parties must be determined from the contents of the decree. The effect of such a decree must be declared in the light of the literal meaning of the language used.

Holling v. Holling, 16 Neb. App. 394, 744 N.W.2d 479 (2008)

- Neb. Rev. Stat. § 25-601 (Reissue 1995) governs dismissals without prejudice. It provides as follows: An action may be dismissed without prejudice to a future action (1) by the plaintiff, before the final submission of the case to the jury, or to the court where the trial is by the court; (2) by the court where the plaintiff fails to appear at the trial; (3) by the court for want of necessary parties; (4) by the court on the application of some of the defendants where there are others whom the plaintiff fails to diligently prosecute; (5) by the court for disobedience by the plaintiff of an order concerning the proceedings in the action. In all other cases on the trial of the action the decision must be upon the merits.

- § 25-601 is unambiguous in its terms. After submission, a trial court has no authority to dismiss a case without prejudice on the basis that a plaintiff has failed to produce sufficient evidence to sustain his or her claims.

In re Interest of C.K., L.K., and G.K., 240 Neb. 700, 484 N.W.2d 68 (1992)

- Papers requested to be noticed must be marked, identified, and made a part of the record. Testimony must be transcribed, properly certified, marked and made a part of the record. Trial court's ruling in the termination proceeding should state and describe what it is the court is judicially noticing. Otherwise, a meaningful review is impossible. [See also *State v. Norwood*, 203 Neb. 201, 277 N.W.2d 709 (1979), on next page of outline]

Johnson v. Johnson, 282 Neb. 42, 803 N.W.2d 420 (2011)

- A judgment entered without personal jurisdiction is void.
- a void judgment may be attacked at any time in any proceeding.
- We will reverse a decision on a motion to vacate only if the litigant shows that the district court abused its discretion.
- a voluntary appearance signed the day before the petition is filed waives service of process if filed simultaneously with or after the petition. See § 25-516.01(1)

Kilgore v. Nebraska Dept. of Health & Human Servs., 277 Neb. 456, 763 N.W.2d 77 (2009)

- An award of costs in a judgment is considered a part of the judgment. As such, a judgment does not become final and appealable until the trial court has ruled upon a pending statutory request for attorney fees.
- To be appealable, an order must satisfy the final order requirements of Neb. Rev. Stat. § 25-1902
- The mere oral announcement of a judgment without an entry on the trial docket is not the rendition of a judgment.
- For a final judgment to exist, there must be an order that is both signed by the court and filed stamped and dated by the clerk of the court.

Koch v. Koch, 226 Neb. 305, 312, 411 N.W.2d 319, 323 (1987)

- "Indispensable parties to a suit are those who not only have an interest in the subject matter of the controversy, but also have an interest of such a nature that a final decree cannot be made without affecting their interests, or leaving the controversy in such a condition that its final determination may be wholly inconsistent with equity and good conscience. . . ." Cited in *Helter v. Williamson*, 239 Neb. 741, 478 N.W.2d 6 (1991)

Meadows v. Meadows, 18 Neb. App. 333, 789 N.W.2d 519 (2010)

Facts: Mom appealed district court ruling that it was "not an inconvenient forum" to hear dad's modification action. Court of Appeals dismissed for lack of an appealable order.

- § 25-1902 provides that a party may appeal from a court's order only if the decision is a final, appealable order. Under § 25-1902, an order is final for purposes of an appeal if it affects a substantial right and (1) determines the action and prevents a judgment, (2) is made during a special proceeding, or (3) is made on summary application in an action after judgment is rendered.

- overruling a motion to decline jurisdiction under § 43-1244 on the ground of inconvenient forum does not affect a substantial right and is not a final, appealable order.

Parker v. Parker, 10 Neb. App. 658, 636 N.W.2d 385 (2001)

*Helpful hints on styling your court orders. At least one of our judges is a stickler about these sorts of things. Also note the law generally precludes a trial court from only partially rendering judgment on the pleadings. Anything less than a final determination of **all** pending issues is not an appealable order.*

- It has long been the rule that a "finding" by a trial court is not a final, appealable order. An appellate court is without jurisdiction to entertain appeals from nonfinal orders.
- A court order is generally not appealable unless all of the claims of the plaintiff and intervenor are viewed as adjudicated.

See § 25-1315 (Cum. Supp. 2006) for the express rule governing exceptions to this general rule (it only applies when there are more than 2 parties OR multiple claims for relief). Trial court orders not resolving all claims against all parties are always subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties, thus, they are not appealable.

- In equity cases trial judges should include at the end of any final order a phrase to the effect that "*any request for relief by any party not specifically granted by this order is denied.*"
- We suggest that trial courts discontinue the practice of stating findings and then ending the journal with the phrase "It is so ordered." This phrase adds nothing to the journal, because a finding by a court does not clearly mean the court intends to award the relief someone might conclude is necessary.

Perkins v. Perkins, 198 Neb. 401, 253 N.W.2d 42 (1977)

- A court may make changes in a divorce decree after term of court to cover children conceived during marriage but born after the divorce.

Pope-Gonzalez v. Husker Concrete, 21 Neb. App. 575, 842 N.W.2d 135 (2013)

- Determination of an appropriate sanction for failure to comply with a proper discovery order initially rests with the discretion of the trial court, and its rulings on appropriate sanctions will not be disturbed on appeal absent a showing of an abuse of that discretion. *Mandolfo v. Mandolfo*, 281 Neb. 443, 796 N.W.2d 603 (2011).
- The Nebraska Supreme Court has found that unavoidable casualty, which rises to a sufficient ground to vacate a default judgment, must be one preventing a party from prosecuting or defending. See *Aetna Cas. & Surety Co. v. Dickinson*, 216 Neb. 660, 345 N.W.2d 8 (1984).
- a pro se litigant is held to the same standards as one who is represented by counsel. *Prokop v. Cannon*, 7 Neb. App. 334, 583 N.W.2d 51 (1998). Although people have a right to represent themselves, the trial court also has inherent powers to compel conformity to Nebraska procedural practice.
- The Nebraska Supreme Court has also noted that dismissal or default judgment is an appropriate sanction for failing to comply with a discovery order. See *Stanko v. Chaloupka*, 239 Neb. 101, 474 N.W.2d 470 (1991).

Ryder v. Ryder, 290 Neb. 648, 861 N.W.2d 449 (2015)

- Where parties to a divorce action voluntarily execute a property settlement agreement which is approved by the dissolution court and incorporated into a divorce decree from which no appeal is taken, its provisions will not thereafter be vacated or modified in the absence of fraud or gross inequity.
- The meaning of a dissolution decree presents a question of law.

State v. Barranco, 278 Neb. 165, 769 N.W.2d 343 (2009)

Yeah, you learned this in high school. But some trial judges seem to forget it. Now you can specifically cite this dicta back to them. Maybe it will help.

- Vertical *stare decisis* compels lower courts to follow strictly the decisions rendered by higher courts within the same judicial system.
- A judge who disagrees with a statute or a decision of a higher court may express that disagreement, but must do so in a way that is consistent with his or her obligation to do what the law requires.
- it is the function of the Legislature through the enactment of statutes to declare what is the law and public policy of this state.

State v. Cummings, 2 Neb. App. 820, 515 N.W.2d 680 (1994)

- Default. Plaintiffs are entitled to a default judgment without offering evidence in support of the allegations of their petition, except allegations of value and amount of damage. ***Weir v. Woodruff***, 107 Neb. 585, 186 N.W. 988 (1922)
- Minimum Contacts. An act of sexual intercourse resulting in conception in Nebraska shows sufficient minimum contacts with the forum state for jurisdiction to attach.

State v. Hausmann, 277 Neb. 819, 765 N.W.2d 219 (2009)

Our Nebraska Supreme Court admits it has been talking out of two sides of its mouth!

- Judicial efficiency is served when any court, including an intermediate appellate court, is given the opportunity to reconsider its own rulings, either to supplement its reasoning or correct its own mistakes.
- The district court has the inherent power to vacate or modify its judgments or orders, either during the term at which they were made, or upon a motion filed within 6 months of the entry of the judgment or order. *(prior decisions overruled by this opinion)*
- An intermediate appellate court may also timely modify its opinion. An appellate court has the inherent power to reconsider an order or ruling until divested of jurisdiction
- In the absence of an applicable rule to the contrary, a motion asking the court to exercise that inherent power does not toll the time for taking an appeal. A party can move the court to vacate or modify a final order—but if the court does not grant the motion, a notice of appeal must be filed within 30 days of the entry of the earlier final order if the party intends to appeal it. And if an appeal is perfected before the motion is ruled upon, the district court loses jurisdiction to act.

State v. Merrill, 273 Neb. 583, 731 N.W.2d 570 (2007)

Facts: State filed "**affidavit of Lien for Child support**" with the clerk of district court in obligated parent/defendant's criminal child abuse case, seeking to recover his appearance bond to help pay his child support arrears in a separate court case. After the defendant's conviction and prison sentence *his* father, who had actually put up the bond money, notified the court that he wanted his money back. The

State objected and following hearing the district court ordered the bond money returned to the defendant's father. The State attempted to appeal that decision. This case, though representing a failed effort to snatch up bond money, is nevertheless instructional.

- [T]he state is seeking to enforce whatever lien it may have on the bond money through a garnishment proceeding in the child support case. The district court correctly noted that **the state's remedy is in the civil case.** Regardless of the status of that civil proceeding, the state has no specific statutory authorization to appeal the order entered in this criminal case directing the clerk to return the posted bond money to (the person who posted the bond).
- We conclude that the state was not authorized to appeal the ...order in this criminal case and that therefore, this court lacks jurisdiction over this appeal. ... Absent specific statutory authorization, the state, as a general rule, has no right to appeal an adverse ruling in a criminal case.

State v. Norwood, 203 Neb. 201, 277 N.W.2d 709 (1979)

- A court must take judicial notice of its own records in the case under consideration. [A court] has a right to examine its own records and take judicial notice of its own proceedings and judgment in an interwoven and dependent controversy where the same matters have already been considered and determined.

State v. Wulf, 22 Neb. App. 211, 849 N.W.2d 588 (2014)

- Under the doctrine of jurisdictional priority, where different state courts have concurrent original jurisdiction over the same subject matter, basic principles of judicial administration require that the first court to acquire jurisdiction should retain it to the exclusion of another court. That is, a second court lacks jurisdiction over the same matter involving the same parties.

State o/b/o Joseph F. v. Rial, 251 Neb. 1, 554 N.W.2d 769 (1996)

- [T]he district court retains jurisdiction for orders regarding support notwithstanding the fact that the paternity determination was on appeal.
- In a civil action, only a **preponderance of the evidence** is necessary to sustain the establishment of **paternity**.

Trogdon v. Trogdon, 18 Neb. App. 313, 780 N.W.2d 45 (2010)

Facts: Parties divorced in California. Mom and child later move to Nebraska and Dad moves to Washington State. Years later Mom registers the California divorce in her home state of Nebraska, and seeks to enforce against Dad in Washington. Dad is mailed a copy of the registration by the clerk of district court, and files a written objection on his own with the court, disputing the amount of alleged arrears, but not the court's lack of personal jurisdiction over him. Two months later, in preparation for the evidentiary hearing on his objection, he hires an attorney, who files an objection, claiming the Nebraska court lacks personal jurisdiction over him. The district court rules that it did have jurisdiction. He later appeals.

Held: when the father filed his objection to the registration, he asked the court to address the merits of the cause of action. This simple fact gave the Nebraska court jurisdiction over him.

- Personal jurisdiction is the power of a tribunal to subject and bind a particular entity to its decisions. *Hunt v. Trackwell*, 262 Neb. 688, 635 N.W.2d 106 (2001). Lack of personal jurisdiction may be waived and such jurisdiction conferred by the conduct of the parties. *Id.* For example, a party that files an answer generally denying the allegations of a petition invokes

the court's power on an issue other than personal jurisdiction and confers on the court personal jurisdiction.

- Similarly, a party who does more than call a court's attention to the lack of personal jurisdiction by asking for affirmative relief will not later be heard to claim that the court lacked jurisdiction over that party. *Glass v. Nebraska Dept. of Motor Vehicles*, 248 Neb. 501, 536 N.W.2d 344 (1995).
- a confirmed support order cannot be contested with respect to any matter that could have been asserted at the confirmation hearing.
- [UIFSA] Section 42-742 goes on to enumerate the specific defenses which can be raised when contesting the validity or enforcement of a registered order and the effect of a validly raised defense. Section 42-742 provides:

  (a) A party contesting the validity or enforcement of a registered order or seeking to vacate the registration has the burden of proving one or more of the following defenses:

  (1) the issuing tribunal lacked personal jurisdiction over the contesting party;
  (2) the order was obtained by fraud;
  (3) the order has been vacated, suspended, or modified by a later order;
  (4) the issuing tribunal has stayed the order pending appeal;
  (5) there is a defense under the law of this state to the remedy sought;
  (6) full or partial payment has been made;
  (7) the statute of limitation under section 42-739 precludes enforcement of some or all of the alleged arrearages; or
  (8) the alleged controlling order is not the controlling order.

  (b) If a party presents evidence establishing a full or partial defense under subsection (a) of this section, a tribunal shall stay enforcement of the registered order, continue the proceeding to permit production of additional relevant evidence, and issue other appropriate orders. An uncontested portion of the registered order may be enforced by all remedies available under the law of this state.

  If the contesting party does not establish a defense under such subsection to the validity or enforcement of the order, the registering tribunal shall issue an order confirming the order.
- [UIFSA] Section 42-742(a)(5) clearly provides that if "there is a defense under the law of this state to the remedy sought," such defense can be raised prior to confirmation of a foreign support order. The Nebraska Supreme Court has previously held that the doctrine of equitable estoppel is a possible defense in proceedings concerning the enforcement or modification of support orders... *Truman v. Truman*, 256 Neb. 628, 633-34, 591 N.W.2d 81, 85 (1999)

Wagner v. Wagner, 275 Neb. 693, 749 N .W.2d 137 (2008)

- When multiple issues are presented to a trial court for simultaneous disposition in the same proceeding and the court decides some of the issues, while reserving other issues for later determination, the court's determination of less than all the issues is an interlocutory order and is not a final order for the purpose of an appeal.
- Trial courts, and the clerks of those courts, should not file stamp any court-issued document that is not meant to take legal effect.
- There must first be a final determination of the rights of the parties before there is a judgment to be either rendered or entered.

- confusion "'can be avoided if trial courts will, as they should, limit themselves to entering but one final determination of the rights of the parties in a case.'"

Wilson v. Wilson, 19 Neb. App. 103, 803 N.W.2d 520 (2011)

Facts: Parties divorced Oct. 2009. Decree split marital property and required Wife to vacate marital residence by 10-31-11. No appeal taken. Wife failed to vacate and months later Husband filed action 'to determine amounts due under decree.' He claimed $30,000 in extra costs he incurred due to Wife not moving out. The D.Ct. sustained his motion and in addition found Wife in contempt for failure to vacate. Wife appealed, claiming the court in effect modified the terms of the decree's property settlement agreement without having filed for a modification. Ct. of Appeals agreed, and reversed that portion of the order. It found that there was no ambiguity or lack of clarity concerning what was actually ordered in the decree, and accordingly there was nothing for the court to clarify.

Held: Husband must file complaint to modify if he doesn't like the terms of the decree. He cannot modify the decree by a back door approach.

- A trial court retains jurisdiction to determine the amounts due for alimony and child support and to enforce its prior judgment, and included in that power to enforce its judgment is power to determine any amounts due under the initial decree.
- A party seeking to modify a dissolution decree must show a material change of circumstances which occurred subsequent to the entry of the original decree or a previous modification which was not contemplated when the prior order was entered.
- Modifying the amounts awarded to a parent in the decree, without following the appropriate procedures for bringing and resolving an application to modify the decree, was not appropriate.

Collateral Estoppel/Res Judicata

Note: **The doctrines of both *Res Judicata* (claim preclusion) and *Collateral Estoppel* (issue preclusion) relate to new court cases filed that attempt to refute findings in an earlier case. Contrast with the concept of the *Law of the Case*, which is used in the original case to prevent previously settled issues from becoming unsettled in the same case.**

Hara v. Reichert, 287 Neb. 577, 843 N.W.2d 812 (2014)

New terminology is adopted, for those of us who didn't take Latin in High School

- In the past, we have referred to claim preclusion and issue preclusion as res judicata and collateral estoppel. Courts and commentators have moved away from that terminology and now use the terms claim preclusion and issue preclusion. Put simply, they are more clear and descriptive.
- While the doctrines are similar and serve similar purposes, they are distinct. A close examination of their elements shows this to be true. Claim preclusion looks to the entire cause of action as opposed to a single issue. Claim preclusion does not require a full and fair opportunity to litigate, whereas issue preclusion does. Claim preclusion bars litigation of matters not actually litigated, whereas issue preclusion applies only to issues actually litigated. Claim preclusion also applies only between the parties (or their privies) who were involved in the prior action, while issue preclusion may be used by a nonparty in a later action, either offensively or defensively.

  An example of the doctrines and how they might interact in a hypothetical situation might be helpful. Take, for example, a car (driven by Adam), which collides with two other cars (driven by Brody and Carl). Brody sues Adam, on a theory of negligence, for damage to his

car. Adam denies that he was negligent. A jury finds otherwise and final judgment is entered against Adam. Brody cannot later maintain a separate suit, on the same facts, for additional damage to items in his car's trunk. Claim preclusion would bar the suit. Now Carl sues Adam, also on a theory of negligence, for damage to his car. Claim preclusion would not apply, because Carl was not involved in the prior adjudication. But assuming the same essential facts, issue preclusion would prevent Adam from contesting his negligence; that issue was actually and finally decided in the prior suit between Adam and Brody.

- Issue preclusion bars the relitigation of a finally determined issue that a party had a prior opportunity to fully and fairly litigate. Issue preclusion applies where (1) an identical issue was decided in a prior action, (2) the prior action resulted in a final judgment on the merits, (3) the party against whom the doctrine is to be applied was a party or was in privity with a party to the prior action, and (4) there was an opportunity to fully and fairly litigate the issue in the prior action.

Jensen v. Jensen, 275 Neb. 921, 750 N.W.2d 335 (2008)

- [W]e have never held that the absence of a child support worksheet provides a basis for a collateral attack on a final judgment. Once the [child support] order became final, even without a worksheet, it was enforceable.
- if a trial court fails to prepare the applicable worksheets, the parties are required to request that such worksheet be included in the trial court's order. Orders for child support or modification which do not contain such worksheets will on appeal be summarily remanded to the trial court so that it can prepare the worksheets as required by the guidelines.

McCarson v. McCarson, 263 Neb. 534, 641 N.W.2d 62 (2002)

- The applicability of the doctrines of *collateral estoppel* and *res judicata* is a question of law.
- When a court of competent jurisdiction renders a final judgment affecting the issue of paternity, the decision of that court is *res judicata* to the parties absent a fraud upon the court. See Neb Rev. Stat. §25-2001 and §25-2008.

State v. Yelli, 247 Neb. 785, 530 N.W.2d 250 (1995)

- A judgment in a *civil* paternity adjudication is *res judicata* as between the same parties in a subsequent *civil* action such as a support modification proceeding.

Common Law Marriages

States that authorize common law marriage: Alabama, Colorado, District of Columbia, Idaho, Iowa, Kansas, Montana, Rhode Island, South Carolina, Texas, and Utah. Sonya C. Garza, *Common Law Marriage: A Proposal for the Revival of a Dying Doctrine,* 40 New Eng. L. Rev. 541, 545 (2006).

Nebraska is not a "common law state," however Nebraska will recognize the validity of common law marriages formed in jurisdictions that allow for them. For more information on this issue, see: http://en.wikipedia.org/wiki/Common-law_marriage_in_the_United_States

Essentially, in a common law marriage, two persons create a valid marital relationship without the benefit of a legal marriage ceremony performed according to statutory requirements. Denise K. Mills, *Common Law Marriage in Colorado,* 16 Colo. Law. 252 (Feb. 1987).

The United States Supreme Court has held that common law marriages are valid, notwithstanding statutes that require ceremonial marriages to be solemnized by a minister or a magistrate, if no specific provision to the contrary exists. *Meister v. Moore,* 96 U.S. 76, 24 L.Ed. 826 (1877).

Courts in various jurisdictions have uniformly declared that the common law age of consent applies to common law marriages, even when statutes otherwise require parental or judicial approval for persons under a specified age, unless those statutes expressly modify or abrogate the common law. The common law marriage of a person is valid, regardless of whether the person has reached the age of competency as established by statute, if the person is competent under the common law. Under English common law, children below the age of seven were incapable of marrying. After that age they could marry, but the marriage was voidable until they became able to consummate it, which the law presumed to be at age fourteen for males and twelve for females. 1 Homer H. Clark, Jr., *The Law of Domestic Relations in the United States* § 2.1 (2d ed. 1987)

In the case of People v. Lucero, 747 P.2d 660 (Colo. 1987), the Colorado Supreme Court set out the requirements for a valid common law marriage in Colorado. These requirements are as follows:
- mutual consent or agreement of the parties to be husband and wife; followed by
- mutual assumption of the marital relationship

Spitz v. T.O. Haas Tire Co., 283 Neb. 811, 815 N.W.2d 524 (2012)

- In Nebraska, a couple cannot create a common-law marriage by agreement or cohabitation and reputation.

Jensen v. Jensen, 275 Neb. 921, 750 N.W.2d 335 (2008)

Facts*: Paternity order was modified after the parents of the minor child separated, to include a judicially approved agreement whereby father paid mother $14,000 in cash, with the understanding that mother would not ask father for child support for the parties' minor child, but that if she changed her mind, the father would be entitled to an equitable credit for the $14,000. Numerous modification actions later, dad was ordered to pay support, with no credit for the $14,000 prior payment. Eventually dad filed a declaratory judgment action, seeking the credit. Mom objected, wanting the agreement voided as being, inter alia, a conditional order and against public policy.* ***Held***: The parties' original arrangement will be honored by the court.

- Orders purporting to be final judgments, but that are dependent upon the occurrence of uncertain future events, do not necessarily operate as "judgments" and may be wholly ineffective and void as such.
- [W]hile conditional orders will not automatically become final judgments upon the occurrence of the specified conditions, they can operate in conjunction with a further consideration of the court as to whether the conditions have been met, at which time a final judgment may be made.
- [T]he void conditional judgment rule does not extend to actions in equity. Conditional judgments are a fundamental tool with which courts sitting in equity have traditionally been privileged to properly devise a remedy to meet the situation. Therefore, where it is necessary and equitable to do so, a court of equitable jurisdiction may enter a conditional judgment and such judgment will not be deemed void simply by virtue of its conditional nature.
- Inequity may result if the court adopts a policy of less than full enforcement of mutually agreed-upon property and support agreements.
- [P]ublic policy forbids enforcement of a private agreement that purports to discharge a parent's liability for child support, if the agreement does not adequately provide for the child. But the agreement at issue here did not discharge (the father's) liability for child support. Instead, it expressly provided (the father) with credit for a payment that the parties agreed would constitute prepayment of any subsequent child support award. We conclude that on the facts of this case, the agreement is enforceable.

Nichols v. Nichols, 288 Neb. 339, **847** N.W.2d 307 (2014)

- [N]o appeal can be taken from an order that grants a motion to dismiss a complaint but allows time in which to file an amended complaint; such a conditional order is not a judgment.

Simons v. Simons, 261 Neb. 570, 624 N.W.2d 36 (2001)

- Obligated parent's release from prison is not an unknowable or uncertain future event. Only the date of release was unknown. Conditioning future child support order upon his release from prison does not constitute a conditional judgment.

Distinguish from:

Harvey v. Harvey, 14 Neb. App. 380, 707 N.W.2d 444 (2005)

Court in dissolution proceeding ordered the sale of the marital home, if certain conditions were not met regarding refinancing within a set time period.

- In Nebraska, a judgment is the final determination of the rights of the parties in an action. Neb. Rev. Stat. §25-1301(1) (Cum. Supp. 2004). However, if a judgment looks to the future in an attempt to judge the unknown, it is a conditional judgment. A conditional judgment is wholly void because it does not "perform *in praesenti*" and leaves to speculation and conjecture what its final effect may be.

Vogel v. Vogel, 262 Neb. 1030, 637 N.W.2d 611 (2002)

***Facts**: Court ordered differing visitation schedules, depending upon whether the father was transferred overseas, or if the parents moved close to one another. Mother appealed.*
***Held**: such alternative visitation schedules constitute conditional orders.*

- If a judgment looks to the future in an attempt to judge the unknown, it is a conditional judgment. A conditional judgment is wholly void because it does not "perform *in praesenti*" and leaves to speculation and conjecture what its final effect may be. Such orders become

effective only upon the happening of certain future events which may or may not occur. Whether such orders will ever become effective is speculative.

Constitutional Issues/ Statutory Interpretation
(See also Criminal Non-Support)

Allen v. Sheriff of Lancaster Cty., 245 Neb. 149, 511 N.W.2d 125 (1994).

- An indigent litigant had a right to appointed counsel in a contempt action for failure to pay a debt assigned to him in a dissolution decree, where he was jailed for contempt.

But see:

Turner v. Rogers et al., U.S. Supreme Court (2011) (See also p. 51 of this outline)
Note: **South Carolina has a very different system from Nebraska for initiating civil contempt actions. Actions in S. Carolina are initiated by the clerks of the various courts, and not by a IV-D child support enforcement office.**

- The Sixth Amendment does not govern civil cases.
- Where civil contempt is at issue, the Fourteenth Amendment's Due Process Clause allows a State to provide fewer procedural protections than in a criminal case. In particular, that Clause does not require that counsel be provided where the opposing parent or other custodian is not represented by counsel and the State provides alternative procedural safeguards equivalent to adequate notice of the importance of the ability to pay, a fair opportunity to present, and to dispute, relevant information, and express court findings as to the supporting parent's ability to comply with the support order.
- A court may not impose punishment "in a civil contempt proceeding when it is clearly established that the alleged contemnor is unable to comply with the terms of the order." *Hicks* v. *Feiock* , 485 U. S. 624
- The Due Process Clause allows a State to provide fewer procedural protections in civil contempt proceedings than in a criminal case.
- "distinct factors" the U.S. Supreme Court has used to decide what specific safeguards are needed to make a civil proceeding fundamentally fair include:
  (1) the nature of "the private interest that will be affected,"
  (2) the comparative "risk" of an "erroneous deprivation" of that interest with and without "additional or substitute procedural safeguards," and
  (3) the nature and magnitude of any countervailing interest in not providing "additional or substitute procedural requirements.
- Since 70% of child support arrears nationwide are owed by parents with either no reported income or income of $10,000 per year or less, the issue of ability to pay may arise fairly often.
- The "private interest that will be affected" argues strongly for the right to counsel.

- Accurate decisionmaking as to the "ability to pay"—which marks a dividing line between civil and criminal contempt—must be assured because an incorrect decision can result in a wrongful incarceration.
- An available set of "substitute procedural safeguards," if employed together, can significantly reduce the risk of an erroneous deprivation of liberty. These include (1) notice to the defendant that his "ability to pay" is a critical issue in the contempt proceeding; (2) the use of a form (or the equivalent) to elicit relevant financial information from him; (3) an opportunity at the hearing for him to respond to statements and questions about his financial status; and (4) an express finding by the court that the defendant has the ability to pay.
- This decision does not address civil contempt proceedings where the underlying support payment is owed to the State, *e.g.,* for reimbursement of welfare funds paid to the custodial parent, or the question what due process requires in an unusually complex case where a defendant "can fairly be represented only by a trained advocate. The average defendant does not have the professional legal skill to protect himself when brought before a tribunal with power to take his life or liberty, *wherein the prosecution is presented by experienced and learned counsel.*

Carroll v. Moore, 228 Neb. 561, 423 N.W.2d 757 (1988)

- Persons accused of paternity have the right to court appointed counsel if found to be indigent. This is true in non state assistance cases as well as state aid cases.
- A determination of paternity in a state-initiated paternity suit is *res judicata*, and therefore not open to attack in a later proceeding involving collateral issues such as nonpayment of support.

Cammarata v. Chambers, 6 Neb. App. 467, 574 N.W.2d 530 (1998)

- A child support order may consist merely of an order for "no support." Even if a court order provides that no support is due from either parent, that does not change the fact that there is an existing support order.
- County Attorney may not in such cases seek to obtain a support order for custodial parent under provisions of §43-512.03 (authorizing county attorney intervention to establish an order for child support where no order presently exists.)

Freis v. Harvey, 5 Neb. App. 679, 563 N.W.2d 363 (1997)

- Child support judgments are not rendered dormant by the passage of time.

Kiplinger v. Nebraska Dept. of Nat. Resources, 282 Neb. 237, 803 N.W.2d 28 (2011)

- A statute is presumed to be constitutional, and all reasonable doubts are resolved in favor of its constitutionality. The burden of establishing the unconstitutionality of a statute is on the one attacking its validity.
- The unconstitutionality of a statute must be clearly established before it will be declared void.

Kropf v. Kropf, 248 Neb. 614, 538 N.W.2d 496 (1995)

- §§ 42-358 and 43-512.03I do not grant the district court the authority to appoint the county attorney to pursue support obligation arrearage where the decree, order, or judgment does not provide for child support.

Lenz v. Lenz, 222 Neb. 85, 382 N.W.2d 323 (1986)

- A judgment must be sufficiently certain in its terms to be able to be enforced in a manner provided by law.
- [W]e hold that the part of the divorce decree in this case which ordered the payment of "all of the expenses for the minor child's special schooling" is indefinite, uncertain, and incapable of enforcement. For these reasons it is fatally defective and cannot be enforced.

Little v. Streater, 452 U.S. 1, 101 S.Ct. 2202, 68 L.Ed.2d 627 (1981)

- The denial of the aid of a genetic test to indigent defendants in state-initiated paternity suits violates due process.

Mathews v. Mathews, 267 Neb. 604, 676 N.W.2d 42 (2004)

- A finding of indigency is a matter within the initial discretion of the trial court, and such a finding will not be set aside on appeal in the absence of an abuse of discretion by the trial court.

Seymour v. Froelich, 236 Neb. 808, 464 N.W.2d 310 (1991)
Citing: **Restatement (Second) of Conflict of Laws** § 108 at 321 (1971)

- a "judgment for the payment of money will not be enforced in other states unless the amount to be paid has been finally determined under the local law of the state of rendition."

Sickler v. Sickler, 293 Neb. 521, 878 N.W.2d 549 (May 2016)

- We have held that child support obligations bear no "resemblance whatever to a debt, and therefore the Constitution does not forbid imprisonment for the defendant's refusal to obey the order of the court" to pay child support.
- The courts may, through the exercise of their equitable powers, enforce orders made in dissolution proceedings. We have held that a party may use contempt proceedings to enforce a property settlement agreement incorporated into a dissolution decree. But we have never directly addressed whether a contempt order for failure to abide by a property division runs afoul of the constitutional prohibition against imprisonment for debt, when the court has ordered imprisonment as a sanction.
- We now expressly hold ... that imprisonment for contempt for the failure to comply with the order of property division in a dissolution decree does not violate article I, § 20, of the Nebraska Constitution.

State v. Yelli, 247 Neb. 785, 530 N.W.2d 250 (1995)

- Because the burdens of proof would be the same, a judgment in a civil paternity adjudication is *res judicata* as between the same parties in a subsequent *civil* action such as a support modification proceeding.
- Evidence of prior civil adjudications has been admitted in a subsequent *criminal* nonsupport proceeding to establish the defendant's obligation to support his child. The prior civil adjudications are admitted as *nonconclusive* evidence of the defendant's support obligation.
- *But*: The judgment in a civil paternity action is *not* binding under the doctrines of *res judicata* or collateral estoppel in a subsequent *criminal* case.

- Prior paternity adjudications lack reliability if they do not affirmatively show that the alleged father was represented by or waived his right to counsel.
- Both federal and state due process dictate that an indigent defendant in a state-assisted civil paternity action has the right to the services of appointed counsel.

**** Query…what do you do when the alleged father defaults in his paternity case? Did he waive his right to counsel?***

Civil Contempt

What follows is a discussion of statutory and case law on CIVIL contempt. Almost exclusively when an obligated parent (OP) is brought into court for nonpayment of child support it is on a civil petition for contempt, rather than the more harsh criminal contempt. The OP is said to "hold the keys to the jail cell in his hands" and be able to release him/her self upon the mere payment of the support that is owed as set forth in the court order. Notwithstanding this fact, civil contempt has quasi criminal elements, as it can, and often does ultimately result in the incarceration of the OP. For this reason, a court that accepts an admission of civil contempt from an OP must produce a record that the admission is entered voluntarily, that the OP understands the nature of the admission, and its consequences, including the possible penalty. Analogizing an admission of civil contempt to a court accepting a guilty plea in a criminal proceeding is appropriate, and the colloquy between the court and the OP should be similar to that in a criminal plea proceeding. See ***State of Nebraska v. Benson****, 199 Neb. 549, 260 N.W.2d 208 (1977)*

§42-358 Attorney for minor child; appointment; powers; child or spousal support; records; income withholding; contempt proceedings; fees; evidence; appeal

(1)…

(2) Following entry of any decree, the court having jurisdiction over the minor children of the parties may at any time appoint an attorney, as friend of the court, to initiate contempt proceedings for failure of any party to comply with an order of the court directing such party to pay temporary or permanent child support. The county attorney or authorized attorney may be appointed by the court for the purposes provided in this section, in which case the county attorney or authorized attorney shall represent the state.

(3) … A rebuttable presumption of contempt shall be established if a prima facie showing is made that the court-ordered child or spousal support is delinquent. … If income withholding is not feasible and no other action is pending for the collection of support payments, the court shall appoint an attorney to commence contempt of court proceedings. If the county attorney or authorized attorney consents, he or she may be appointed for such purpose. The contempt proceeding shall be instituted within ten days following appointment, and the case shall be diligently prosecuted to completion. …

(4) If, at the hearing, the person owing child or spousal support is called for examination as an adverse party and such person refuses to answer upon the ground that his or her testimony may be incriminating, the court may, upon the motion of the county attorney or authorized attorney, require the person to answer and produce the evidence. In such a case the evidence produced shall not be admissible in any criminal case against such person nor shall any evidence obtained because of the knowledge gained by such evidence be so admissible.

42-358.03. Permanent child support payments; failure to pay; work release program.
Any person found guilty of contempt of court for failure to pay permanent child support payments and imprisoned therefore shall be committed to a court-supervised work release program. Ninety percent of earnings realized from such program shall be applied to payment of delinquencies in support payments minus appropriate deductions for the cost of work release.
Source: Laws 1975, LB 212, § 5.

Nebraska Rules of Evidence, Rule 501:

> Except as otherwise required by the Constitution of the United States or the State of Nebraska or provided by Act of Congress, or the Legislature of the State of Nebraska, by these rules or by other rules adopted by the Supreme Court of Nebraska which are not in conflict with laws governing such matters, **no person has the privilege to**:
> **(1) Refuse to be a witness; or**
> **(2) Refuse to disclose any matter; or**
> **(3) Refuse to produce any object or writing**; or
> (4) Prevent another from being a witness or disclosing any matter or producing any object or writing.

Camp v. Camp, 14 Neb. App. 473, 709 N.W.2d 696 (2006)

- A civil contempt is instituted to preserve and enforce the rights of private parties to a suit, to compel obedience to orders and decrees made to enforce such rights, and to administer the remedies to which the court has found the parties to be entitled.
- A court that has jurisdiction to make a decision also has the power to enforce it by making such orders as are necessary to carry its judgment or decree into effect.

Eliker v. Eliker, 206 Neb. 764, 295 N.W.2d 268 (1980)
Practice Tip: This is a great case to use in contempt of court proceedings!

- Good discussion of distinction between civil and criminal contempt
- A proceeding brought under this section [§42-358] is civil in nature.
- Where a divorced husband **neglects to apply for a modification** of the divorce decree, in spite of the fact that sufficient grounds exist to warrant modification, the mere existence of such grounds with respect to payments due under the decree **is not available as a defense to proceedings for contempt for violating the decree**. *See* 17 Am. Jur. 2d Contempt § 40 (1964)
- Issues of visitation and previous failure to enforce a child support order are not relevant to proceedings under section 42-358, R.R.S.1943, or section 42-364.01,

Hossaini v. Vaelizadeh, 283 Neb. 369, 808 N.W.2d 867 (2012)
[Note: "disapproves" of a small portion of ***Smeal Fire Apparatus Co. v. Kreikemeier***, 279 Neb 661, 782 N.W.2d 848 (2010), as to the proper standard of review of the trial court's determination of civil contempt.]

- **Contempt: Appeal and Error.** In a civil contempt proceeding where a party seeks remedial relief for an alleged violation of a court order, an appellate court employs a three-part standard of review in which (1) the trial court's resolution of issues of law is reviewed de novo, (2) the trial court's factual findings are reviewed for clear error, and (3) the trial court's determinations of whether a party is in contempt and of the sanction to be imposed is reviewed for abuse of discretion.

- When a party to an action fails to comply with a court order made for the benefit of the opposing party, such act is ordinarily a civil contempt, which requires willful disobedience as an essential element. "Willful" means the violation was committed intentionally, with knowledge that the act violated the court order.
- Outside of statutory procedures imposing a different standard, it is the complainant's burden to prove civil contempt by clear and convincing evidence.

In re Interest of Thomas M., 282 Neb. 316, 803 N.W.2d 46 (2011)

- Generally, a court may punish for contempt as a part of the court's inherent contempt powers.
- The juvenile court, as a court of record, has the statutory authority pursuant to Neb. Rev. Stat. § 25-2121 (Reissue 2008) to punish contemptuous conduct by fine or imprisonment.
- To find a party in contempt in juvenile court, there must be a finding of willful violation of a juvenile court's order.
- A proceeding before a juvenile court is a "special proceeding" for appellate purposes.
- To be final and appealable, an order in a special proceeding must affect a substantial right. A substantial right is an essential legal right, not a mere technical right.
- DHHS claims that the juvenile court erred when it found DHHS in contempt, because the juvenile court did not have jurisdiction to issue a contempt order due to DHHS' sovereign immunity. We reject this argument.
- The juvenile court has jurisdiction over DHHS as the "custodian" of [the minor child]. See § 43-247(5) (providing that juvenile court has jurisdiction over "[t]he parent, guardian, or custodian of any juvenile described in this section"). See, also, Neb. Rev. Stat. §§ 43-284 (Reissue 2008) and 43-285 (Cum. Supp. 2010).
- Because the State, through the county attorney, initiated the action under the juvenile code, the State had elected to sue and waived sovereign immunity to the extent encompassed by the juvenile code. See Neb. Const. art. V, § 22 (providing that State "may sue and be sued, and the Legislature shall provide by law in what manner and in what courts suits shall be brought").
- It logically follows that where the State has waived sovereign immunity in the case and the agency (DHHS) has appeared in the case, the breadth of the waiver by the State is equally applicable to the agency. See *In re Interest of Krystal P. et al., supra*. See, also, *Doe v. Board of Regents*, 280 Neb. 492, 788 N.W.2d 264 (2010) (equating agency and State for purposes of waiver of sovereign immunity); *County of Lancaster v. State*, 247 Neb. 723, 529 N.W.2d 791 (1995). Given that the juvenile court had contempt power, ... and given that DHHS had appeared in the case and waived sovereign immunity, the juvenile court had authority to enforce its contempt order against DHHS.
- Although not framed as a due process issue, DHHS nevertheless contends and we agree that adequate notice and a meaningful opportunity to be heard prior to entry of a contempt order are warranted.
- To find a party in contempt in juvenile court, there must be a finding of willful violation of a juvenile court's order. . . . [O]nly a willful failure to abide by the juvenile court's order would be contemptuous and, . . . willfulness is a fact which must be established on the record.
- Based on the record presented, DHHS has not yet been held in contempt as a result of this order. Thus, DHHS' objection to this order is limited to the terms of the order itself. We conclude that the order appealed from is not a final, appealable order.

- To be final and appealable, an order in a special proceeding must affect a substantial right. . . . A substantial right is an essential legal right, not a mere technical right.

Klinginsmith v. Wichmann, 252 Neb. 889, 567 N.W.2d 172 (1997)

The portion of this case indicating that a civil contempt order is not an appealable order has been overruled.

- In Nebraska, dissolution of marriage cases are equitable in nature, [A] civil contempt proceeding cannot be the means to afford equitable relief to a party [see also ***Blaine v. Blaine***, 275 Neb. 87, 744 NW2d 444 (2008), which involves using a contempt hearing to interpret provisions of a QDRO ordered as part of the Decree of Dissolution.]

Lenz v. Lenz, 222 Neb. 85, 382 N.W.2d 323 (1986)

- A judgment must be sufficiently certain in its terms to be able to be enforced in a manner provided by law.
- [W]e hold that the part of the divorce decree in this case which ordered the payment of "all of the expenses for the minor child's special schooling" is indefinite, uncertain, and incapable of enforcement. For these reasons it is fatally defective and cannot be enforced.

But see: **Druba v. Druba** , 238 Neb. 279, 470 N.W.2d 176 (1991)

- [A] trial court may make appropriate orders as to the manner in which expenses, after the [dependent health] insurance payments, are to be shared. While such an order could not result in the issuance of an execution by a clerk, the order is enforceable through the contempt power of the court. There is no other way that unknown future expenses can be handled.

Locke v. Volkmer, 8 Neb. App. 797, 601 N.W.2d 807 (1999)

- An appellate court, reviewing a final judgment or order in a contempt proceeding, reviews for errors appearing on the record. When reviewing a judgment for errors appearing on the record, the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable. A trial court's factual finding in a contempt proceeding will be upheld on appeal unless the finding is clearly erroneous.
- [T]the Nebraska Supreme Court held that to be reasonable, the amount of money that a person is required to pay in order to purge oneself of contempt must be within the person's ability to pay. The trial court must take into consideration the assets and financial condition of the contemnor and his or her ability to raise money. See ***Klinginsmith v. Wichmann***, 252 Neb. 889, 567 N.W.2d 172 (1997)
- When a party to an action fails to comply with an order of the court made for the benefit of the opposing party, such act is ordinarily a civil contempt if there has been willful disobedience of the court's order, which is an essential element of civil contempt.
- Willful means the violation was committed intentionally, with knowledge that the act was in violation of the court order. If it is impossible to comply with the order of the court, the failure to comply is not willful.
- A reasonable attorney fee may be taxed against a party found to be in contempt.

Maddux v. Maddux, 239 Neb. 239, 475 N.W.2d 524 (1991)

Discusses the distinction between civil, or coercive, and punitive contempt sanctions. When a coercive sanction is imposed, the contemner holds the keys to his jail cell, in that the sentence

is conditioned upon his continued noncompliance. A punitive sanction is akin to a criminal sentence, in that it is not subject to mitigation should the contemner comply with the court order.

***See Smeal Fire Apparatus Co. v. Kreikemeier (Smeal II)**, 279 Neb. 661, 782 N.W.2d 848 (2010) for a reversal of caselaw regarding civil contempt orders.*

- When a commitment to jail is utilized as a coercive sanction in a civil contempt proceeding involving willful and contumacious failure to pay child support, a court may sentence the contemner to jail for a specified period, provided the court order permits the contemner to purge himself or herself of contempt and be released from jail upon payment of a reasonable amount of money toward the back child support.
- To be reasonable, the amount of money required to be paid for a contemner to purge himself or herself of contempt of court must be within the contemner's ability to pay. The trial court may take into consideration not only the assets and financial condition of the contemner and the contemner's ability to raise money, but also the contemner's ability to earn money through a work release program while the contemner serves the coercive sanction in jail. If a contemner complains that he or she does not have the ability to comply with the purge order, the burden is on them to prove that inability.

Mays v. Mays, 229 Neb. 674, 428 N.W.2d 618 (1988)

Of course this came out of Sarpy County…

- [A]bsent an application and notice requesting modification, a trial court has no power to modify, during the course of contempt proceedings, the terms of an earlier order for support or division of property.

Penn Cal, L.L.C. v. Penn Cal Dairy, 264 Neb. 122, 646 N.W.2d 601 (2002)

- The district courts of this state have the inherent power to enforce compliance with court orders and judgments through contempt proceedings.
- Given the district court's inherent power to punish individuals for contempt of its orders, a Nebraska district court has the inherent power to punish a judgment debtor for his contempt of a foreign judgment which had been properly registered under the Nebraska Uniform Enforcement of Foreign Judgments Act (UEFJA).

Richardson v. Anderson, 8 Neb. App. 923, 604 N.W.2d 427 (2000)

*Discusses also the **Clean Hands Doctrine.** Some great language….*

- A parent has no right to insist upon the pursuit of fruitless dreams of success. There comes a time when a parent who is a would-be entrepreneur but is unsuccessful must simply become employed.
- [The noncustodial parent] cannot remain unemployed while he lives in an impressive style and use that lack of employment as an excuse for not paying child support.

In re Samantha L., 284 Neb. 856, 824 N.W.2d 691 (2012)

- When reviewing a contempt order, an appellate court reviews for abuse of discretion the trial court's determination of whether a party is in contempt and the appropriateness of the sanction it imposed.
- A judicial abuse of discretion exists when the reasons or rulings of a trial judge are clearly untenable, unfairly depriving a litigant of a substantial right and denying just results in matters submitted for disposition.

- Nebraska courts, through their inherent judicial power, have the authority to do all things necessary for the proper administration of justice.
- The power to punish for contempt is incident to every judicial tribune.
- The authority to punish for contempt is derived from a court's constitutional power, without any expressed statutory aid, and is inherent in all courts of record.
- Before a court can exercise its inherent contempt powers, the contemnor is entitled to reasonable notice and an opportunity to be heard.
- Contempts committed in the presence of the court, also known as direct contempts, give the court personal knowledge of the facts and do not require the court to inform itself of the contemptuous conduct through witnesses and evidence.
- The events constituting indirect contempt occur outside the presence of the court, and the court must inform itself of the facts through witnesses or other evidence.
- If the court must inform itself through witnesses or evidence of any material facts of contemptuous conduct, then summary punishment is inappropriate.

Sickler v. Sickler, 293 Neb. 521, 878 N.W.2d 549 (May 2016)

- A court can impose criminal, or punitive, sanctions only if the proceedings afford the protections offered in a criminal proceeding. A criminal or punitive sanction is invalid if imposed in a proceeding that is instituted and tried as civil contempt, because it lacks the procedural protections that the Constitution would demand in a criminal proceeding. A civil sanction is coercive and remedial; the contemnors ""carry the keys of their [jail cells] in their own pockets,"" because the sentence is conditioned upon continued noncompliance and is subject to mitigation through compliance. In contrast, a criminal sanction is punitive; the sentence is determinate and unconditional, and the contemnors do not carry the keys to their jail cells in their own pockets.
- We have recognized that when a purge order involves payment of money, the sum required to purge oneself of contempt must be within the contemnor's *present* ability to pay, taking into consideration the assets and financial condition of the contemnor and his or her ability to raise money. Otherwise, the contempt becomes punitive rather than coercive. As the U.S. Supreme Court said in ***Turner v. Rogers***, it is the ability to comply with a contempt order that marks a dividing line between civil and criminal contempt. In order for the punishment to retain its civil character, the contemnor must, *at the time the sanction is imposed*, have the ability to purge the contempt by compliance and either avert punishment or, at any time, bring it to an end. A present inability to comply with a contempt order is a defense, not necessarily to contempt, but to incarceration.
- while deliberate disposal of financial resources to avoid compliance with an order may be willful behavior justifying a finding of contempt and incarceration under *criminal* contempt proceedings, such a person cannot be incarcerated under a *civil* contempt proceeding unless he or she has the present ability to pay the purge amount when incarcerated.
- Civil contempt is by its very nature inapplicable to one who is powerless to comply with the court order. Only criminal contempt can rely solely on a past ability to comply accompanied by a past refusal to do so.
- Given the importance of the ability to comply in distinguishing between civil and criminal contempt and its due process implications, several jurisdictions hold that a court that imposes incarceration as part of civil contempt proceedings must make express findings regarding the contemnor's ability to comply with the purge order, regardless of whether the contemnor is

indigent. We agree that, prospectively, this is the best approach in order to avoid inadvertent violations of due process rights and for consistency of procedure for both represented and nonrepresented indigent contemnors.

- it is the contemnor who has the burden to assert and prove the inability to comply with the contempt order to avoid incarceration or to purge himself or herself of contempt. *See Maddux v. Maddux*, 239 Neb. 239, 475 N.W.2d 524 (1991)
- We agree with other courts that have found that a contemnor may defend against incarceration under a civil contempt order, but only upon a showing of such inability by a preponderance of the evidence; that showing entails attempts to exhaust all resources and assets or borrow sufficient funds and the inability to thereby secure the funds to comply with the purge order. The burden of both production and persuasion is on the contemnor. The contemnor must be afforded only the opportunity, before being incarcerated, to demonstrate the inability to comply.
- Furthermore, a finding of willfulness with regard to the underlying contempt, proved by the complainant by clear and convincing evidence, is sufficient to shift the burden to the contemnor to show by a preponderance of the evidence an inability to comply, in the event the sanctions for contempt include incarceration.
- By unmistakably imposing a criminal sanction in civil proceedings, such order damages the fairness of the judicial process.

Smeal Fire Apparatus Co. v. Kreikemeier, 279 Neb 661, 782 N.W.2d 848 (2010)

This is not a child support case, but it has enormous impact on the world of civil contempt of court.

Note: this case was itself partially disapproved in ***Hossaini v. Vaelizadeh***, 283 Neb. 369, 808 N.W.2d 867 (2012), cited above, as ***Smeal*** described the proper Standard of Review of a trial court determination of civil contempt.]

- Although there is no graceful way of retreating from this court's previous rulings, some of our troubling contempt cases have created needless difficulties at both the trial and the appellate levels. An untangling of the snarls was long overdue. Our decision changes the legal landscape of our present contempt law. We overrule a long line of cases affecting a trial court's jurisdiction, an appellate court's jurisdiction, and the standard of proof in civil contempt cases.
- we overrule cases that have unnecessarily limited a court's inherent and statutorily granted contempt powers and cases that have precluded appellate review of final civil contempt orders. These cases' roots run deep. Correcting our contempt jurisprudence will require extensive pruning.
- We hold that in a civil contempt proceeding, a district court has inherent power to order compensatory relief when a contemnor has violated its order or judgment. We further hold that whether a contempt sanction is civil or criminal is relevant only when a party appeals from an interlocutory order of contempt. An interlocutory contempt order is an order that a court issues during an ongoing proceeding before the final judgment in the main action.
- Finally, we conclude that for future cases, the standard of proof in civil contempt proceedings is **clear and convincing evidence**, unless the Legislature has mandated another standard.
- Civil contempt proceedings are '"instituted to *preserve and enforce the rights of private parties to the suit* and to compel obedience to orders and decrees made to enforce the rights and to *administer the remedies to which the court has found them to be entitled . . .* , '" Civil contempt proceedings are *remedial* and coercive in their nature.

- "[T]he power to punish for contempt of court is a power inherent in all courts of general jurisdiction, . . . independent of any special or express grant of statute."
- Nebraska courts, through their inherent judicial power, have the authority to do all things reasonably necessary for the proper administration of justice. And this authority exists apart from any statutory grant of authority.
- Because of the court's continuing equity jurisdiction over the [divorce] decree, the power to provide **equitable relief** in a contempt proceeding is particularly appropriate.
- a court cannot modify a dissolution decree in a contempt proceeding absent an application for a modification and notice that a party seeks modification.
- if a complainant seeks, or a court is considering, a modification of the underlying decree as an equitable sanction for contempt of the court's decree, the alleged contemnor must first have notice that a modification and a finding of contempt will be at issue. But when the alleged contemnor has notice and an opportunity to be heard, a court can modify the underlying decree as a remedy for contempt if the violation cannot be adequately remedied otherwise.
- a coercive contempt sanction is conditioned upon the contemnor's continued noncompliance with a court order; i.e., the defendant is in a position to mitigate the sentence by complying with the court's order. In contrast, criminal contempt sanctions are punitive. They vindicate the court's authority and cannot be ended by any act of the contemnor.
- only civil contempt orders issued **before a final judgment** in the main action are interlocutory [and thus not appealable].
- For appeal purposes, we hold that the distinction between criminal and civil contempt sanctions has no relevance to whether a party may appeal from a final order in a supplemental postjudgment contempt proceeding.
- We now overrule any cases that could be interpreted as holding that a final civil contempt order from a postjudgment proceeding is nonappealable and may only be attacked through a habeas corpus proceeding.
- a party to a final marital dissolution decree cannot ask a court to **interpret the decree** other than through a modification or a contempt proceeding
- in some circumstances, Neb. Rev. Stat. § 42-358(3) (Reissue 2008) permits a rebuttable presumption of contempt if a *prima facie* showing is made that an obligor is delinquent in his or her child or spousal support obligations.
- Because a conditional commitment is a possible sanction in a civil contempt proceeding, we conclude that the "clear and convincing" standard of proof is the most appropriate standard.
- we overrule all the cases listed in footnote 129 to the extent that these cases hold or imply that proof beyond a reasonable doubt is required for civil contempt proceedings. Outside of statutory procedures imposing a different standard, it is the complainant's burden to prove civil contempt by clear and convincing evidence.

See **Spady v. Spady**, 284 Neb. 885, 824 N.W.2d 366 (2012)

District court found obligated parent in civil contempt for failure to pay alimony, despite the fact the parent failed to personally appear at the contempt hearing. The Supreme Court upheld the contempt finding on other grounds.

State ex rel. Bonner v. McSwine, 14 Neb. App. 486, 709 N.W.2d 691 (2006)

- A finding that a judgment debtor is not in contempt does not discharge or otherwise impair the underlying judgment for child support. (*Duh!*)
- Pursuant to Neb. Rev. Stat. § 43-1613 (Reissue 2004), in any and all cases referred to a child support referee by the district court, the parties shall have **the right to take exceptions** to the findings and recommendations made by the referee and to have a further hearing before the district court for final disposition.

State v. Reinsch, 283 Neb. 820, 812 N.W.2d 293 (May 2012)

- A civil contempt order against a nonparty witness is a final and appealable order.

Turner v. Rogers et al., U.S. Supreme Court (2011) – (See **Constitutional law**)

Gangwish v. Gangwish, 267 Neb. 901, 678 N.W.2d 503 (2004)

- While building equity in a corporation in lieu of taking salary can be a wise business decision, the "'support of one's children is a fundamental obligation which takes precedence over almost everything else.
- It would simply be inequitable for the children to suffer because of the father's decision to build value in the corporation by depressing his salary.
- Courts must consider, in addition to looking at the noncustodial parent's reported income, (1) the in-kind benefits, e.g., perquisites, that the parent received from the corporation; (2) the corporation's depreciation expenses; and (3) with due regard for business realities, the amount of the corporation's income which should equitably have been attributed to the parent.

Criminal Non-Support & Related

§ 28-706 Criminal Non-Support; penalty; exceptions.

(1) Any person who intentionally fails, refuses, or neglects to provide proper support which he or she knows or reasonably should know he or she is legally obliged to provide to a spouse, minor child, minor stepchild, or other dependent commits criminal nonsupport.

(2) …

(3) Support includes, but is not limited to, food, clothing, medical care, and shelter.

(4) A designation of assets for or use of income by an individual in accordance with section 68-922 shall be considered just cause for failure to use such assets or income to provide medical support of such individual's spouse.

(5) This section does not exclude any applicable civil remedy.
(6) Except as provided in subsection (7) of this section, criminal nonsupport is a Class II misdemeanor.
(7) Criminal nonsupport is a Class IV felony if it is in violation of any order of any court.
Source: Laws 1977, LB 38, § 145; Laws 1978, LB 920, § 3; Laws 1988, LB 419, § 11; Laws 1989, LB 362, § 2; Laws 2006, LB 1248, § 52.

Nebraska v. Eichelberger, 227 Neb. 545, 418 N. W.2d 580 (1988)
Facts: *Defendant fathered one child during his marriage. Later the parties separated and orders for child support were entered, while the defendant was present in court with counsel. He failed to comply with the order or pay support, leading to a criminal prosecution.*

- Intent may be inferred from the words or acts of the defendant and from the circumstances surrounding the incident.
- The State proved that [the defendant] had resources with which he might have paid his past-due child support many times over. [Defendant] offered no evidence to overcome the inference that those resources were available to him had he wished to comply with the support orders.
- [I]t is a well-established principle that in a criminal case a court may take judicial notice of its own records in the case under consideration.
- In determining whether a criminal defendant is indigent as the term is used in Neb. Rev. Stat. § 29-1804.04 (Reissue 1985), a court is to consider the seriousness of the offense; the defendant's income; the availability of resources, including real and personal property, bank accounts, Social Security, and unemployment or other benefits; normal living expenses; outstanding debts; and the number and age of dependents.
- Exercise of the right to assistance of counsel is subject to the necessities of sound judicial administration. State v. Richter, supra. Criminal defendants are not permitted to use their constitutional right to counsel to manipulate or obstruct orderly procedure in the courts or to interfere with the fair administration of justice.

State v. Bright, 238 Neb. 348, 470 N.W.2d 181 (1991)
State v. Eichelberger, 227 Neb. 545, 418 N.W.2d 580 (1988)

- In the context of a criminal statute such as § 28-706, "intentionally" means willfully or purposely, and not accidentally or involuntarily.
- Intent may be inferred from the words or acts of the defendant and from the circumstances surrounding the incident.
- The determination of whether a defendant has the ability to pay child support in order to determine whether the failure to do so was intentional is a question of fact left to the jury.

State v. McCrimon, 15 Neb. App. 452, 729 N.W.2d 682 (2007)
Facts: *Defendant was sentenced to intensive supervision probation (ISP) following conviction for insurance fraud. One condition required him to pay $200/mo. Toward his child support arrears, or be considered in violation of his probation. Defendant appealed.*

- When a court sentences a defendant to probation, it may impose any conditions of probation that are authorized by statute.
- Requiring a probationer to pay child support is statutorily authorized under Neb. Rev. Stat. §29-2262(2) (Cum. Supp.2004).

- "...although the impact of the probation order in the instant case may be harsh, it is not unreasonable to expect [the defendant] to pay his preexisting child support obligation when he currently has an income and some assets. Additionally, the impact of the probation term may help ensure that [the defendant] maintains steady employment and fulfills his family responsibilities."
- Once probation is imposed, the defendant's ability to pay must be considered before a court can revoke the probation and impose a jail term for violating a probation condition requiring payments.

State v. Menuey, 239 Neb. 513, 476 N.W.2d 846 (1991)

Facts: *Following divorce mother obtained full custody of the children in a modification action, and the father's child support obligation was then increased. Father responded by quitting his job, leaving town and traveling the world, but* ***never paying his support 'because he was too depressed****.' He worked many jobs in many different locations, but never paid support. At one point he told the mother that "if anyone tried to make him pay more than $300, he would just leave and [she] would never be able to get a dime and [she] would never be able to do nothing about it." In a letter to his work supervisor he wrote: "I feel that I can no longer work for a company that allows an ex-spouse to garnishe [sic] my paycheck at will for any whim she choses [sic]. . . . I am better off working for a non-corporation." Criminal nonsupport charges were later filed. A jury returned a guilty verdict. Father appealed.*

- There is more than sufficient evidence to support a finding that defendant is and has always been able-bodied and capable of earning at a rate sufficient to enable him to support his children as directed in the modification order and that he simply elected, for reasons of his own, not to do so.
- [T]he failure to support one's children is a grave and ignoble offense and is to be treated as such.

State v. Reuter, 216 Neb. 325, 343 N.W.2d 907 (1984)

Facts: *Defendant was convicted of criminal non-support for failure to pay child support on behalf of his 4 minor children, for which he had previously been court ordered to support. The evidence establishes that defendant was capable of working, was employed, and earned at least $1,000 per month.*

- A single act may give rise to both civil and criminal sanctions.
- A sentence of imprisonment for the failure to support one's children as ordered by a court does not violate the eighth amendment to the U.S. Constitution and article I, § 9, of the Nebraska Constitution, both of which prohibit the infliction of "cruel and unusual" punishment.
- "To abandon one's children to a life of poverty and reliance upon public charity is a heinous and ignoble offense and is to be treated as such."
- We do not think the allowance for the support of defendant's minor child bears any resemblance whatever to a debt, and therefore the constitution does not forbid imprisonment for the defendant's refusal to obey the order of the court. (citing **Fussell v. State**, 102 Neb. 117, 166 N.W. 197 (1918))

State v. Yelli, 247 Neb. 785, 530 N.W.2d 250 (1995)

This case reminds us of the clear distinction between the standards of proof in civil vs. criminal cases. The burden of establishing a paternity judgment is lower than for that of establishing elements of a criminal conviction. Don't assume you can prove paternity in a criminal case by introducing the record of the paternity judgment.

- Both federal and state due process dictate that an indigent defendant in a state-assisted civil paternity action has the right to the services of appointed counsel. Where a record is silent as

to a defendant's opportunity for counsel, an appellate court may not presume that such rights were respected.

- A mother's testimony that one is the father of her child is sufficient only if she be corroborated as to material facts and circumstances which tend to support her testimony and from which, together with her testimony as to the principal act, the inference of paternity may be drawn.
- The burden in a criminal proceeding is to produce proof beyond a reasonable doubt of every element of a charged offense. The doctrines of *res judicata* and collateral estoppel are not applicable when the burden of persuasion is different in the subsequent proceeding.

See also **Nebraska v. Bright**, 238 Neb. 348, 470 N.W.2d 181 (1991)

(Quite) a bit about Custody & Visitation

(*See also* **Child Support Guidelines**)

The Nebraska bar association has produced a PDF brochure addressing the issues of child custody and visitation. It is available at:

http://nebar.com/associations/8143/files/2012_CustodyVisitation.pdf

§ 42-358. Attorney for minor child; appointment; powers; child or spousal support; records; income withholding; contempt proceedings; fees; evidence; appeal.

(b) The court may appoint an attorney to protect the interests of any minor children of the parties. Such attorney shall be empowered to make independent investigations and to cause witnesses to appear and testify on matters pertinent to the welfare of the children. The court shall by order fix the fee, including disbursements, for such attorney, which amount shall be taxed as costs and paid by the parties as ordered. If the court finds that the party responsible is indigent, the court may order the county to pay the costs.

…

Annotations:

From June 1, 1998, forward, when appointing a guardian *ad litem* or an attorney to represent the interests of the minor pursuant to this section in forums other than the juvenile court, the appointing court, in the order making the appointment, shall specify whether the person appointed is to act as a guardian ad litem or as an attorney pursuant to this section. One person may not serve in both capacities. **Betz v. Betz**, 254 Neb. 341, 575 N.W.2d 406 (1998).

§43-1252 **Registration of child custody determination.**

This statute governs the regulations for registering a foreign state/nation court order for purposes of enforcing child *custody* under UCCJEA. Note: This is a completely separate and distinct registration tool from the one provided for under UIFSA. It can NOT be used to register orders for child support related purposes.

§43-1226 – 43-1266 are provisions of the Uniform Child Custody Jurisdiction and Enforcement Act - UCCJEA (RRS Nebraska 2003)

Neb. Rev. Stat. § 42-364(2) (Reissue 1998) provides that in determining a child's best interests in custody and visitation matters, the factors to be considered shall include, but not be limited to, the following:

> The relationship of the minor child to each parent prior to the commencement of the action or any subsequent hearing;
> (b) The desires and wishes of the minor child if of an age of comprehension regardless of chronological age, when such desires and wishes are based on sound reasoning;
> (c) The general health, welfare, and social behavior of the minor child; and
> (d) Credible evidence of abuse inflicted on any family or household member.

§ 28-316. Violation of custody; penalty

(1) Any person, including a natural or foster parent, who, knowing that he has no legal right to do so or, heedless in that regard, takes or entices any child under the age of eighteen years from the custody of its parent having legal custody, guardian, or other lawful custodian commits the offense of violation of custody.

(2) Except as provided in subsection (3) of this section, violation of custody is a Class II misdemeanor.

(3) Violation of custody in contravention of an order of any district or juvenile court of this state granting the custody of a child under the age of eighteen years to any person, agency, or institution, with the intent to deprive the lawful custodian of the custody of such child, is a Class IV felony.

Bhuller v. Bhuller, 17 Neb. App. 607, 767 N.W.2d 813 (2009)
Anyone? Anyone? Bueller. How many times do we have to be told? The Supreme Court has "had it" with support orders that lack work sheets.

- An order modifying child custody which does not include a **child support calculation** is not a final order. *See also* **Johnson v. Johnson**, 15 Neb. App. 292, 726 N.W.2d 194 (2006)
- § 43-2929 requires the final judgment in cases involving child custody to incorporate a parenting plan which resolves the issue of visitation.

Carter v. Carter, 276 Neb. 840, 758 N.W.2d 1 (2008)
This case offers a good discussion on what constitutes the "home state" of a minor child under the UCCJEA.

Coleman v. Kahler, 17 Neb. App. 518, 766 N.W.2d 142 (2009)

- The Nebraska Supreme Court has held that before a custodial parent can remove a child from the state, permission of the court is required, whether or not there is a travel restriction placed on the custodial parent. *State ex rel. Reitz v. Ringer,* 244 Neb. 976, 510 N.W.2d 294 (1994).
- Our review of removal jurisprudence in Nebraska involving children born in and out of wedlock reveals a common element: a prior child custody determination.
- Under the Uniform Child Custody Jurisdiction and Enforcement Act, a "child custody determination" is defined to mean "a judgment, decree, or other order of a court providing for the legal custody, physical custody, or visitation with respect to a child.
- Based on *State on behalf of* ***Pathammavong v. Pathammavong,*** 268 Neb. 1, 679 N.W.2d 749 (2004), and *State ex rel. Grape v. Zach, supra,* we hold that Nebraska's **removal jurisprudence does not apply to a child born out of wedlock where there has been no prior adjudication**

addressing child custody or parenting time. *See also* ***Rommers v. Rommers***, 22 Neb. App. 606 (2014)

Colling v. Colling, 20 Neb. App. 98, 818 N.W.2d 637 (2012)
Facts: Lincoln mom with custody of three elementary school age children marries Georgia fiancée and wants to relocate her family away from father in Lincoln to live with her husband in Georgia. She can't surmount the legal hurdles.
The first instance I have seen of use of the word "cybervisitation".

Conn v. Conn, 15 Neb. App. 77, 722 N.W.2d 507 (2006)

- A parent's rights are not absolute and must yield to the best interests of the child.

Dragon v. Dragon, 21 Neb. App. 228, 835 N.W.2d 56 (2013)
***Holding*:** A somewhat unusual set of facts. Trial court set too high a burden on parent desiring to relocate in search of better employment opportunities.

- Legitimate employment opportunities for a custodial parent may constitute a legitimate reason for leaving the state.
- A custodial parent is not required to exhaust all possible job leads locally before securing a better position in another state.
- The ultimate question in evaluating the parties' motives in seeking removal of a child to another jurisdiction is whether either party has elected or resisted removal in an effort to frustrate or manipulate the other party.
- The list of factors to be considered in determining the potential that removal to another jurisdiction holds for enhancing the quality of life of the parent seeking removal and of the children should not be misconstrued as setting out a hierarchy of considerations, and depending on the circumstances of a particular case, any one consideration or combination of considerations may be variously weighted.
- The effect of the removal of a child to another jurisdiction must be evaluated in light of the child's relationship with each parent.
- A noncustodial parent's visitation rights are important, but a reduction in visitation time does not necessarily preclude a custodial parent from relocating for a legitimate reason.
- In considering removal of a child to another jurisdiction, a court focuses on the ability of the noncustodial parent to maintain a meaningful parent-child relationship.

Drew on Behalf of Reed v. Reed, 16 Neb. App. 905, 755 N.W.2d 420 (2008)
See § 4-212 of the Child Support Guidelines

- Joint physical custody means the child lives day in and day out with both parents on a rotating basis.
- Numerous parenting times with a child do not constitute joint physical custody. Liberal parenting time does not justify a joint custody child support calculation.

Eliker v. Eliker, 206 Neb. 764, 295 N.W.2d 268 (1980).
Time may heal all wounds, but it does not make child support go away.

- Questions of custody and support are not controllable by agreement of the parties.
- Neither of the parties is authorized to interfere with the court's orders and only the court can determine what, if any, adjustments should be made.

Elsome v. Elsome, 257 Neb. 889, 601 N.W.2d 537 (1999)

- If trial evidence establishes a joint physical custody arrangement, courts will so construe it, regardless of how prior decrees or court orders have characterized the arrangement.
- When the parent owing child support has physical custody of the minor children at least **38% of the time**, the parties have **joint physical custody**, and the joint physical custody worksheet (worksheet 3) should be used in setting child support.

See § 4-212 of the Child Support Guidelines

Farnsworth v. Farnsworth, 276 Neb. 653, 756 N.W.2d 522 (2008)
In re Interest of Eric O. & Shane O., 9 Neb. App. 676, 617 N.W.2d 824 (2000)
[*But also see* **Cesar C. v. Alicia L.,** 281 Neb. 979, 800 N.W.2d 249 (July 2011) for a limitation on this doctrine]

"Parental Preference Doctrine and Fitness or Forfeiture"

- The father's natural right to the custody of his children trumps the interest of a grandparent to the parent-child relationship and the preferences of the child. This is true even when the father has been previously absent from the child's life and owes thousands of dollars in back child support, and even when the child had been living with the maternal grandparents and the child's mother, prior to the mother's death.
  - Nebraska law creates a **presumption in favor of child custody with a biological parent** as against an unrelated third party.
- Although the question present in every child custody case is the best interests of the child, a court cannot overlook or disregard that the best interests standard is subject to the overriding recognition that the relationship between parent and child is constitutionally protected.
- The courts may not properly deprive a parent of the custody of a minor child unless it is affirmatively shown that such parent is **unfit to perform the duties** imposed by the relationship or has forfeited that right.
- The U.S. Supreme Court has held that due process of law requires a parent to be granted a hearing on his or her fitness as a parent before being deprived of custody. And the right of a parent to the care, custody, and management of his or her children is considered one of the most basic rights of man.
- Parental preference means that absent unfitness or forfeiture, the natural parent prevails against an unrelated person in a custody dispute. … While appellate courts have often spoken of a natural parent's superior rights as against those of an "unrelated" person in various articulations of the parental preference doctrine, this is somewhat misstated. The reality is that anyone other than a natural parent is "unrelated," even though the person seeking custody may be family.

Gartner v. Hume, 12 Neb. App. 741, 686 N.W.2d 58 (2004)

- Child Custody. To prevail on a motion to remove a minor child to another jurisdiction, the custodial parent must first satisfy the court that he or she has a legitimate reason for leaving the state. After clearing that threshold, the custodial parent must next demonstrate that it is in the child's best interests to continue living with him or her. [See also the *Removal of Minor Child from Nebraska* section.]

Grange v. Grange, 15 Neb. App. 297, 725 N.W.2d 853 (2006)

- Ordinarily, custody of a minor child will not be modified unless there has been a material change in circumstances showing that the custodial parent is unfit or that the best interests of the child require such action. ***Heistand v. Heistand***, 267 Neb. 300, 673 N.W.2d 541 (2004).
- A decree of divorce, insofar as minor children are concerned, is never final in the sense that it cannot be changed, but is subject to review at any time in the light of changing conditions. See ***Matson v. Matson***, 175 Neb. 60, 120 N.W.2d 364 (1963).

Haynes v. Haynes, 205 Neb. 35, 286 N.W.2d 108 (1979)

- While it is true that a parent has a natural right to the custody of his child, the court is not bound as a matter of law to restore a child to a parent under any and all circumstances. The welfare of a child of tender years is paramount to the wishes of the parent where it has formed a natural attachment for persons who have long been in the relation of parents with the parents' approval and consent

Hibbard v. Hibbard, 230 Neb. 364, 366, 431 N.W.2d 637, 639 (1988).

- Children have the right to be treated as interested and affected persons and not as pawns or chattel of either or both parents.

Hickenbottom v. Hickenbottom; 239 Neb. 579; 477 N.W.2d 8 (1991)

- [T]he parties in a proceeding to dissolve a marriage cannot control the disposition of minor children by agreement. ***Hicks v. Hicks***, 223 Neb. 189, 388 N.W.2d 510 (1986)
- A **stepfather** is the husband of a child's mother by virtue of a marriage subsequent to that of which the child is the offspring; thus, a husband who divorces the mother of such a child is no longer the child's stepfather.
- [U]nder appropriate circumstances, an ex-stepparent is entitled to visitation with a former stepchild.

Hopkins v. Hopkins, 294 Neb. 417, ___ N.W.2d ___ (August 2016)

This controversial case sets forth in great detail how trial courts are to handle child custody matters when a parent who seeks or has obtained legal custody of a minor child introduces a registered sex offender into the household where a minor child is residing. The court split 4-2.

The case also defines commonly used legal terms of rebuttable presumption, burden of persuasion and burden of production.

- Generally, there are two types of presumptions. The "'bursting bubble'" presumption shifts only the burden of production, and if that burden is met, the presumption disappears.
- Nebraska Evidence Rule 301 (Neb. Rev. Stat. § 27-301 (Reissue 2008)). "In all cases not otherwise provided for by statute or by these rules a presumption imposes on the party against whom it is directed the burden of proving that the nonexistence of the presumed fact is more probable than its existence."

In re Interest of Brian B. et al., 268 Neb. 870, 689 N.W.2d 184 (2004)

- The right of parents to maintain custody of their child is a natural right, subject only to the paramount interest which the public has in the protection of the rights of the child.

In Re Interest of Danaisha W. Et Al., 287 Neb. 27, 840 N.W.2d 533 (2013)

- For an appellate court to acquire jurisdiction of an appeal, there must be a final order entered by the court from which the appeal is taken. Among the three types of final orders which may be reviewed on appeal is an order that affects a substantial right made during a special proceeding. A proceeding before a juvenile court is a special proceeding for appellate purposes.
- We have held that where an order from a juvenile court is already in place and a subsequent order merely extends the time for which the previous order is applicable, the subsequent order by itself does not affect a substantial right and does not extend the time in which the original order may be appealed.
- Orders which temporarily suspend a parent's custody and visitation rights do not affect a substantial right and are therefore not appealable.
- Whether a substantial right of a parent has been affected by an order in juvenile court litigation is dependent upon both the object of the order and the length of time over which the parent's relationship with the juvenile may reasonably be expected to be disturbed. Although the February 11 order was not specifically designated as "temporary" in nature, it was effectively so, because on the same date, the court scheduled the hearing on the State's motion to terminate parental rights for March 21.

In re Interest of Karlie D., 283 Neb. 581, 811 N.W.2d 214 (2012)

- The Nebraska Juvenile Code clearly expresses a preference for placement with blood relatives.

In re Interest of Lakota Z. & Jacob H., 282 Neb. 584, 804 N.W.2d 174 (2011)

- Under the parental preference principle, a parent's natural right to the custody of his or her child trumps the interests of strangers to the parent-child relationship and the preferences of the child.
- Absent circumstances which justify terminating a parent's constitutionally protected right to care for his or her child, due regard for the right requires that a biological or adoptive parent be presumptively regarded as the proper guardian for his or her child.
- In guardianship termination proceedings involving a biological or adoptive parent, the parental preference principle serves to establish a rebuttable presumption that the best interests of a child are served by reuniting the child with his or her parent.
- An individual who opposes the termination of a guardianship bears the burden of proving by clear and convincing evidence that the biological or adoptive parent either is unfit or has forfeited his or her right to custody. Absent such proof, the constitutional dimensions of the relationship between parent and child require termination of the guardianship and reunification with the parent.
- Parental unfitness means a personal deficiency or incapacity which has prevented, or will probably prevent, performance of a reasonable parental obligation in child rearing or which has caused, or probably will result in, detriment to a child's well-being. ... evidence of unfitness should be focused upon a parent's ability to care for a child, and not any other moral failings a parent may have.
- "[i]f the evidence of unfitness is insufficient to justify termination of parental rights in an action maintained under the Nebraska Juvenile Code," then "similarly deficient evidence of parental unfitness" would prevent a court from granting child custody "to one who is a stranger to the parent-child relationship."

Lamb v. Lamb, 14 Neb.App. 337, 707 N.W.2d 423 (Neb.App. 2005)

- The Nebraska Child Custody Jurisdiction Act **does *not* confer subject matter jurisdiction** upon a Nebraska court to modify a child support order issued by another state.
- The modification of another state's child support order must be addressed under the Uniform Interstate Family Support Act, Neb. Rev. Stat. 42-701 to 42-751
- Registering a child support order issued by another state under the **Nebraska Uniform Enforcement of Foreign Judgments Act** does not confer subject matter jurisdiction on a Nebraska court to modify the foreign order with respect to payments to be made in the future.

Muzzey v. Ragone, 20 Neb. App. 669, 831 N.W.2d 38 (2013)

The issue of grandparent visitation is still a hot topic in Nebraska. Here is the latest.

Held: A party may have standing to sue at the inception of a case, but intervening circumstances may serve to render the case moot. Here, the fact that the parents of the minor child married subsequent to the filing of the petition for grandparent visitation served not so much to deprive the grandparents of standing, as to render the case moot.

- Section 43-1802(1) provides that a grandparent may seek visitation with a grandchild if:
  - The child's parent or parents are deceased;
  - The marriage of the child's parents has been dissolved or petition for the dissolution of such marriage has been filed, is still pending, but no decree has been entered; or
  - The parents of the minor child have never been married but paternity has been legally established.
- Both standing and mootness are key functions in determining whether a justiciable controversy exists, or whether a litigant has a sufficient interest in a case to warrant declaratory relief. *Wetovick v. County of Nance*, 279 Neb. 773, 782 N.W.2d 298 (2010); *Schneider v. Lambert*, 19 Neb. App. 271, 809 N.W.2d 515 (2011). A case becomes moot when the issues initially presented in the litigation cease to exist, when the litigants lack a legally cognizable interest in the outcome of litigation, or when the litigants seek to determine a question which does not rest upon existing facts or rights, in which the issues presented are no longer alive.

Nielsen v. Nielsen, 207 Neb. 141, 296 N.W.2d 483 (1980)

- The right of a parent to the custody of his minor child is not lightly to be set aside in favor of more distant relatives or unrelated parties, and the courts may not deprive a parent of such custody unless he is shown to be unfit or to have forfeited his superior right to such custody.

Peterson v. Peterson, 224 Neb. 557, 399 N.W.2d 792 (1987)

- The district court may maintain legal custody of minor children, while awarding physical custody to a parent or other party.

Raney v. Blecha, 258 Neb. 731, 605 N.W.2d 449 (2000)

- **Grandparents' existing visitation rights** are not automatically terminated by an adoption, but can be modified upon a showing of cause with the child's best interests at issue.

Rommers v. Rommers, 22 Neb. App. 606, 858 N.W.2d 607 (2014)

Facts: Married couple split when mother left for Arizona with infant. Husband then filed for divorce, and wanted custody of infant. Trial court allowed mother to keep child in AZ, indicating since she left Nebraska before divorce was filed the court was powerless to do anything about the child remaining in AZ.

Held: Trial court erred in that regard.

- The trial court should have first entered an order regarding custody and then conducted a proper *Farnsworth (v. Farnsworth*, 257 Neb. 242, 597 N.W.2d 592 (1999)), removal analysis, which would take into account an appropriate parenting plan in accordance with the custody determination and decision regarding removal and would also include a determination regarding child support and an award of the tax exemption.
- Once the district court has made the initial custody determination, it should not skip over the majority of the removal analysis if the parent has requested or, as in this case, has already left the state with the child. There is a two-step process before a custodial parent is allowed to remove a child from the State of Nebraska. The custodial parent must satisfy the court that there is a legitimate reason for leaving the state and that it is in the minor child's best interests to continue to live with that parent.

Schrag v. Spear, 290 Neb. 98, 858 N.W.2d 865 (2015)

A divided and troubling opinion of the Court of Appeals is reversed.

- parental relocation cases are "among the most complicated and troubling" cases that courts must resolve. ... such determinations are matters initially entrusted to the discretion of the trial judge, and the trial judge's determination is to be given deference.
- In ***Coleman v. Kahler***, 17 Neb. App. 518, 766 N.W.2d 142 (2009), the Court of Appeals held that Nebraska's removal jurisprudence does not apply to a child born out of wedlock where there has been no prior adjudication addressing child custody or parenting time.
- Before a custodial parent can remove a child from the state, permission of the court is required, whether or not there is a travel restriction placed on the custodial parent.
- As we noted in ***Farnsworth v. Farnsworth***, the legitimacy of the custodial parent's motive for a proposed relocation is part of the "threshold question" of whether the parent has a legitimate reason for moving, and also plays a "further role in ascertaining a child's best interests" if the threshold showing is made.
- The party seeking modification of child custody bears the burden of showing a change in circumstances. In determining whether the custody of a minor child should be changed, the evidence of the custodial parent's behavior during the year or so before the hearing on the motion to modify is of more significance than the behavior prior to that time.
- We agree with the dissent that a noncustodial parent need not show that actual harm has befallen a child in order to establish that a modification of custody due to a material change in circumstances would be in the child's best interests.

State on behalf of Combs v. O'Neal, 11 Neb. App. 890, 662 N.W.2d 231 (2003)

- The **"parental preference doctrine"** holds that in a child custody controversy between a biological parent and one who is neither a biological nor an adoptive parent, the **biological parent has a superior right to custody** of the child. ***In re Stephanie H. et al.***, 10 Neb. App. 908, 639 N.W.2d 668 (2002), citing ***In re Interest of Amber G. et al.***, 250 Neb. 973, 554 N.W.2d 142 (1996).
- A court may not properly deprive a biological or adoptive parent of the custody of the minor child unless it is affirmatively shown that such parent is unfit to perform the duties imposed by the relationship or has forfeited that right
- Parental forfeiture means that parental rights "'may be forfeited by substantial, continuous, and repeated neglect of a child and a failure to discharge the duties of parental care and

protection.'" ***In re Interest of Eric O. & Shane O.***, 9 Neb. App. 676, 685, 617 N.W.2d 824, 832 (2000).

- The Nebraska Supreme Court has stated that a person standing *in loco parentis* to a child is one who has put himself or herself in the situation of a lawful parent by assuming the obligations incident to the parental relationship, without going through the formalities necessary to a legal adoption, and the rights, duties, and liabilities of such person are the same as those of the lawful parent. ***In re Interest of Destiny S.***, 263 Neb. 255, 639 N.W.2d 400 (2002), citing ***Weinand v. Weinand***, 260 Neb. 146, 616 N.W.2d 1 (2000).

State o/b/o Jakai C. v. Tiffany M, 292 Neb. 68, 871 N.W.2d 230 (November 2015)

- In a child custody modification case, first, the party seeking modification must show a material change in circumstances, occurring after the entry of the previous custody order and affecting the best interests of the child. Next, the party seeking modification must prove that changing the child's custody is in the child's best interests.
- A material change in circumstances means the occurrence of something which, had it been known at the time of the initial decree, would have persuaded the court to decree differently.
- The party seeking modification of child custody bears the burden of showing as an initial matter that there has been a change in circumstances.
- In determining whether the custody of a minor child should be changed, the evidence of the custodial parent's behavior during the year or so before the hearing on the motion to modify is of more significance than the behavior prior to that time.

State o/b/o Maddox S. v. Matthew E., 23 Neb. App. 500, 873 N.W.2d 208 (January 2016)

- a trial court's decision to award joint legal or physical custody can be made without parental agreement or consent so long as it is in the child's best interests. Neb. Rev. Stat. § 42-364(3) (Cum. Supp. 2014) states:

  > Custody of a minor child may be placed with both parents on a joint legal custody or joint physical custody basis, or both, (a) when both parents agree to such an arrangement in the parenting plan and the court determines that such an arrangement is in the best interests of the child or (b) if the court specifically finds, after a hearing in open court, that joint physical custody or joint legal custody, or both, is in the best interests of the minor child regardless of any parental agreement or consent.

- While such a uniquely tailored joint custody resolution is without precedent, we cannot say the district court abused its discretion given the facts of this case.

State o/b/o Pathammavong v. Pathammavong, 268 Neb. 1, 679 N.W.2d 749 (2004)

- While an unwed mother is initially entitled to automatic custody of the child, the issue must ultimately be resolved on the basis of the fitness of the parents and the best interests of the child. [see also ***Barth v. Barth***, 22 Neb. App. 241, 851 N.W.2d 104 (2014)]

Stuhr v. Stuhr, 240 Neb. 239, 481 N.W.2d 212 (1992)

- In the absence of a contrary statutory provision, in a child custody controversy between a biological or adoptive parent and one who is neither biological nor an adoptive parent of the child involved in the controversy, a fit biological or adoptive parent has a superior right to custody of the child.

Watson v. Watson, 272 Neb. 647, 724 N.W.2d 24 (2006)

This case reviews the UCCJEA and addresses when courts can, and cannot transfer issues of child custody and visitation to courts in other states. Generally, as long as one parent resides in Nebraska and maintains a relationship with the minor child, Nebraska courts maintain ***exclusive jurisdiction*** *over the issues of custody and visitation, regardless of where the child lives. This is regardless of what courts in other states purport to do.*

Weinand v. Weinand, 260 Neb. 146, 616 N.W.2d 1 (2000)

- [A]bsent exceptional circumstances that invoke equitable principles, an ex-stepparent generally does not have a duty to support an ex-stepchild after the termination of the marriage to the child's biological parent.
- A district court in a dissolution action, acting pursuant to Neb. Rev. Stat. §42-364 (Reissue 1998), has jurisdiction to grant rights of visitation to an ex-stepparent when that ex-stepparent establishes that during the marriage he or she acted as a parent to the stepchild.
- Must an ex-stepparent who is awarded rights of reasonable visitation in a divorce decree pay child support as a consequence of such an award when that child is now living with, and being supported by, both her natural mother and the man judicially determined to be her natural father?
- In the absence of a statute, it is clear that the common law does not impose a liability for support upon stepparents except in some instances where the stepparent voluntarily takes the stepchild into his or her family and assumes, in loco parentis, the obligations incident to a parental relationship.
- The Nebraska divorce statutes do not impose a duty upon any individual other than a parent to pay for the support of minor children.
- We, therefore, hold that in circumstances where a minor child is living with, and being supported by, both of his or her natural parents, the statutory responsibility for the child's support is solely that of the natural parents. The ex-stepfather can no longer be statutorily obligated for the support of his ex-stepdaughter.

Welch v. Welch, Jr., 246 Neb. 435, 519 N.W.2d 262 (1994)

- As a general rule, the custodial parent's right of support and the noncustodial parent's right of visitation are entitled to separate enforcement. A failure to pay child support does not justify a parent's unilateral withdrawal of visitation rights, and a failure to allow visitation does not justify a parent's unilateral nonpayment of support.
- a court may suspend child support payments when the custodial parent deprives the noncustodial parent of visitation and there is no showing that the children are in need.

Wilson v. Wilson, 224 Neb. 589, 399 N.W.2d 802 (1987)

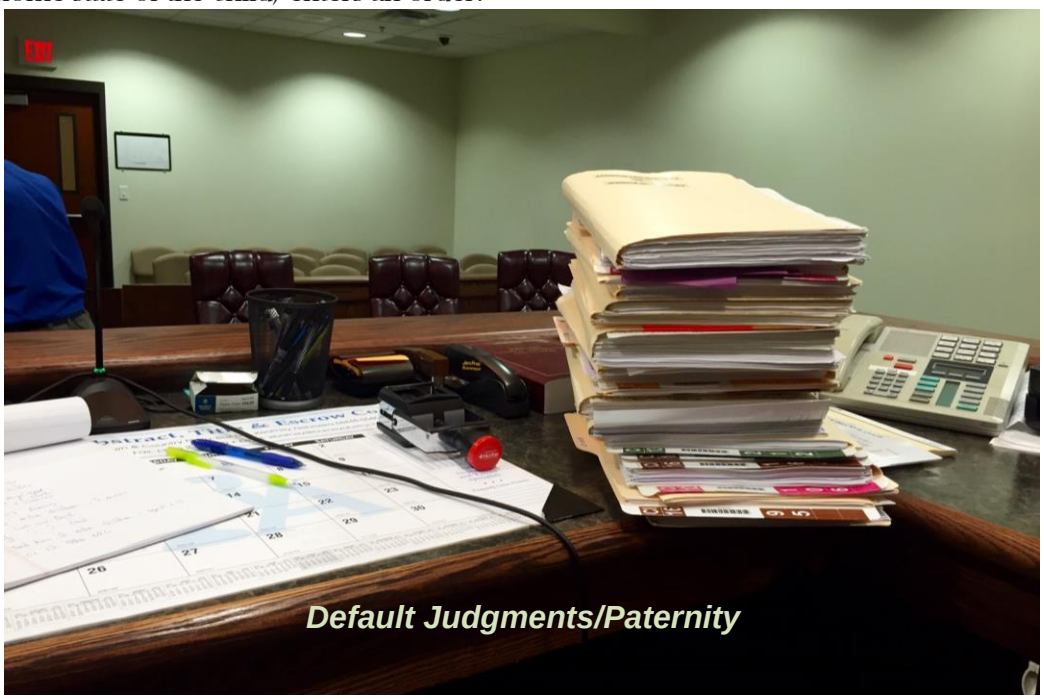
The *Mother* of all parenting/visitation schedule cases. Considered the "Holy Grail" in Family Law for over two decades.

Zimmerman v. Biggs, 22 Neb. App. 119, 848 N.W.2d 653 (2014)

- The UCCJEA was enacted to serve the following purposes: (1) to avoid interstate jurisdictional competition and conflict in child custody matters, (2) to promote cooperation between courts of other states so that a custody determination can be rendered in a state best suited to decide the case in the interest of the child, (3) to discourage the use of the interstate system for continuing

custody controversies, (4) to deter child abductions, (5) to avoid relitigation of custody issues, and (6) to facilitate enforcement of custody orders.

- The most basic proposition under the UCCJEA is that in order for a state to exercise jurisdiction over a child custody dispute, that state must be the home state as defined by the UCCJEA or fall under limited exceptions to the home state requirement specified by the act. Neb. Rev. Stat. § 43-1238 (Reissue 2008); The UCCJEA provides that a state has jurisdiction to make an initial custody determination only if it is the home state of the child on the date of the commencement of the proceeding or was the home state of the child within 6 months before the commencement of the proceeding and the child is absent from the state but a parent or person acting as a parent continues to live in the state. § 43-1238. (case citations omitted)
- Although a custody determination in a domestic violence case *could* be considered an initial child custody determination under Neb. Rev. Stat. § 43-1227 (Reissue 2008), such a determination is considered binding and conclusive on other courts only if such determination was made by a court with jurisdiction under the UCCJEA. See Neb. Rev. Stat. § 43-1231 (Reissue 2008). Similarly, Neb. Rev. Stat. § 43-1241 (Reissue 2008) provides that under the UCCJEA, a court may exercise emergency temporary jurisdiction under the act, but such a determination remains in effect only until a court that would have jurisdiction to make an initial custody determination (i.e., the home state of the child) enters an order.



§ 25-2001(1) (Reissue 2008)
The inherent power of a district court to vacate or modify its judgments or orders during term may also be exercised after the end of the term, upon the same grounds, upon a motion filed within six months after the entry of the judgment or order.

§43-1412. Paternity; action to establish; procedure; public hearings prohibited; evidence; default judgment; decree; payment of costs and fees. (Reissue 2004)
(1) ….
(2) A default judgment shall be entered upon a showing of service and failure of the defendant to answer or otherwise appear.

Fredericks v. Western Livestock Auction Co., 225 Neb. 211, 403 N.W.2d 377 (1987)

- A " default judgment will not ordinarily be set aside on the application of a party who, by his own fault, negligence, or want of diligence, has failed to protect his own interests. . . ."

Fitzgerald v. Fitzgerald, 286 Neb. 96, 835 N.W.2d 44 (2013)

- *Joyce v. Joyce* directly cited *Tejral* and addressed only an argument that due process was violated, making no reference to any local court rule [requiring mail notice be sent of a default hearing].
- Since September 1, 1995, this court's rules have permitted district courts to propose local rules which become effective on approval by this court and publication in the Nebraska Advance Sheets.
- modification of child custody and support in a dissolution action is made pursuant to Neb. Rev. Stat. § 42-364 (Cum. Supp. 2012) and is therefore a special proceeding.
- a notice requirement can easily be satisfied in a modification proceeding by a simple mailing of notice to the address that a parent is required to maintain on file with the clerk of the district court. Thus, in a modification proceeding, the local rule's notice requirement would not "paralyze the ordinary and orderly functioning of the legal process."

Joyce v. Joyce, 229 Neb. 831, 834, 429 N.W.2d 355 (1988)

Limited by *Fitzgerald v. Fitzgerald*, above

- This court held in *Tejral v. Tejral,* 220 Neb. 264, 267, 369 N.W.2d 359, 361 (1985) that "where a party in a dissolution of marriage case is served personally with a summons and a copy of the petition in the case, and that party chooses not to file any pleading nor to enter an appearance in the case, and has not otherwise requested notice of hearing, notice of default hearing need not be given to such party. We further hold that it is an abuse of the trial court's discretion under § 42-372 to set aside a dissolution decree, properly entered, on the sole basis that notice of hearing was not sent to the party in default of filing any pleading or entering an appearance in the case." The same rule is applicable in a URESA [Revised Uniform Reciprocal Enforcement of Support Act] case.
- The same rule is also applicable in this case. Appellant failed to file an appearance or a pleading in this case. Local court rules do not supersede the common law of this state. Notice of the default hearing was not required, and therefore appellant's third assignment of error is without merit." Starr v. King, at 342.

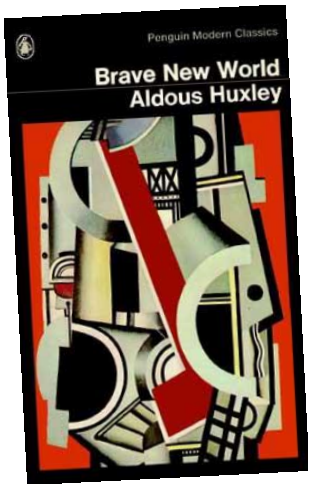
State on behalf of A.E. vs. Buckhalter, 273 Neb. 443, 730 N.W.2d 340 (2007)

Limited by *Fitzgerald v. Fitzgerald*, above

- [A] party who is served with summons and a copy of the complaint and fails to answer or make an appearance in a case is not entitled to further notice of a hearing."A party's **voluntary inaction and inattention** should not be permitted to paralyze the ordinary and orderly functioning of the legal process." Citing ***Tejral v. Tejral***, 220 Neb. 264, 369 N.W.2d 359 (1985). [W]hen the court has entered a default judgment and the defendant has made a prompt application at the same term to set it aside, with the tender of an answer or other proof disclosing a meritorious defense, the court should on reasonable terms sustain the

motion and permit the cause to be heard on the merits. A meritorious or substantial defense or cause means one which is worthy of judicial inquiry because it raises a question of law deserving some investigation and discussion or a real controversy as to the essential facts.

- To vacate the default judgment, Buckhalter is not required to show that he will ultimately prevail, but only that he has a recognized defense that is not frivolous.



- By failing to take the genetic testing ordered by the court, Buckhalter passed up the opportunity to present a meritorious defense.
- Buckhalter argues that the employment verification forms the State introduced to show Buckhalter's income were inadequate. Buckhalter contends that the State should have requested his tax returns through discovery instead of relying on the employment verification forms as evidence of his income. ... We believe the State used a reasonable method to obtain information about Buckhalter's income when he refused to participate in the proceedings or submit evidence in his own behalf. The court did not err in calculating its child support award on employment verification forms instead of tax returns or wage stubs.

Steinberg v. Stahlnecker, 200 Neb. 466, 468, 263 N.W.2d 861, 863 (1978)

- Where a judgment has been entered by default and a prompt application has been made at the same term to set it aside, with the tender of an answer or other proof disclosing a meritorious defense, the court should on reasonable terms sustain the motion and permit the cause to be heard on the merits.
- A party seeking to vacate a default judgment must tender an answer or other proof disclosing a meritorious defense (as a condition of having the default judgment vacated).

Talkington v. Womens Servs., 256 Neb. 2, 588 N.W.2d 790 (1999)

- A district court has the inherent authority to vacate or modify its decision within the same term in which the initial decision was rendered.

Discovery

See Nebraska Rules for Discovery, in PDF or HTML formats.

Disestablishment and related

(See also Paternity)

☆ The Unicameral upended the legal apple cart on this issue in 2008, by passage of LB 1014 (Section 47). The bill is codified at **§ 43-1412.01:**

§ 43-1412.01. Legal determination of paternity set aside; when; guardian ad litem; court orders.

An individual may file a complaint for relief and the court may set aside a final judgment, court order, administrative order, obligation to pay child support, or any other legal determination of

paternity if a scientifically reliable genetic test performed in accordance with sections 43-1401 to 43-1418 establishes the exclusion of the individual named as a father in the legal determination. The court shall appoint a guardian *ad litem* to represent the interest of the child. The filing party shall pay the costs of such test. A court that sets aside a determination of paternity in accordance with this section shall order completion of a new birth record and may order any other appropriate relief, including setting aside an obligation to pay child support. No support order may be retroactively modified, but may be modified with respect to any period during which there is a pending complaint for relief from a determination of paternity under this section, but only from the date that notice of the complaint was served on the nonfiling party. *A court shall not grant relief from determination of paternity if the individual named as father (1) completed a notarized acknowledgment of paternity pursuant to section 43-1408.01,* (2) adopted the child, or (3) knew that the child was conceived through artificial insemination.
Source: Laws 2008, LB1014, § 47.

It remains to be seen how courts and litigants will apply this statute. The language is permissive: Courts MAY set aside paternity judgments if the legal father steps through all the right hoops, and is not listed on a notarized acknowledgment of paternity. Guardians *ad litem* MUST be appointed first to represent the child's interests, and I suspect their findings and recommendations to the court will be given deference.

Query: does the court consider what is in the "best interests" of the minor child? What is in the best interests? On one level, it would be clear that a child with two parents would stand in better position financially than the same child with only one parent. This would include the right to receive dependent social security benefits should the legally recognized father become disabled or die during the children's minority. Also the child would have the right to inherit from any estate of the father, and possible from his extended family. These are only the financial benefits that could accrue to the child. I will leave it to others to discuss the emotional and societal bonds and benefits the child would potentially receive from having a father. Clearly society and the courts are concerned with other than a pure biological relationship between child and father. Otherwise we would not allow adoptions or anonymous artificial insemination. The Unicameral has opened a Pandora's Box with this legislation, in my opinion. A howitzer has been sent in to swat a fly. I think it is clear that the law already afforded adequate legal protections to men named in lawsuits to be biological parents. You snooze, you lose. That seems no longer to be Nebraska law, however.

In Re Interest of Sarah H., 21 Neb.App. 441, 838 N.W.2d 389 (2013)

- When a dissolution decree includes an order of child support, the issue of paternity is considered adjudicated and the issue of paternity cannot be relitigated between the parties because of the doctrine of res judicata, absent certain limited circumstances.
- Neb. Rev. Stat. § 43-1412.01 (Reissue 2008) provides a means to set aside an otherwise final legal determination of paternity, including an obligation to pay child support.
- Neb. Rev. Stat. § 43-1412.01 (Reissue 2008) overrides *res judicata* principles and allows, in limited circumstances, an adjudicated father to disestablish a prior, final paternity determination based on genetic evidence that the adjudicated father is not the biological father.

Stacy M. v. Jason M., 290 Neb. 141, 858 N.W.2d 852 (2015)

Facts: After his divorce was final H finds out he is not the bio father of the youngest child born into his marriage. He files a motion to terminate his child support, but wants to still be considered the legal father of the minor child. Mother objects.

Held: Father can't have it both ways.

- a finding that an individual is not a biological father is not the equivalent of a finding that an individual is not the legal father. See ***State on behalf of B.M. v. Brian F.***, 288 Neb. 106, 846 N.W.2d 257 (2014).
- Under Nebraska common law, later embodied in Neb. Rev. Stat. § 42-377 (Reissue 2008), legitimacy of children born during wedlock is presumed. This presumption may be rebutted only by clear, satisfactory, and convincing evidence. The testimony or declaration of a husband or wife is not competent to challenge the paternity of a child.
- The district court in a dissolution proceeding has jurisdiction to resolve a disputed issue of paternity. Even if paternity is not directly placed in issue or litigated by the parties to a dissolution proceeding, any dissolution decree which orders child support implicitly makes a final determination of paternity. When the parties fail to submit evidence at the dissolution proceeding rebutting the presumption of paternity, the dissolution court can find paternity based on the presumption alone.
- …a dissolution decree which orders child support is a legal determination of paternity. As a result, any dissolution decree that orders child support is res judicata on the issue of paternity
- However, in 2008, the Legislature enacted § 43-1412.01, which overrides res judicata principles and allows, in limited circumstances, an adjudicated father to disestablish a prior, final paternity determination based on genetic evidence that the adjudicated father is not the biological father. Section 43-1412.01 gives the court discretion to determine whether disestablishment of paternity is appropriate in light of both the adjudicated father's interests and the best interests of the child.
- …the language of the statute does not provide any support for the equitable relief which Jason seeks. Rather, it permits but does not require a court to set aside a child support obligation when paternity has been disestablished. It does not authorize any change in child support without such disestablishment.
- The public policy of this state provides that parents have a duty to support their minor children until they reach majority or are emancipated, and a parent is not relieved of this duty by virtue of divorce. The obligation of support is a duty of a legally determined parent.

State on behalf of B.M. v. Brian F., 288 Neb. 106 846 N.W. 2d 257 (2014)

In what is destined to be the seminal Nebraska disestablishment case, the Supreme Court reverses a district judge who took matters into his own hands, and disestablished paternity without being asked to do so, based upon the results of DNA testing completed 17 years after the legal father signed an acknowledgment of paternity. The man then defaulted after the State filed a paternity action in 1996. (Note: The acknowledgment of paternity statute has been amended since 1996.)

- A judicial abuse of discretion exists when the reasons or rulings of a trial judge are clearly untenable, unfairly depriving a litigant of a substantial right and denying just results in matters submitted for disposition.
- [A]ctions to determine paternity and parental support are governed by §§ 43-1401 through 43-1418.

- We have recognized that paternity proceedings are purely statutory and that because the statutes regarding paternity proceedings modify the common law, they must be strictly construed. See ***Cross v. Perreten***, 257 Neb. 776, 600 N.W.2d 780 (1999).
- because Brian was still legally the father under the paternity decree, the district court further erred when it terminated child support based solely on the finding that Brian was not the biological father of the child.
- "the proper legal effect of a signed, unchallenged acknowledgment of paternity is a finding that the individual who signed as the father is in fact the legal father" – citing *Cesar C. v. Alicia L.*, 281 Neb. 979, 985, 800 N.W.2d 249, 254 (2011)
- [W]e do not think it is prudent to invite adjudicated fathers who are subject to the pre-1997 version of § 43-1409, to sever their parent-child relationship merely by filing any pleading to which the results of genetic testing are attached.
- [W]e have recognized that a child can be harmed when a father seeks to set aside paternity. See ***Alisha C. v. Jeremy C.,*** 283 Neb. 340, 808 N.W.2d 875 (2012). The legal effect of disestablishment can cut off inheritance. See Neb. Rev. Stat. §§ 30-2201 to 30-2902.
- We do not believe that rebutting or collaterally attacking the facts in an acknowledgment which served as a basis for the factual finding that Brian was "actually the father" in the paternity action is tantamount to vacating the decree containing the judgment that Brian is the legal father and ordering child support. See § 43-1412(1).
- [A] finding that an individual is not a biological father is not the equivalent of a finding that an individual is not the legal father.
- The paramount concern in child support cases, whether in the original proceeding or subsequent modification, remains the best interests of the child.
- Section 43-1412.01, operative in 2008, generally provides a statutory remedy by which to set aside a judgment of paternity, thus disestablishing the parent-child relationship, including where genetic testing excludes the individual as the father. Section 43-1412.01 provides:

  > An individual may file a complaint for relief and the court may set aside a final judgment, court order, administrative order, obligation to pay child support, or any other legal determination of paternity if a scientifically reliable genetic test performed in accordance with sections 43-1401 to 43-1418 establishes the exclusion of the individual named as a father in the legal determination. . . . A court shall not grant relief from determination of paternity if the individual named as father (1) completed a notarized acknowledgment of paternity pursuant to section 43-1408.01, (2) adopted the child, or (3) knew that the child was conceived through artificial insemination.
- It has been observed that "finality of judgments is an important concept in our system of jurisprudence, because it enables the parties to litigation to know once and for all their rights and obligations." *Dougherty v. Swift-Eckrich, Inc.*, 4 Neb. App. 653, 658, 547 N.W.2d 522, 525 (1996). Nevertheless, in civil cases, a court of general jurisdiction has inherent power to vacate or modify its own judgment during the term in which it was issued.
- The standard for showing fraud or newly discovered evidence is high. ***Alisha C. v. Jeremy C.***, 283 Neb. 340, 808 N.W.2d 875 (2012).
- We strictly construe paternity statutes, and we are not inclined to create a novel remedy by broadly reading an evidentiary paternity statute. Section 43-1409 as it existed in 1995 does not create a remedy to vacate the judgment of paternity.

- [N]othing in our case law, the Nebraska statutes, or the Nebraska Child Support Guidelines indicates that genetic testing excluding a legal father as the biological father of a child is sufficient evidence standing alone to establish a material change in circumstances warranting the modification or termination of child support which has previously been ordered in an existing paternity and child support judgment.
- It was an abuse of discretion to terminate child support based solely on genetic test results when the child support obligation had its origins in the unchallenged judgment of paternity.
- Upon the entry of judgment and passage of the appeal time, the evidence supporting the judgment no longer mattered. From that point forward, the judgment became controlling in establishing Brian as the child's legal father. *(Concurring Opinion of Judge Cassel)*
- When a judgment becomes final, it is simply too late to rebut an evidentiary presumption upon which it is based. Were that not so, and if parties were free to challenge a judgment years after its entry simply by showing that the underlying facts are different than what the court determined them to be, no judgment would ever be final. *(Judge Stephen, Concurrence)*
- This result demonstrates that without a remedial procedure in place, hospital acknowledgments of paternity easily become a child support system that is unconcerned with actual paternity. *(Dissenting opinion of Justices Connolly and McCormack)*

Cases pre-existing the passage of § 43-1412.01 (Unicameral 2008) include:

Day vs. Heller, 264 Neb. 934, 653 N.W.2d 475 (2002)

Facts: *Wife became pregnant during marriage with child of boyfriend. Wife held out pregnancy and child born to her as being husband's child. Parties divorced 4 years after birth of child. Husband was ordered to pay child support and granted visitation. Eight years of child support payments and visitations later ex-husband discovered that he was not biological father of child. He was pissed, and sued.*

- **Question Presented:** Will Nebraska recognize a tort or assumpsit cause of action against a mother for her misrepresentation and concealment of biological fatherhood?
- **Holding:** In effect, ex-husband is saying, "He is not my son; I want my money back." "[A] *tort or assumpsit claim that seeks to recover for the creation of a parent-child relationship has the Effect of saying "I wish you had never been born" to a child who, before the revelation of biological fatherhood, was under the impression that he or she had a father who loved him or her." "We decline to allow a party to use a tort or assumpsit claim as a means for sending or reinforcing this message."*
- Ex-husband's tort and assumpsit causes of action are **contrary to public policy**. *"We do not believe that having a close and loving relationship "imposed" on one because of a misrepresentation of biological fatherhood is the type of "harm" that the law should attempt to remedy.*
- It does not lie within the power of any judicial system to remedy all human wrongs, and to attempt to correct such wrongs or give relief from their effects may do more social damage than if the law leaves them alone. (citation omitted)
- The court does not address ex-husbands res judicata and collateral estoppel arguments.

State v. Cummings, 2 Neb. App. 820, 515 N.W.2d 680 (1994)

- Plaintiffs are entitled to a default judgment without offering evidence in support of the allegations of their petition, except allegations of value and amount of damage. ***Weir v. Woodruff***, 107 Neb. 585, 186 N.W. 988 (1922)

State on behalf of L.L.B. v. Hill, 268 Neb. 355, 682 NW2d 709 (2004)

This case involves the disestablishment of paternity some 5 years after the default order was entered. No "replacement father" was involved. The state did not object to the disestablishment after DNA tests came back showing the legal father to not be the biological dad. The state appealed the sole issue of the district court's vacation of child support arrears. The supreme court reversed the vacation on equitable grounds. Query: does this case open the door to legal fathers challenging existing paternity orders years later?

- **Judgments: Equity: Time.** A litigant seeking the vacation or modification of a prior judgment after term may take one of two routes. The litigant may proceed either under Neb. Rev. Stat. §25-2001 (Cum. Supp. 2002) or under the district court's independent equity jurisdiction.
- To be entitled to equitable relief from a judgment, a party must show that the situation is not due to his or her fault, neglect, or carelessness.

Dissolution and Related

§42-372. Decree; appeals

(1) A decree dissolving a marriage becomes final and operative, except for the purpose of review by appeal, at the time specified in section 42-372.01.

(2) For the purpose of review by appeal, the decree shall be treated as a final order as soon as it is entered. If an appeal is instituted that does not challenge the finding that the marriage is irretrievably broken, then the decree shall become final and operative, as to that portion of the decree that dissolves the marriage, at the time specified in section 42-372.01 as if no such appeal had been instituted. If an appeal is instituted within thirty days after the date the decree is entered that challenges the finding that the marriage is irretrievably broken, such decree does not become final until such proceedings are finally determined or the date of death of one of the parties to the dissolution, whichever occurs first.

Source: Laws 1972, LB 820, § 26; Laws 1986, LB 600, § 10; Laws 1987, LB 33, § 8; Laws 1995, LB 544, § 1; Laws 1997, LB 77, §1; Laws 2000, LB 921, § 33.

Alicia C. v. Jeremy C., 283 Neb. 340, 808 N.W.2d 875 (2012)

- Under Nebraska common law, later embodied in Neb. Rev. Stat. § 42-377 (Reissue 2008), legitimacy of children born during wedlock is presumed, and this presumption may be rebutted only by clear, satisfactory, and convincing evidence.
- When the parties fail to submit evidence at the dissolution proceeding rebutting the presumption of paternity, the dissolution court can find paternity based on the presumption alone.
- [A]ny dissolution decree which orders child support implicitly makes a final determination of paternity.
- A dissolution decree that orders child support is *res judicata* on the issue of paternity.
- [S]tatutes (allowing for the disestablishment of paternity) have largely been in response to a "disestablishment movement" which began after high profile cases in which men felt defrauded

by the child support system which forced them to support children they were not genetically related to.

- Rev. Stat. § 43-1412.01 (Reissue 2008) overrides res judicata principles and allows, in limited circumstances, an adjudicated father to disestablish a prior, final paternity determination based on genetic evidence that the adjudicated father is not the biological father.
- § 43-1412.01 applies to paternity determinations both when the child is born into a marriage as well as when the child is born to unmarried parents.
- In enacting a statute, the Legislature must be presumed to have knowledge of all previous legislation upon the subject.
- If the language of a statute is clear, the words of such statute are the end of any judicial inquiry regarding its meaning.
- Neb. Rev. Stat. § 43-1412.01 (Reissue 2008) gives the court discretion to determine whether disestablishment of paternity is appropriate in light of both the adjudicated father's interests and the best interests of the child.
- [I]t is hard to imagine, as a practical matter, a circumstance after 2008 in which an out-of-wedlock child's paternity would be established by means other than notarized acknowledgment or genetic testing.
- [G]enetic testing can now relieve presumed fathers of their traditional support obligations, while at the same time imposing support obligations on men who engaged in out-of-wedlock relations which resulted in the child's conception.
- While the presumption of paternity has not changed, its role in protecting children has become less vital with the advent of genetic testing and the shifting focus of the law from marital to biological ties.
- With changing societal values regarding illegitimacy and the advent of genetic testing, the marital presumption has become less important as a tool for ensuring a child's support by both parents, and the legal environment has become more concerned with biological ties to fatherhood.
- While (§ 43-1412.01) fails to precisely detail what circumstances should be considered in weighing the interests of the parties, we believe it would be appropriate for the court to consider the child's age, the length of time since the establishment of paternity, the previous relationship between the child and the established father, and the possibility that the child could benefit from establishing the child's actual paternity.

Nebraska v. Storz, 235 Neb. 368, 455 N.W.2d 182 (1990)

- Child conceived after the divorce decree was signed but before the parents' divorce decree was final is a child of the marriage, and only the court which heard the divorce has the jurisdiction to address issues relating to the support of the child.

☆ **State ex rel. Storz v. Storz**, 235 Neb. 368, 455 N.W.2d 182 (1990)
Nemec v. Nemec, 219 Neb. 891, 367 N.W.2d 705 (1985)

- full and complete general jurisdiction over the entire marital relationship and all related matters, including child custody and support, is vested in the district court in which a petition for dissolution of a marriage is properly filed
- Because the child was conceived while the father and mother were married [*even though conception occurred several months following the signing of the divorce decree*] and is the

product of that marriage, custody and support issues respecting the child must be determined through a modification of the dissolution decree rather than through a paternity action.

Domicile

(See also : *Removal of Minor Child from Nebraska*)

Clymer v. La Velle, 194 Neb. 91, 230 N.W.2d 213 (1975)
Palagi v. Palagi, 10 Neb. App. 231, 627 N.W.2d 765 (2001)
A minor child who is away at college still retains the home state domicile of the custodial parent, and still remains an unemancipated child.

- Domicile is that place where a person has his or her true, fixed, and permanent home.
- The habitation or residence of a minor child is, by operation of law, determined and fixed by that of the parent legally entitled to the custody and control of the child unless the parent has voluntarily surrendered such right.
- Where parents of the child are separated by a decree of divorce, the child's domicile normally follows that of the parent who has custody by virtue of the decree of divorce. *This is true without regard to the child's physical location.*
- A minor child may acquire a domicile of choice only if he or she is emancipated.

Due Process

§ 42-355. Defendant; proper service or appearance.
No marriage shall be dissolved or legal separation decreed unless the defendant has been properly served with process or entered an appearance in the case.
Source:Laws 1972, LB 820, § 9; Laws 1983, LB 447, § 48; Laws 2004, LB 1207, § 22.

Conn v. Conn, 13 Neb. App. 472, 695 N.W.2d 674 (2005)

- A prisoner has no absolute constitutional right to be released from prison so that the prisoner can be present at a hearing in a civil action.
- The U.S. and Nebraska Constitutions provide that no person shall be deprived of life, liberty, or property without due process of law. U.S. Const. amends. V and XIV; Neb. Const. art. I, § 3. "When a person has a right to be heard, procedural due process includes . . . a reasonable opportunity to refute or defend against a charge or accusation [and] a reasonable opportunity to confront and cross-examine adverse witnesses and present evidence on the charge or accusation . . . ."
- Although due process does not require the appointment of counsel to represent a prisoner in a private civil matter, due process does require that the prisoner.receive meaningful access to the courts to defend against suits brought against him or her.
- Where due process so requires, we do not read **§42-356** to prohibit a trial court from allowing one of the parties to appear **by telephone** during a final hearing held in open court upon the oral testimony of witnesses.

Turner v. Rogers, (2011) *(See also page 32 of this outline)*
Issues Presented: (1) whether the Supreme Court of South Carolina erred in holding – in conflict with twenty-two federal courts of appeals and state courts of last resort – that an indigent defendant has no

constitutional right to appointed counsel at a civil contempt proceeding that results in his incarceration, and (2) does the Court have jurisdiction to review the decision of the South Carolina Supreme Court?

Held: We …hold that the Due Process Clause does not automatically require the provision of counsel at civil contempt proceedings to an indigent individual who is subject to a child support order, even if that individual faces incarceration (for up to a year). In particular, that Clause does not require the provision of counsel where the opposing parent or other custodian (to whom support funds are owed) is not represented by counsel and the State provides alternative procedural safeguards equivalent to those we have mentioned (adequate notice of the importance of ability to pay, fair opportunity to present, and to dispute, relevant information, and court findings).

Since the NCP did not have clear notice that ability to pay would be the critical question in this proceeding, nor was he provided with information that would have allowed the NCP to disclose such information, the South Carolina courts erred in finding him able to pay and thus in civil contempt.

- We must decide whether the Fourteenth Amendment's Due Process Clause requires the State to provide counsel (at a **civil** contempt hearing) to an indigent person potentially faced with such incarceration.
- We conclude that where as here the custodial parent (entitled to receive the support) is unrepresented by counsel, the State need not provide counsel to the noncustodial parent (required to provide the support). But we attach an important caveat, namely, that the State must nonetheless have in place alternative procedures that assure a fundamentally fair determination of the critical incarceration-related question, whether the supporting parent is able to comply with the support order.
- The Due Process Clause of the 14th Amendment, while it does not require a state to provide counsel at civil contempt proceedings to indigent individuals, even if incarceration is a possibility, does require some safeguards to prevent the erroneous deprivation of liberty. South Carolina Supreme Court reversed and remanded.
- To determine whether a right to counsel is required here, opposing interests and the probable value of "additional or substitute procedural safeguards" must be taken into account.
- An available set of procedural safeguards, if employed together, can significantly reduce the risk of an erroneous deprivation of liberty. These include:

  (1) notice to the defendant that his "ability to pay" is a critical issue in the contempt proceeding;

  (2) the use of a form (or the equivalent) to elicit relevant financial information from him;

  (3) an opportunity at the hearing for him to respond to statements and questions about his financial status; and

  (4) an express finding by the court that the defendant has the ability to pay.
- The record indicates that Turner received neither counsel nor the benefit of alternative procedures like those we have described. He did not receive clear notice that his ability to pay would constitute the critical question in his civil contempt proceeding. No one provided him with a form (or the equivalent) designed to elicit information about his financial circumstances. The court did not find that Turner was able to pay his arrearage, but instead left the relevant "finding" section of the contempt order blank. The court nonetheless found Turner in contempt and ordered him incarcerated. Under these circumstances Turner's incarceration violated the Due Process Clause.

- This decision does not address civil contempt proceedings where the underlying support payment is owed to the State. (likely in such matters the right of an indigent NCP to court appointed counsel would be guaranteed.)

Duty to Support; Duration of Support

§42-371.01 *Duty to pay child support; termination, when; procedure; State Court Administrator; duties.*

(1) An obligor's duty to pay child support for a child terminates when (a) the child reaches nineteen years of age, (b) the child marries, (c) the child dies, or (d) the child is emancipated by a court of competent jurisdiction, unless the court order for child support specifically extends child support after such circumstances. (2) The termination of child support does not relieve the obligor from the duty to pay any unpaid child support obligations owed or in arrears. (3) The obligor may provide written application for termination of a child support order when the child being supported reaches nineteen years of age, marries, dies, or is otherwise emancipated. The application shall be filed with the clerk of the district court where child support was ordered. A certified copy of the birth certificate, marriage license, death certificate, or court order of emancipation or an abstract of marriage as defined in section 71-601.01 shall accompany the application for termination of the child support. The clerk of the district court shall send notice of the filing of the child support termination application to the last-known address of the obligee. The notice shall inform the obligee that if he or she does not file a written objection within thirty days after the date the notice was mailed, **child support may be terminated without further notice.** The court shall terminate child support if no written objection has been filed within thirty days after the date the clerk's notice to the obligee was mailed, the forms and procedures have been complied with, and the court believes that a hearing on the matter is not required.

(4) The State Court Administrator shall develop uniform procedures and forms to be used to terminate child support.

Source: Laws 2006, LB 1115, § 30.

§43-504. "(1) The term dependent child shall mean a child under the age of nineteen years who is living with a relative or with a caretaker who is the child's legal guardian or conservator in a place of residence maintained by one or more of such relatives or caretakers as his, her, or their own home, or which child has been removed from the home of his or her father, mother, grandfather, grandmother, brother, sister, stepfather, stepmother, stepbrother, stepsister, uncle, aunt, first or second cousin, nephew, or niece as a result of judicial determination .."

Source: Laws 2007, LB 351, §1

§ 43-1410. Child support; decree or approved settlement; effect after death of parent.
Any judicially approved settlement or order of support made by a court having jurisdiction in the premises shall be binding on the legal representatives of the father or mother in the event of his or her death, to the same extent as other contractual obligations and judicial judgments or decrees.

Source: Laws 1941, c. 81, §10, p. 325; C.S.Supp.,1941, § 43-710; R.S.1943, (1983), §13-110

Cavanaugh v. DeBaudiniere, 1 Neb. App. 204, 493 N.W.2d 197 (1992)

- The Nebraska Supreme Court, in **Stuhr v. Stuhr**, 240 Neb. 239, 481 N.W.2d 212 (1992), held that in the absence of a statutory provision otherwise, in a child custody controversy, a fit biological or adoptive parent has a superior right to custody of the child. The right of a biological parent to custody of the minor child is not lightly to be set aside in favor of more distant relatives or unrelated parties, and the courts may not deprive a parent of such custody unless the biological parent is shown to be unfit or to have forfeited his or her superior right to such custody.
- [A]n **ex-stepparent** is entitled to visitation of a former stepchild, based upon the doctrine of in loco parentis, where the stepparent and a young child have lived in a home environment and developed deep and lasting bonds of mutual affection. The courts have acknowledged the fact that a stepparent may be the only parent the child has truly known and loved during its minority. Therefore, rejection of visitation privileges cannot be based upon the mere fact that the person is not the biological parent, but is the stepparent. Thus, when the parties have developed a bond and the status of in loco parentis, the courts have protected the relationship by conferring rights of visitation. Should Thomas desire to continue such status, the district court shall fix his rights of visitation and determine the amount of **child support** payable by (the now ex-husband) for the support of (the child).

Deterding v. Deterding, 18 Neb. App. 922, 797 N.W.2d 33 (2011)

Facts: Child conceived through artificial insemination during the marriage. Husband files for divorce and claims he is not the bio father, so he shouldn't have to pay support. Mom agrees. Court of Appeals does not.

- We are not bound by the parties' agreement regarding child custody and alimony.
- Parties in a proceeding to dissolve a marriage cannot control the disposition of matters pertaining to minor children by agreement. *Weinand v. Weinand*, 260 Neb. 146, 616 N.W.2d 1 (2000).
- If [the husband] consented to [the wife] being artificially inseminated, he made a decision to bring a child into the world, and he should not be permitted to abandon his responsibility to that child simply because he is not the biological father.
- Both the Legislature and the Nebraska Supreme Court have recognized that there are situations where a person who is not a biological parent may still have a responsibility to support a child.
- if [husband] knew and consented to [wife's] being artificially inseminated, he has some responsibility to support the child even if he is not her biological parent.
- the term "parent" is not specifically defined in the statutes.
- [Husband] still may be responsible for supporting the child if he has assumed, in loco parentis, the obligations incident to a parental relationship.
- The Nebraska Supreme Court has held that a person standing *in loco parentis* to a child is one who has put himself or herself in the situation of a lawful parent by assuming the obligations incident to the parental relationship, without going through the formalities necessary to a legal adoption, and the rights, duties, and liabilities of such person are the same as those of the lawful parent. *Weinand v. Weinand, supra*; *Hickenbottom v. Hickenbottom*, 239 Neb. 579, 477 N.W.2d 8 (1991).

- We do find... that the district court erred in failing to award child support simply because [the husband] is not the child's biological father. The paramount concern and question in determining child support is the best interests of the child.

Druba v. Druba , 238 Neb. 279, 470 N.W.2d 176 (1991)

- It is obvious that in this day and age, if a parent does not wish to provide such [health] insurance for his children, that parent must be ready to pay for health care for the children.

Finnern v. Bruner, 167 Neb. 281, 92 N.W.2d 785 (1958)

- A decree awarding alimony and child support in an action for divorce does not become dormant by lapse of time and the defense of the statute of limitations is not available to defeat recovery of delinquent payments.

Foster v. Foster, 266 Neb. 32, 662 NW2d 191 (2003)

- It is clear that the marriage dissolution statutes do not empower district courts to order a parent to contribute to the support of children beyond their majority.

Groseth v. Groseth, 257 Neb. 525, 600 N.W.2d 159 (1999)

- Courts have jurisdiction to enforce court-approved settlement agreements wherein a parent *voluntarily* promises to support a child beyond the age of majority.

Henderson v. Henderson, 264 Neb. 916, 653 N.W.2d 226 (2002)

- Parents have a duty to support their minor children until they reach majority or are emancipated, and a parent is not relieved of this duty by virtue of divorce. [see Neb. Rev. Stat. § 42-371.01]
- In effect, the mother asks us to read the word "minor" out of the statute and to add words such as to include adult children who are handicapped to the extent they cannot support themselves. More than that, she wishes us to write into the statute a requirement that divorced parents maintain their handicapped offspring in an institution of higher learning to an indefinite age. This we cannot do.

Henke v. Guerrero, 13 Neb. App. 337, 692 N.W.2d 762 (2005)

- The requirement of support begins at the time of the birth of a child, whether the child is born in lawful wedlock or otherwise.

Kracman v. Kracman, 232 Neb. 152, 440 N.W.2d 194 (1989)

In this case, custodial parent sought to waive all past due child support as part of a joint application to modify support. The court refused to go along with the stipulation.

- Questions of custody and support are not controllable by agreement of the parties.

Eliker v. Eliker, 206 Neb. 764, 295 N.W.2d 268 (1980)

- Courts are without authority to reduce the amount of accrued child support (absent equitable estoppel).

Meyers v. Meyers, 222 Neb. 370, 383 N.W.2d 784 (1986).

- § 42-364 is clear and unambiguous in conferring authority to compel divorced parents to

support minor children, but also clear and unambiguous in conferring no authority for the support of adult children.

- The dissolution statutes do not empower courts to order a parent to contribute to the support of an adult handicapped child.

But distinguish:

Parents *can* agree to enter into a property settlement agreement that, among other things, calls for one parent to support a child of the marriage beyond that child's emancipation. Such agreements may be binding and enforceable by the district court (but Not the child support authorities).

Morrill County v. Darsaklis, 7 Neb. App. 489, 584 N.W.2d 36 (1998)

- A parent is required to provide his or her child with the basic necessities of life. Both parents have a duty to support their minor children, and the amount of child support awarded is a function of the status, character, and situation of the parties.
- The primary consideration in determining the level of child support payments is the best interests of the child.
- Nebraska courts have consistently examined a parent's earning capacity, as well as actual wages, to determine child support. This is particularly apposite when a parent receives valuable benefits which are not paid as cash, and also when a parent unjustifiably chooses to be underemployed or unemployed. See, also, Nebraska Child Support Guidelines, paragraph C(5), which allows deviation from application of the guidelines if application of them would result in an unjust or inappropriate result.

See Guidelines **§ 4-203** and **§ 4-204**

Spencer v. Spencer, 165 Neb. 675, 87 N.W.2d 212 (1957)

- [A]n allowance for child support in a fixed sum payable monthly...survives the death of the father of the minor children. ... Especially is this so where the divorce decree is made a lien upon the father's estate.
- Section 42-312, R.R.S.1943 (repealed 1972), provides: 'If the circumstances of the parties shall change, or it shall be to the best interests of the children, the court may afterwards from time to time on its own motion or on the petition of either parent revise or alter, to any extent, the decree so far as it concerns the care, custody and maintenance of the children or any of them.'

State on Behalf of J. R. v. Mendoza, 240 Neb. 149, 481 N.W.2d 165 (1992)

- Stepparent must legally support minor child living in his/her home. Obligation ends when child emancipates, or when stepparent becomes divorced from parent of child.
  See Neb. Rev. Stat. §28-705(1)

Sylvis v. Walling, 248 Neb. 168, 532 N.W.2d 312 (1995).

- The duty to support one's child begins at birth.

Willers v. Willers, 255 Neb. 769, 587 N.W.2d 390 (1998)

- We ... find that the parental duty to support minor children can be enforced retroactively to the date of the divorce decree where a child is born in wedlock, the parents are subsequently divorced, but the divorce decree is silent on the issue of child support.

Wills v. Wills, 16 Neb.App. 559, 745 N.W.2d 924 (2008)
The age of emancipation is never modifiable

- Under Neb.Rev.Stat. § 42-746(d) (Reissue 2004), the law of the state which issued the initial controlling order governs the duration of the obligation of support.
- Section 42-746 states, in pertinent part:

  I Except as otherwise provided in section 42-747.03 , a tribunal of this state shall not modify any aspect of a child support order that cannot be modified under the law of the issuing state, including the duration of the obligation of support....

  (d) In a proceeding to modify a child support order, the law of the state that is determined to have issued the initial controlling order governs the duration of the obligation of support. The obligor's fulfillment of the duty of support established by that order precludes imposition of a further obligation of support by a tribunal of this state.
- *See* ***Groseth v. Groseth,*** 257 Neb. 525, 600 N.W.2d 159 (1999)

Earned Income Tax Credit Information

The following information has been provided by Kelly Boswell, Legal Aid of Nebraska, Director, Low-Income Tax Clinic

The child tax credit (CTC) and earned income tax credit (EITC) are different and often confused. The CTC is a credit of $1,000 per qualifying child that you also need to claim the dependency exemption to qualify for. The EITC is a credit that varies in amount based on how many kids (0,1,2,or 3+) and how much "earned" income you have. Anyone can file a tax return as long as they have income. There is no floor for filing although you are not legally required to file unless your income is over the base exemption and standard deduction amounts. Even if you are not required to file, you may wish to do so in order to qualify for a refund.

For certain low-income individuals the impact of the EITC can be life changing. For example in 2011 a single working mother with 2 kids made $15,000 at her job. If this was her only income she would be entitled to $5,112 in EITC alone. This would not include any amounts she would gain from other credits (such as the CTC) or from any additional tax withholding.

The EITC cannot be "given" to the non-custodial parent. In order to qualify, you must have the child living with you for at least 6 months of the tax year. You cannot waive this requirement and the 8832 or an order from the court does not change the eligibility. Like the ability to claim Head of Household filing status and claim child care expenses, the non-custodial parent can't claim this credit. Because of the large amounts of money involved tax fraud on this issue is rampant. Many taxpayers do not understand when they get to "claim" the child that they don't get all of the tax benefits. Many tax preparers (and attorneys) don't get it either. This year the IRS issued a new checklist to help tax preparers reduce the likelihood of fraudulent EITC claims.

The non-custodial parent can claim the CTC if they are also allowed to claim the dependency exemption, which now typically requires the 8332 form to be completed as well.

While the CTC is usually worth $1,000 per child (applied to tax that you owe) you get a refund of any "unused" portion of the credit by applying for the "Additional Child Tax Credit". The amount over what you owe in taxes is partially refundable and there is a formula the IRS applies to determine the exact amount. For low-income taxpayers it is usually the full remaining amount.

There is lots of great information on these issues at the IRS website.
I recommend Publication 501, pages 10-15, for a great discussion of child claiming issues including an entire page of examples.
http://www.irs.gov/pub/irs-pdf/p501.pdf

Earning Capacity

Claborn v. Claborn, 267 Neb. 201, 673 N.W.2d 533 (2004)

- Paragraph D [now § 4-204] of the guidelines provides that if applicable, earning capacity may be considered in lieu of a parent's actual, present income and may include factors such as work history, education, occupational skills, and job opportunities.

Collins v. Collins, 19 Neb. App. 529, 808 N.W.2d 905 (2012)

***Facts**: State filed complaint to modify and increase child support from $0 to $168/mo, and imputed minimum wage income to the noncustodial parent, who was employed at a higher rate of pay at the time the complaint was filed, but who was unemployed at time of trial. Evidence elicited showed that parent had applied for work at at least 10 businesses per week (32 in 3 weeks), in a variety of fields, but could not get hired.*

***Held**: State failed to meet its burden of proof to show parent had earning capacity of minimum wage income.*

- [E]arning capacity should be used only if there is evidence that the parent can realize that capacity through reasonable efforts.
- The party seeking the modification has the burden to produce sufficient proof that a material change of circumstances has occurred that warrants a modification.
- The parties ask us to decide whether the material change of circumstances must exist at the time of filing of the complaint to modify or at the time of the modification trial. We hold that the change in circumstances must exist at the time of the modification trial for two reasons. First, because the court's decision to modify child support must be based upon the evidence presented in support of the complaint to modify. Second, because the change in circumstances cannot be temporary.
- it would be improper for the court to focus on anything but the most recent circumstances ascertainable from the evidence.
- ...such change of circumstances should exist at the time of trial and not merely at the time of the complaint to modify.
- Lee's decrease in income since the initial complaint to modify was not due to her fault or voluntary choice. On the contrary, Lee has remained unemployed despite numerous efforts on her part to find employment.
- Although Lee's employment ...lasted for more than 3 months, given that it had effectively terminated, it could not be reasonably expected to last for an additional 6 months. Thus, the

State's evidence failed to trigger the rebuttable presumption of a change of circumstances under § 4-217.

See dissent:

- The Nebraska Supreme Court has held that a material change in circumstances is a concept which eludes precise, concrete definition. See *Dobbins v. Dobbins*, 226 Neb. 465, 411 N.W.2d 644 (1987).

Cooper v. Cooper, 8 Neb. App. 532, 598 N.W.2d 474 (1999)

- the trial court did not abuse its discretion when considering the earning capacity of a mother, who chose to work only part time in order to spend more time with her children, rather than her actual income when no specific evidence showed an inability to spend adequate time with the children while she was working 40 hours per week.

Dworak v. Fugit, 1 Neb. App. 332, 495 N.W.2d 47 (1992)

Holding: *Earning capacity, and not mere income, is what a court should focus on*

- The amount of child support awarded is a function of the status, character, and situation of the parties.... The primary consideration in determining the level of child support payments is the best interests of the child.

Henke v. Guerrero, 13 Neb. App. 337, 692 N.W.2d 762 (2005)

- Child support may be based on a parent's earning capacity when a parent voluntarily leaves employment and a reduction in that parent's support obligation would seriously impair the needs of the children.
- Earning capacity may be used as a basis for an initial determination of child support under the Nebraska Child Support Guidelines where *evidence is presented* that the parent is capable of realizing such capacity through reasonable effort.

Johnson v. Johnson, 20 Neb. App. 895, 834 N.W.2d 812 (2013)

***Facts*:** Husband had been earning $140,000/yr, but at the time of the divorce decree he had quit that job due to stress, and was unemployed. He hoped to start up his own business, and resume earning about the same rate of pay as his old job. CS and alimony were by agreement based on him earning $140k a year. He remained unemployed for 3 years before finding a job paying only $75K. So dad then filed for a downward mod. Trial court refused to go along.

Held: Reversed.

- When the evidence demonstrates that the parent is unable to realize a particular earning capacity by reasonable efforts, it is clearly untenable for the trial court to attribute that earning capacity to the parent for purposes of determining child support
- while it is true that Benjamin voluntarily chose to leave the employment through which he had realized the $140,000-per-year earning capacity throughout the marriage, the record is clear that he did so prior to the dissolution proceedings and the dissolution decree. This is not a case where a parent has voluntarily left employment after a support order was entered and has sought to reduce his or her obligation as a result.
- there is no evidence in the record to demonstrate that Benjamin's voluntarily leaving his prior employment was not done in good faith, and his willingness to contemplate continuing the same earning capacity and exhaust his retirement account to keep his obligations current despite a lack of income for several years suggests that there was no bad faith.

- the decision of whether to modify a child support obligation must be based upon the evidence presented by the parties and that it would be improper for the court to focus on anything but the most recent circumstances ascertainable from the evidence. *Collins v. Collins*, 19 Neb. App. 529, 808 N.W.2d 905 (2012).
- *This is where it gets interesting*: Even if [the father's] earning capacity, as opposed to actual income, was the key factor when determining his income, his monthly expenses would clearly be relevant to determining his ability to pay a support award.

Lainson v. Lainson, 219 Neb. 170, 362 N.W.2d 53 (1985)

- Earning capacity, as used in [§ 42-364 (4)], means the overall capability of a parent to make child support payments based on the overall situation of the parent making such payments, including **investment income**, and is not limited to the ability to earn a wage.

Mehne v. Hess, 4 Neb. App. 935, 553 N.W.2d 482 (1996)

- The entire **net** amount received from personal injury settlement award constituted income for child support purposes.

Rauch v. Rauch, 256 Neb. 257, 590 N.W.2d 170 (1999)

- The guidelines provide that if applicable, earning capacity may be considered in lieu of a parent's actual, present income. Nebraska Child Support Guidelines, paragraph D. This is especially true when it appears that the parent is capable of earning more income than is presently being earned. See also ***Gangwish v. Gangwish***, 267 Neb. 901, 678 N.W.2d 503 (2004).
- The court did not abuse its discretion when it deviated from the guidelines by not considering farming losses when calculating the noncustodial parent's monthly income.

Robbins v. Robbins, 3 Neb. App. 953, 536 N.W.2d 77 (1995)

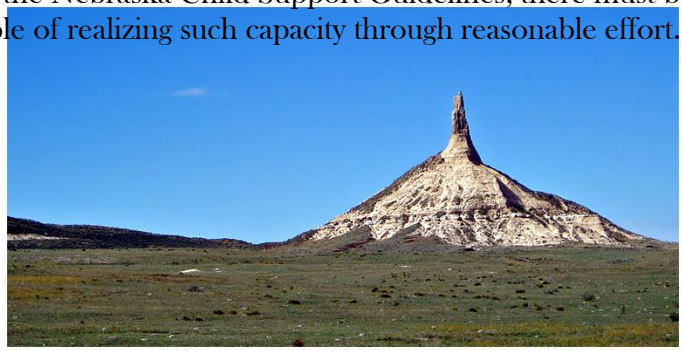
- Basing the child support on the **speculation of a future job** and income is contrary to the dictates of the guidelines.

Shiers v. Shiers, 240 Neb. 856, 485 N.W.2d 574 (1992)

- There is statutory and judicial authority for considering a parent's net earning capacity rather than his or her actual net income in determining child support. *See,* Neb.Rev.Stat. § 42-364(6), *Ristow v. Ristow,* 152 Neb. 615, 41 N.W.2d 924 (1950).
- the Nebraska Supreme Court has held that a court may and should deviate from the child support guidelines when a parent's earning capacity exceeds her or his actual earnings and the application of the guidelines would result in an unfair and inequitable support order.

State v. Porter, 259 Neb. 366, 610 N.W.2d 23 (2000)

- Pursuant to [§42-364 (4)], when earning capacity is used as a basis for an initial determination of child support under the Nebraska Child Support Guidelines, there must be some evidence that the parent is capable of realizing such capacity through reasonable effort.



Emancipation & Related

42-371.01. Duty to pay child support; termination, when; procedure; State Court Administrator; duties.

(1) An obligor's duty to pay child support for a child terminates when (a) the child reaches nineteen years of age, (b) the child marries, (c) the child dies, or (d) the child is emancipated by a court of competent jurisdiction, unless the court order for child support specifically extends child support after such circumstances.

(2) The termination of child support does not relieve the obligor from the duty to pay any unpaid child support obligations owed or in arrears.

(3) The obligor may provide written application for termination of a child support order when the child being supported reaches nineteen years of age, marries, dies, or is otherwise emancipated. The application shall be filed with the clerk of the district court where child support was ordered. A certified copy of the birth certificate, marriage license, death certificate, or court order of emancipation or an abstract of marriage as defined in section 71-601.01 shall accompany the application for termination of the child support. The clerk of the district court shall send notice of the filing of the child support termination application to the last-known address of the obligee. The notice shall inform the obligee that if he or she does not file a written objection within thirty days after the date the notice was mailed, child support may be terminated without further notice. The court shall terminate child support if no written objection has been filed within thirty days after the date the clerk's notice to the obligee was mailed, the forms and procedures have been complied with, and the court believes that a hearing on the matter is not required.

…

Source: Laws 1997, LB 58, § 1; Laws 2000, LB 972, § 16; Laws 2006, LB 1115, § 30.

§43-504. "(1) The term dependent child shall mean a child under the age of nineteen years majority or a child who is under the age of nineteen years who is living with a relative or with a caretaker who is the child's legal guardian or conservator . . .."

§43-289. The marriage of any juvenile committed to a state institution under the age of nineteen years shall not make such juvenile of the age of majority.

Source: Laws 1981, LB 346, § 45; Laws 1985, LB 447, § 26; Laws 1986, LB 1177, § 18; Laws 1989, LB 182, § 15; Laws 1996, LB 1044, § 141.

§43-2101. Persons declared minors; marriage, effect.

All persons under nineteen years of age are declared to be minors, but in case any person marries under the age of nineteen years, his or her minority ends.

Source: Laws 1988, LB 790, § 6.

Groseth v. Groseth, 257 Neb. 525, 600 N.W.2d 159 (1999)

- The age of majority is a "nonmodifiable" provision of a support order when a responding state is modifying a support order issued in another state. See, also, Unif. Interstate Family Support Act, § 611

In re Petition of Anonymous 3, a minor, 279 Neb. 912, 782 N.W.2d 591 (2010)

- Emancipation means the freeing of the child from the care, custody, control, and service of his or her parents.
- The emancipation of a minor may be proved by circumstantial evidence or may be implied from the conduct of the parties.
- Either acts solely initiated and performed by a minor child or acts of a parent inconsistent with the performance of parental obligations may effectuate a minor's emancipation.

Millatmal v. Millatmal, 272 Neb. 452, 723 N.W.2d 79 (2006)

In divorce action between two natives of Pakistan, husband was ordered to pay child support for child who lived with mother, but who was *legally married* under Pakistani law, in an arranged marriage. Child's husband continued to live in Pakistan. No steps had been taken to end that marriage.

- §42-117 (Reissue 2004) – All marriages contracted without this state, which would be valid by the laws of the country in which the same were contracted, shall be valid in all courts and places in this state.

Query: Where does this leave us should a same sex couple legally married in Canada, Europe, D.C and various other United States, seek a separation agreement or divorce here, and child support is an issue? How about a CP who is divorced from a same sex marriage who has a child support order stemming from that divorce? Stay tuned…

- Given that Naheed's Pakistani marriage is considered valid in Nebraska, we conclude that Naheed is emancipated. As a result of her emancipation, the district court abused its discretion in ordering Taj to pay child support to Parveen.
- See, also, ***Randall v. Randall***, 216 Neb. 541, 545, 345 N.W.2d 319, 321 (1984) ("validity of a marriage is generally determined by the law of the place where it was contracted").

Moore v. Bauer, 11 Neb. App. 572, 657 N.W.2d 25 (2003)

- In Nebraska, an obligor's duty to pay child support for a child terminates when the child reaches 19 years of age, the child marries, the child dies, or the child is **emancipated** by a court of competent jurisdiction, unless the court order for child support specifically extends child support after such circumstances. Neb. Rev. Stat. §42-371.01 (Cum. Supp. 2002).

Palagi v. Palagi, 10 Neb. App. 231, 627 N.W.2d 765 (2001)

Facts *:* Nebraska divorce involving a noted Omaha attorney. Parties continued to reside in Nebraska, but 18 yr old child went away to college in Kansas, which has an 18 year age of emancipation. Obligor parent wanted to stop paying child support.

Held: Support continues.

- Emancipation means the freeing of the child for a portion of its minority from the care, custody, control, and service of its parents.
- Emancipation occurs where the parent renounces all the legal duties and voluntarily surrenders all the legal rights of his or her position to the child or to others.
- A child who moves out of a custodial parent's home for a short time is not emancipated if that child continues to be supported by a parent.
- In order to acquire a **domicile** by choice, there must be a concurrence of (1) residence (physical presence) in the new locality and (2) an intention to remain there
- This state also has a significant interest in having its law applied to its divorce decree, which still governs the matter of child support obligations between two of this state's citizens.

- a number of courts have declined to apply either a newly enacted age of majority or another state's age of majority to a preexisting support decree. These cases reason that at the time the support agreement was issued, the parties intended the age of majority in support orders to mean the age of majority existing when the support order originated.
- The habitation or residence of a minor child is, by operation of law, determined and fixed by that of the parent legally entitled to the custody and control of the child unless the parent has voluntarily surrendered such right.
- The only way Eva could acquire a Kansas domicile is by becoming emancipated.
- The emancipation of a child by a parent may be proved by circumstantial evidence or may be implied from the conduct of the parties

Wills v. Wills, 16 Neb. App. 559, 745 N.W.2d 924 (2008)

Facts: 1992 New Mexico divorce. Dad to pay child support until children emancipate under NM law (age 18). Later both parents and the children move to NE, and Mom has NE court modify, and resets emancipation age to 19. Held: No can do! The court takes an extensive look into the various **UIFSA** amendments, and the official commentary accompanying those amendments, in reaching its decision.

- Section 42-746 states, in pertinent part:

  > Except as otherwise provided in section 42-747.03, a tribunal of this state shall not modify any aspect of a child support order that cannot be modified under the law of the issuing state, including the duration of the obligation of support. . . .
  > (d) In a proceeding to modify a child support order, the law of the state that is determined to have issued the initial controlling order governs the duration of the obligation of support. The obligor's fulfillment of the duty of support established by that order precludes imposition of a further obligation of support by a tribunal of this state.

- Despite a basic difference in the nature of the case, we rely upon the decision in ***Groseth v. Groseth***, 257 Neb. 525, 600 N .W.2d 159 (1999), for guiding principles. ... First, we properly look to the official comments contained in a model act on which a Nebraska statute or series of statutes was patterned for some guidance in an effort to ascertain the intent of the legislation. ... Second, dicta in *Groseth* supports our interpretation. Third, a court must look to a statute's purpose and give to the statute a reasonable construction which best achieves that purpose, rather than a construction which would defeat it.
- A comment to the 2001 UIFSA amendments...(states): The fact that the State of the new controlling order has a different duration of for [sic] child support is specifically declared to be irrelevant by UIFSA. ... This comment refers to the 2001 amendment to UIFSA § 611 adding a new section (d), which was, in turn, adopted essentially verbatim by the Nebraska Legislature as the current § 42-746(d). Section 42-476I was also amended to expressly refer to the duration of the obligation of support as an aspect that cannot be modified under the law of the issuing state.
- [T]he duration of the support obligation remains fixed despite the subsequent residence of all parties in a new state with a different duration of child support.

Wulff v. Wulff, 243 Neb. 616, 500 N.W.2d 845 (1993)

- Whether there has been an emancipation is a question of fact, but what is emancipation is a question of law.

- Emancipation is not necessarily a continuing status; even if once established, it may be terminated at any time during the child's minority.
- A minor child giving birth may be one factor to be considered in the determination of whether a minor has achieved a new status or position inconsistent with parental control, but should not alone be dispositive.

24A Am. Jur. 2d Divorce and Separation § 1042 (1998)

> [a] child who is attending college full-time, living with a parent during vacations and holidays, and who is employed only in the summer, is not emancipated. Likewise, a child who lives away from home but whose parents pay a substantial amount of money for medical and educational expenses and independent-living arrangements is not emancipated.

Equity, Equitable Estoppel, Equitable Credit/"Overpayments"
(See also Child Support & Related, Social Security)

Berg v. Hayworth, 238 Neb 527, 471 N.W.2d 435 (1991) Permits equitable credits

Bock v. Dalbey, 283 Neb. 994, 815 N.W.2d 530 (2012)
- when a statute provides an adequate remedy at law, equity will not entertain jurisdiction, and a party must exhaust the statutory remedy before it may resort to equity. [citing *Teadtke v. Havranek*, 279 Neb. 284, 777 N.W.2d 810 (2010)]

Christiansen v. County of Douglas, 288 Neb. 564, 849 N.W.2d 493 (2014)
- Although in many contexts the traditional distinctions between law and equity have been abolished, whether an action is one in equity or one at law controls in determining an appellate court's scope of review.

Cotton v. Cotton, 222 Neb. 306, 383 NW2d 739 (1986)
- A court has an inherent power to determine the status of its judgments. The district court may, on motion and satisfactory proof that a judgment had been fully paid or satisfied by the act of the parties thereto, order it discharged and canceled of record.

Eliker v. Eliker, 206 Neb. 764, 295 N.W.2d 268 (1980)
- Courts are without authority to reduce the amount of accrued child support (absent equitable estoppel).

☆ **Gress v. Gress;** 257 Neb. 112; 596 N.W.2d 8 (1999) (Gress I)
Hanthorn v. Hanthorn 236 Neb 225, 460 N.W.2d 650 (1990)
- Social Security payments made to a parent's child on account of the parent's disability should be considered as credits towards the parents' court ordered obligation in the absence of circumstances making credit inequitable. Such benefit payments are the result of the obligor's disability and are a substitute for the obligor's loss of earning power and his or her obligation to pay for the support of his or her dependents.

- Social security payments satisfy court ordered child support on a month by month basis. They may not be carried over to satisfy court ordered support amounts in *future* months.
- With regard to social security benefits, a non-custodial parent may be entitled to an equitable credit against child support *arrearages*, with certain qualifications, but there is no entitlement to credit against future child support payments. *Future obligations are not yet accrued, and because they are subject to modification, they are not ascertainable.*
- Excess Social Security benefits should be applied to child support *arrearage* which has accrued since the date of the occurrence which entitled the parent to receive such benefits.
- The credit allowed for Social Security benefit payments is equitable in nature.
- The date of the occurrence which entitles a person to Social Security benefits should be used for purposes of establishing when the benefits may be utilized as a substitute for income. Equitable considerations lead us to allow excess Social Security dependency benefits to be credited against child support arrearage which has accrued from the date of the occurrence which entitled the parent to such benefits, unless the allowance of such credit, in the particular case, would be inequitable.

Gress v. Gress, 274 Neb. 686, 743 N.W.2d 67 (2007) (Gress II)

Facts: *This case is a real treasure trove of case law relating to many aspects of what we do. Child of parties has Down's syndrome and receives social security benefits on account of that condition. NCP wanted his child support reduced because child was receiving social security benefits. Supreme Court said No!*

- The federal government provides **Social Security** to special needs children with the intent that it will supplement other income, not substitute for it.
- **special-needs children** require additional financial support to overcome developmental, cognitive, or physiological problems. With this in mind, the federal government provides Social Security to such children with the intent that it will "supplement other income, not substitute for it." In contrast, the money allocated to the youngest child under the NCSG is meant to provide for the basic needs all children have. To construe one source of money as satisfying both needs would leave either his basic or his special needs unfulfilled.
- [I]t not appropriate to offset child support costs where, as here, the Social Security benefits are intended to mitigate the additional costs that accompany disabilities.

Griess v. Griess; 9 Neb. App. 105, 608 N.W.2d 217 (2000)

Facts: *A rather bizarre case. Parties' child support was erroneously modified, and obligated parent was then court ordered to pay much more child support than he should have been ordered to pay under the guidelines. No one caught the error until he overpaid his support by more than $18,000. He then filed an action seeking credit against his future child support obligation. The court struggled with this, given that his own attorney overlooked the glaring error, but ultimately granted an equitable credit against his future child support obligation. It was clear that the Court of Appeals gave considerable weight in it's decision to the fact that the custodial parent had testified that she did not need the child support money and "never" relied on it in providing support for her children.*

- Whether overpayments of **child support** should be credited against **future child support** is a question of law.
- A future payment of child support is not accrued and vested, and therefore a court may modify the amount of child support due in the future but may generally not forgive or modify past-due child support.
- The general rule is that no credit is given for voluntary overpayments of child support, even if they are made under a mistaken belief that they are legally required. *See also* **Palagi v. Palagi**,

10 Neb. App. 231, 627 N.W.2d 765 (2001). Exceptions are made to the 'no credit for voluntary overpayment rule' when the equities of the circumstances demand it and when allowing a credit will not work a hardship on the minor children.

- Equitable remedies are a special blend of what is necessary, what is fair, and what is workable.
- Where a situation exists which is contrary to the principles of equity and which can be redressed within the scope of judicial action, a court of equity will devise a remedy to meet the situation.

Hall v. Hall, 238 Neb. 686, 472 N.W.2d 217 (1991)

- It is well-recognized law in this state that an action for divorce or for modification of a divorce decree sounds in equity.
- [T]he fact that [the custodial parent] did not respond to [the non custodial parent]'s motion for modification of their divorce decree is not determinative of the status of the tax exemptions. [The noncustodial parent] may not be granted the exemptions simply on [the custodial parent's] failure to respond or appear. Rather, this court, under its equity powers, balances the interests of the parties and then determines where the equities lie.

Hartman v. Hartman, 265 Neb. 515, 657 N.W.2d 646 (2003)

- The decision to vacate an order any time during the term in which the judgment is rendered is within the discretion of the court; such a decision will be reversed only if it is shown that the district court abused its discretion. ... [A] district court has equitable power to vacate a judgment during the term in which it was entered on grounds which include, but are not limited to, those enumerated in §25-2001(4).
- [A] decision to vacate an order within the same term is within the discretion of the court, the decision will be reversed only if it is shown that the district court abused its discretion. ... An abuse of discretion occurs when the trial court's decision is based upon reasons that are untenable or unreasonable or if its action is clearly against justice or conscience, reason, and evidence.

Note: Terms of the various district courts may be found by accessing their respective rules on the Supreme Court's web site.

Henderson v. Henderson, 264 Neb. 916, 653 N.W.2d 226 (2002)

- A noncustodial parent is entitled to credit against a monthly child support obligation for Social Security benefits paid to his or her minor child as a result of the noncustodial parent's post divorce disability.
- The credit is an equitable credit, which in no way modifies the underlying obligation to pay for the support of the dependents. *See* ***Gress v. Gress***, 257 Neb. 112, 596 N.W.2d 8 (*Gress I*)
- Social Security disability insurance program benefits are not means-tested public assistance benefits, but are based on prior earnings of the recipient, not on the financial need of the recipient.

Henke v. Guerrero, 13 Neb. App. 337, 692 N.W.2d 762 (2005)

- While a paternity action is one at law, the award of child support in such an action is equitable in nature. "Child support is equitable relief."

- A trial court's award of child support in a paternity case will not be disturbed on appeal in the absence of an abuse of discretion by the trial court.

Jameson v. Jameson, 13 Neb. App. 703, 700 N.W.2d 638 (2005)

Facts: *For several years, Father voluntarily increased the amount of child support he paid through the child support payment office, resulting in a $19,000 overpayment according to the records of the clerk of district court. Mother sought erasure of credit, claiming that overpayments were not an accident but represented voluntary payments by father. (Parents had agreed informally that support should be increased, but did not seek judicial ratification of their informal agreement)*

Held: *Credit is erased, and* ***Father cannot apply overpayments to offset his later underpayments of support.***

- Whether overpayments of child support should be credited retroactively against child support payments in arrears is a question of law. See ***Palagi v. Palagi***, 10 Neb. App. 231, 627 N.W.2d 765 (2001).
- The general rule for support overpayment claims is that no credit is given for voluntary overpayments of child support, even if they are made under a mistaken belief that they are legally required. Exceptions are made to the "no credit for voluntary overpayment of child support rule" when the equities of the circumstances demand it and when allowing a credit will not work a hardship on the minor children.

Jensen v. Jensen, 275 Neb. 921, 750 N.W.2d 335 (2008)

- [T]he void conditional judgment rule does not extend to actions in equity. Conditional judgments are a fundamental tool with which courts sitting in equity have traditionally been privileged to properly devise a remedy to meet the situation. Therefore, where it is necessary and equitable to do so, a court of equitable jurisdiction may enter a conditional judgment and such judgment will not be deemed void simply by virtue of its conditional nature.
- Inequity may result if the court adopts a policy of less than full enforcement of mutually agreed-upon property and support agreements.
- [P]ublic policy forbids enforcement of a private agreement that purports to discharge a parent's liability for child support, if the agreement does not adequately provide for the child. But the agreement at issue here did not discharge (the father's) liability for child support. Instead, it expressly provided (the father) with credit for a payment that the parties agreed would constitute prepayment of any subsequent child support award. We conclude that on the facts of this case, the agreement is enforceable.
- When overpayments of child support are voluntarily made *outside* the terms of a court order, the general rule is that no credit is given for those payments. The principle behind this rule is that such a credit would be tantamount to allowing one party to unilaterally modify the court's order, which could result in the deprivation of future support benefits. Nonetheless, even then, a credit against child support can be granted where equity requires it. This case is not a case involving a voluntary overpayment because it *was* the payment specified in the court's order. Such a credit clause does not violate public policy because it is regarded as a lump-sum payment of child support, not a waiver of child support altogether. And the agreement still provides regular support for the children

Klinginsmith v. Wichmann, 252 Neb. 889, 567 N.W.2d 172 (1997)

- [A] civil contempt proceeding cannot be the means to afford equitable relief to a party.

Laschanzky v. Laschanzky, 246 Neb. 705; 523 N.W.2d 29 (1994)

- A court of equity does not have discretion to allow or withhold interest in cases where interest is recoverable as a matter of right.

Lucero v. Lucero, 16 Neb. App. 706, 750 N.W.2d 377 (2008)

- The district court may, on motion and satisfactory proof that a judgment has been paid or satisfied in whole or in part by the act of the parties thereto, order it discharged and canceled of record, to the extent of the payment or satisfaction.
- The same principles that apply with respect to retroactivity of a new obligation to pay support, i.e., that the obligation can be retroactive to the first day of the month following the filing of a request to modify to impose (or increase) a child support obligation, should generally apply also when the request is to terminate a child support obligation.
- When a divorce decree provides for the payment of stipulated sums monthly for the support of a minor child or children, such payments become vested in the payee as they accrue, and generally, the courts are without authority to reduce the amounts of such accrued payments. The articulated exception to the vesting rule concerns situations in which the payee is equitably estopped from collecting the accrued payments.

Prell v. Prell, 181 Neb. 504, 505, 149 N.W.2d 104, 105 (1967),

- "We hold that where the decree of divorce gives visitation rights, the law contemplates that the children shall remain within the state so that the rights may be exercised. The mother's removal of the children from the state without the consent of the father or of the court may be sufficient change of circumstances to justify the court in suspending or reducing the amount of child support payments until the children have returned to the state."

Redick v. Redick, 220 Neb. 86, 368 N.W.2d 463 (1985)

- *Pleadings: Estoppel: Proof.* The burden of proof rests on the party who pleads an estoppel to establish the facts upon which the estoppel is based.
- *Estoppel.* Among the elements necessary to be proved to establish the defense of estoppel are: conduct which amounts to a false representation or concealment of material facts, or, at least, which is calculated to convey the impression that the facts are otherwise Than, and inconsistent with, those which the party subsequently attempts to assert; and action or inaction based thereon of such a character as to change the position or status of the party claiming The estoppel, to his injury, detriment, or prejudice.

Smith v. Smith, 201 Neb. 21, 265 N.W.2d 855 (1978)

In *rare cases* a court may find that a party is ***equitably estopped*** from collecting installments accruing after some affirmative action which would ordinarily terminate future installments.

- "The securing of the consent of the father to an adoption *by another* of his child is such action which by its nature should terminate further liability for child support."
  "The courts of other jurisdictions are not in agreement as to whether a consent to an adoption will terminate future child support installments if the adoption is not completed. We believe strong equitable considerations support those cases holding it should do so."

But see… **Williams v. Williams**, 206 Neb. 630, 294 N.W.2d 357 (1980), *limiting* ***Smith.***

State on Behalf of Hopkins v. Batt, 253 Neb. 852, 573 N.W.2d 425 (1998)

- Equitable estoppel is a bar which precludes a party from denying or asserting anything to the contrary of those matters established as the truth by his own deeds, acts, or representations.
- The elements of equitable estoppel are, as to the party estopped,
  (1) conduct which amounts to a false representation or concealment of material facts or, at least, which is calculated to convey the impression that the facts are otherwise than, and inconsistent with, those which the party subsequently attempts to assert;
  (2) the intention, or at least the expectation, that such conduct shall be acted upon by, or influence, the other party or other persons; and
  (3) knowledge, actual or constructive, of the real facts; and as to the other party,
  (4) lack of knowledge and of the means of knowledge of the truth as to the facts in question;
  (5) reliance, in good faith, upon the conduct or statements of the party to be estopped; and
  (6) action or inaction based thereon of such a character as to change the position or status of the party claiming the estoppel, to his injury, detriment, or prejudice.
  [See also **Truman v. Truman**, 256 Neb. 628, 591 N.W.2d 81 (1999)]
- Someone who is not a party to the pending court action may not be estopped.

State on Behalf of Kayla T. v. Risinger, 273 Neb. 694, 731 N.W.2d 892 (2007)

Facts: *Dad learned of unmarried Mom's pregnancy, but had no contact with child for 17 years, until state filed paternity action. Dad admitted paternity but did not want to have to pay $60,000+ in retro support for 17 years, citing mother's promise not to come after him for support in return for him staying away from his child.*

Held: *Dad must pay the retro support.*

- A private agreement between parents that would deprive a child of support from one parent contravenes the public policy of this State.
- [B]ecause the right to support belonged to [the child], any Agreement made or actions taken by [the mother] would not be the basis for equitable *estoppel* in this paternity and child support action brought by the State on the child's behalf.
- Even though the State fashioned the action as one brought on behalf of both the mother and the child, at least with regard to issues of support, this action is one brought on behalf of the child to secure her right to support. Therefore, whether or not the Mother should be equitably estopped from seeking any sort of relief for herself, the State was not estopped from seeking support on the child's behalf in this action.

State on behalf of L.L.B. v. Hill, 268 Neb. 355, 682 N.W.2d 709 (2004)

- To be entitled to equitable relief from a judgment, a party must show that the situation is not due to his or her fault, neglect, or carelessness.
- Here, Hill does not deny that he received notice of the 1996 petition to establish paternity and the State's motion for DNA Testing. Instead of having the testing done, he failed to appear, resulting in a default judgment. ...Even though he firmly believed that he was not the child's father, he did nothing until the State commenced contempt proceedings in 2002, almost 5 years after the dismissal of his motion to vacate in term. It was Hill's inexcusable lack of diligence which led to the accumulation of the arrearages, and as a result, equity will not aid him in vacating those arrearages.

State on Behalf of J. R. v. Mendoza, 240 Neb. 149, 481 N.W.2d 165 (1992)

- (Discussed in more detail elsewhere in this outline) Is a party who signs and files a sworn acknowledgment of paternity with the department of vital statistics for purposes of obtaining a new birth certificate conclusively established as the child's "legal father?" "[W]e decline to give such an acknowledgment conclusive effect."
- "[C]oncerns regarding the stigma of illegitimacy should not outweigh the primary purposes of the filiation statutes: identifying the biological fathers of children born out of wedlock and imposing on them an obligation of support."

Thompson v. Thompson, 18 Neb.App. 363, 782 N.W.2d 607 (2010)

- An obligor parent is entitled to a credit against his or her current child support obligation for payments made by the Department of Veterans Affairs to the child as a result of the obligor parent's disability, in the absence of circumstances making the allowance of such a credit inequitable.

Truman v. Truman, 256 Neb. 628, 591 N.W.2d 81 (1999)

- The doctrine of equitable estoppel could operate to excuse the payment of accrued child support under appropriate factual circumstances

Weaver v. Compton III, 8 Neb. App. 961,605 N.W.2d 478 (2000)

- It is not error to credit an obligated parent's child support balance sheet with cash payments and non-monetary assets (a car) sent to the custodial parent directly by the obligated parent's relatives, which payments were intended for use in the support of the minor child.

Welch v. Welch, Jr., 246 Neb. 435, 519 N.W.2d 262 (1994)

- Neither of the parties is authorized to interfere with the court's orders and only the court can determine what, if any, adjustments should be made.
- The power of a court to suspend child support should be exercised only as "a last resort or where it is apparent that to do so affords the only remedy that can reasonably be expected to fit the mischief." – *citing* **Biesecker v. Biesecker**, 190 Neb. 808, 809, 212 N.W.2d 576, 577 (1973).
- As a general rule, the custodial parent's right of support and the noncustodial parent's right of visitation are entitled to separate enforcement. A failure to pay child support does not justify a parent's unilateral withdrawal of visitation rights, and a failure to allow visitation does not justify a parent's unilateral nonpayment of support.
- a court may suspend child support payments when the custodial parent deprives the noncustodial parent of visitation and there is no showing that the children are in need.

Williams v. Williams, 206 Neb. 630, 294 N.W.2d 357 (1980)

- While equitable estoppel may be applicable in delinquent child support cases, the mere execution of a document *consenting to the adoption* of a child, standing alone, is insufficient to justify imposing the doctrine of equitable estoppel to deny to custodial parent the benefits of a previously entered order of support.

Extradition – Costs

State v. Smith, 13 Neb. App. 477, 695 N.W.2d 440 (2005)

- We...find no abuse of discretion in the determination of the trial court that costs of prosecution (which can be taxed to the defendant) include the expenses of extradition.
- Neb. Rev. Stat. §29-752 (Cum. Supp. 2004) expressly contemplates the expenses of transportation in connection with an extradition, stating:

> When the punishment of the crime is the confinement of the criminal in a Department of Correctional Services adult correctional facility, the expenses shall be paid out of the state treasury on the certificate of the Governor and warrant of the State Treasurer and Director of Administrative Services. In all other cases the expenses shall be paid out of the county treasury in the county wherein the crime is alleged to have been committed. The expenses shall be the fees paid to the officers of the state on whose Governor the requisition is made and shall be equal to the mileage rate authorized in section 81-1176 for each mile which is necessary to travel in returning such prisoner.

Federal Regulations of Interest

Title IV-D of the Social Security Act of 1974
Electronic Code of Federal Regulations, Title 45
Automated Systems for Child Support Enforcement: A Guide for States

Foreign Support Orders

§43-1734. Foreign support order; validity; prima facie evidence; allowable defenses. At any hearing contesting a proposed income withholding based on a foreign support order entered under section 43-1729, the entered order, the certified copy of an income withholding order or notice, if any, still in effect, and the sworn or certified statement concerning arrearages and any assignment of rights shall constitute prima facie evidence, without further proof or foundation, that the support order is valid, that the amount of current support payments and arrearages is as stated, and that the obligee would be entitled to income withholding under the law of the jurisdiction which issued the support order.

Once a prima facie case has been established, *the obligor may raise only the following defenses:*

(1) That withholding is not proper because of a mistake of fact, that is not res judicata, concerning matters such as an error in the amount of current support owed or the arrearage that has accrued, mistaken identity of the obligor, or error in the amount of income to be withheld;

(2) That the court or agency which issued the support order lacked personal jurisdiction over the obligor;

(3) That the support order was obtained by fraud; or

(4) That the statute of limitations, as provided in subsection (3) of section 43-1742, precludes enforcement of all or part of the arrearages.

The burden shall be on the obligor to establish such defenses.
Source: Laws 1985, Second Spec. Sess., LB 7, § 54; Laws 1991, LB 457, § 39

§ 43-1742. Foreign support order; applicability of law.
(1) Except as provided in subsections (2) and (3) of this section, the local law of this state shall apply in all actions and proceedings concerning the issuance, enforcement, and duration of income withholding orders issued by a court of this state based upon a foreign support order entered pursuant to section 43-1729.
(2) The local law of the jurisdiction which issued the foreign support order shall govern the following:
(a) The interpretation of the support order including amount of support, form of payment, and duration of support;
(b) The amount of support arrearages necessary to require the issuance of an income withholding order or notice; and
I The definition of what costs, in addition to the periodic support obligation, are included as arrearages which are enforceable by income withholding, including, but not limited to, interest, attorney's fees, court costs, and costs of paternity testing. (3) The court shall apply the statute of limitations for maintaining an action on arrearages of support payments of either the local law of this state or of the state which issued the foreign support order, whichever provides the longer period of time.
Source: Laws 1985, Second Spec. Sess., LB 7, § 62

Foster Care

In re Interest of Antonio S. & Priscilla S., 270 Neb. 792, 708 N.W.2d 614 (2005)
Generally, custody of a minor ward is an incident of guardianship.

- Where a guardianship is established under the Nebraska Juvenile Code as a means of providing permanency for adjudicated children who have been in the temporary custody of the Department of Health and Human Services, custody is necessarily transferred from the department to the appointed guardian(s) by operation of law.

In Re Interest of Montana S., 21 Neb. App. 315, 837 N.W.2d 860 (2013)

- A party has standing to invoke a court's jurisdiction if it has a legal or equitable right, title, or interest in the subject matter of the controversy. See *In re Interest of Jorius G. & Cheralee G.*, 249 Neb. 892, 546 N.W.2d 796 (1996).
- Foster parents of children who have been adjudicated as being without proper support have standing to object to a plan to change foster care placement of the children.
- Because a foster parent has standing to object to a plan recommending a change in placement, a foster parent also has standing to appeal the juvenile court's decision to adopt such a plan and change the child's placement.
- A proceeding before a juvenile court is a "special proceeding" for appellate purposes.
- The foremost purpose and objective of the Nebraska Juvenile Code is to promote and protect the juvenile's best interests, and the code must be construed to assure the rights of all juveniles to care and protection.

§ 30-2605 Status of guardian of minor; general.
A person becomes a guardian of a minor by acceptance of a testamentary appointment or upon appointment by the court. The guardianship status continues until terminated, without regard to the location from time to time of the guardian and minor ward.
Source: Laws 1974, LB 354, § 223, UPC § 5-201.

§ 30-2606 Testamentary appointment of guardian of minor; notice.
The parent of a minor may appoint by will a guardian of an unmarried minor. Subject to the right of the minor under section 30-2607, a testamentary appointment becomes effective upon filing the guardian's acceptance in the court in which the will is probated if, before acceptance, both parents are dead or the surviving parent is adjudged incapacitated. If both parents are dead, an effective appointment by the parent who died later has priority. This state recognizes a testamentary appointment effected by filing the guardian's acceptance under a will probated in another state which is the testator's domicile. Upon acceptance of appointment, written notice of acceptance must be given by the guardian to the minor and to the person having his care, or to his nearest adult relation.
Source: Laws 1974, LB 354, § 224, UPC § 5-202.

§ 30-2607 Objection by minor of fourteen or older to testamentary appointment.
A minor of fourteen or more years may prevent an appointment of his testamentary guardian from becoming effective, or may cause a previously accepted appointment to terminate, by filing with the court in which the will is probated a written objection to the appointment before it is accepted or within thirty days after notice of its acceptance. An objection may be withdrawn. An objection does not preclude appointment by the court in a proper proceeding of the testamentary nominee, or any other suitable person.
Source: Laws 1974, LB 354, § 225, UPC § 5-203.

§ 30-2608 Natural guardians; court appointment of guardian of minor; standby guardian; conditions for appointment; child born out of wedlock; additional considerations; filings.
(a) The father and mother are the natural guardians of their minor children and are duly entitled to their custody and to direct their education, being themselves competent to transact their own business and not otherwise unsuitable. If either dies or is disqualified for acting, or has abandoned his or her family, the guardianship devolves upon the other except as otherwise provided in this section.
(b) In the appointment of a parent as a guardian when the other parent has died and the child was born out of wedlock, the court shall consider the wishes of the deceased parent as expressed in a valid will executed by the deceased parent. If in such valid will the deceased parent designates someone other than the other natural parent as guardian for the minor children, the court shall take into consideration the designation by the deceased parent. In determining whether or not the natural parent should be given priority in awarding custody, the court shall also consider the natural parent's acknowledgment of paternity, payment of child support, and whether the natural parent is a fit, proper, and suitable custodial parent for the child.
I The court may appoint a standby guardian for a minor whose parent is chronically ill or near death. The appointment of a guardian under this subsection does not suspend or terminate the parent's parental rights of custody to the minor. The standby guardian's authority would take

effect, if the minor is left without a remaining parent, upon (1) the death of the parent, (2) the mental incapacity of the parent, or (3) the physical debilitation and consent of the parent.
(d) …
(e) The petition and all other court filings for a guardianship proceeding shall be filed with the clerk of the county court. The party shall state in the petition whether such party requests that the proceeding be heard by the county court or, in cases in which a separate juvenile court already has jurisdiction over the child in need of a guardian under the Nebraska Juvenile Code, such separate juvenile court. Such proceeding is considered a county court proceeding even if heard by a separate juvenile court judge and an order of the separate juvenile court in such guardianship proceeding has the force and effect of a county court order.
…
Source: Laws 1974, LB 354, § 226, UPC § 5-204; Laws 1995, LB 712, § 18; Laws 1998, LB 1041, § 4; Laws 1999, LB 375, § 1.

§ 30-2610 Court appointment of guardian of minor; qualification; priority of minor's nominee. The court may appoint as guardian any person whose appointment would be in the best interests of the minor. The court shall appoint a person nominated by the minor, if the minor is fourteen years of age or older, unless the court finds the appointment contrary to the best interests of the minor.
Source: Laws 1974, LB 354, § 228, UPC § 5-206

§ 30-2611 Court appointment of guardian of minor; procedure.
(a) Notice of the time and place of hearing of a petition for the appointment of a guardian of a minor is to be given by the petitioner in the manner prescribed by section 30-2220 to:
(1) the minor, if he is fourteen or more years of age;
(2) the person who has had the principal care and custody of the minor during the sixty days preceding the date of the petition; and
(3) any living parent of the minor.
(b) Upon hearing, if the court finds that a qualified person seeks appointment, venue is proper, the required notices have been given, the requirements of section 30-2608 have been met, and the welfare and best interests of the minor will be served by the requested appointment, it shall make the appointment. In other cases the court may dismiss the proceedings, or make any other disposition of the matter that will best serve the interest of the minor.
I If necessary, the court may appoint a temporary guardian, with the status of an ordinary guardian of a minor, but the authority of a **temporary guardian shall not last longer than six months**. In an emergency, the court may appoint a temporary guardian of a minor without notice, pending notice and hearing.
(d) If, at any time in the proceeding, the court determines that the interests of the minor are or may be inadequately represented, it may appoint an attorney to represent the minor, giving consideration to the preference of the minor if the minor is fourteen years of age or older.
Source: Laws 1974, LB 354, § 229, UPC § 5-207; Laws 1978, LB 650, § 20.

Farnsworth v. Farnsworth, 276 Neb. 653, 756 N.W.2d 522 (2008)

- Although the question present in every child custody case is the best interests of the child, a court cannot overlook or disregard that the best interests standard is subject to the overriding recognition that the relationship between parent and child is constitutionally protected. The U.S. Supreme Court has held that due process of law requires a parent to be granted a hearing on his

or her fitness as a parent before being deprived of custody. And the right of a parent to the care, custody, and management of his or her children is considered one of the most basic rights of man. (citing *Stanley v. Illinois*, 405 U.S. 645, 92 S. Ct. 1208, 31 L. Ed. 2d 551 (1972))

In re Adoption of Amea R., 282 Neb. 751, 807 N.W.2d 736 (2011)

- there is no substantial difference between 282 Neb. 758 a *guardian ad litem* and a *next friend* except that historically, a guardian ad litem represented a defendant and a next friend represented a plaintiff.
- A next friend is under control of the court and can be removed if, in the court's discretion, the next friend is unsuitable

in re Guardianship of Elizabeth H., 17 Neb. App. 752, 771 N.W.2d 185 (2009)

This Mom managed to convince the court of appeals that she was unfit. Not an easy task.

- A guardianship is no more than a temporary custody arrangement established for the well-being of a child. The appointment of a guardian is not a *de facto* termination of parental rights, which results in a final and complete severance of the child from the parent and removes the entire bundle of parental rights. Rather, guardianships give parents an opportunity to temporarily relieve themselves of the burdens involved in raising a child, thereby enabling parents to take those steps necessary to better their situation so they can resume custody of their child in the future.
- Granting one legal custody of a child confers neither parenthood nor adoption; a guardian is subject to removal at any time.
- The parental preference principle applies in guardianship proceedings that affect child custody.
- The parental preference principle establishes a rebuttable presumption that the best interests of a child are served by reuniting the child with his or her parent.
- The parental preference principle provides that a parent has a natural right to the custody of his or her child which trumps the interest of strangers to the parent-child relationship and the preferences of the child.
- An individual who seeks appointment as a guardian over the objection of a biological or adoptive parent bears the burden of proving by clear and convincing evidence that the biological or adoptive parent is unfit or has forfeited his or her right to custody. Absent such proof, the constitutional dimensions of the relationship between parent and child require a court to deny the request for a guardianship. Parental unfitness means a personal deficiency or incapacity which has prevented, or will probably prevent, performance of a reasonable parental obligation in child rearing and which has caused, or probably will result in, detriment to a child's well-being.

In re Guardianship of Robert D., 269 Neb. 820, 696 N.W.2d 461 (2005)

- Under the parental preference principle, a parent's natural right to the custody of his or her child trumps the interests of strangers to the parent-child relationship and the preferences of the child.
- Absent circumstances which terminate a parent's constitutionally protected right to care for his or her child, due regard for the right requires that a biological or adoptive parent be presumptively regarded as the proper guardian for his or her child.

- In guardianship termination proceedings involving a biological or adoptive parent, the **parental preference principle** serves to establish a rebuttable presumption that the best interests of the child are served by reuniting the minor child with his or her parent.
- An individual who opposes the termination of a guardianship bears the burden of proving by clear and convincing evidence that the biological or adoptive parent either is unfit or has forfeited his or her right to custody. Absent such proof, the constitutional dimensions of the relationship between parent and child require termination of the guardianship and reunification with the parent.
- Parental rights may be forfeited by a substantial, continuous, and repeated neglect of a child and a failure to discharge the duties of parental care and protection.
- Guardianships are designed to temporarily relieve parents of the rigors of raising a child. The nature of a guardianship makes it particularly inappropriate to establish the forfeiture of parental rights by solely focusing on a parent's failure to discharge the duties of parental care and protection. There must also be clear and convincing evidence of substantial, continuous, and repeated neglect of a child. This may be established by the complete indifference of a parent for a child's welfare over a long period of time.

In re Interest of Lakota Z. & Jacob H., 282 Neb. 584, 804 N.W.2d 174 (2011)

- In guardianship termination proceedings involving a biological or adoptive parent, the parental preference principle serves to establish a rebuttable presumption that the best interests of a child are served by reuniting the child with his or her parent.
- An individual who opposes the termination of a guardianship bears the burden of proving by clear and convincing evidence that the biological or adoptive parent either is unfit or has forfeited his or her right to custody. Absent such proof, the constitutional dimensions of the relationship between parent and child require termination of the guardianship and reunification with the parent.

Uhing v. Uhing, 241 Neb. 368, 488 N.W.2d 366 (1992)

- In a parent's habeas corpus proceeding directed at child custody, a court may not deprive a parent of a minor's custody unless it is affirmatively shown that the parent seeking habeas corpus relief is unfit to perform the parental duties imposed by the parent-child relationship or has legally lost parental rights in the child.

Guidelines Issues

(Including sufficient and insufficient reasons for deviating from the guidelines — See also *Modification Issues*)

Note: Minor tweaking of the Nebraska's child support guidelines took effect Sept. 1, 2011. **View Amendments**

Among the largest changes are:

- a change to Worksheet #1, adding cash medical support as a factor that adjusts a final child support award, much as the cost of dependent health insurance does;
- Birth related medical expenses remain uncollectable. "Health insurance" is now defined to include coverage for medical, dental, orthodontic, optometric, substance abuse, and mental health treatment;

- If a court orders a parent to pay cash medical support, it shall be in lieu of, and not in addition to, requiring the parent to also pay reimbursement for reasonable and necessary children's health care costs;
- If the child is residing with a third party, the court shall order each of the parents to pay to the third party their respective amounts of child support as determined by the worksheet.

View **Child Support Guidelines Worksheets and Income Shares Table**

§42-364.16 Child support guidelines; establishment; use.
The Supreme Court shall provide by court rule, as a rebuttable presumption, guidelines for the establishment of all child support obligations. Child support shall be established in accordance with such guidelines, which guidelines are presumed to be in the best interests of the child, unless the court finds that one or both parties have produced sufficient evidence to rebut the presumption that the application of the guidelines will result in a fair and equitable child support order.
Source: Laws 1985, Second Spec. Sess., LB 7, § 18; Laws 1994, LB 1224, § 46.

§ 4-203 of the Nebraska Child Support Guidelines specifically declares that: "All orders for child support, including modifications, must include a basic income and support calculation worksheet" from the child support guidelines. [This is now absolutely mandatory!!!]

§ 4-203 of the Nebraska Child Support Guidelines also states, in part:

> All orders for child support obligations shall be established in accordance with the provisions of the guidelines unless the court finds that one or both parties have produced sufficient evidence to rebut the presumption that the guidelines should be applied. *All stipulated agreements for child support must be reviewed against the guidelines and if a deviation exists and is approved by the court,* ***specific findings*** *giving the reason for the deviation must be made.*

Bevins v. Gettman, 13 Neb. App. 555, 697 N.W.2d 698 (2005)

- A stipulation for child support is not binding on the court.
- A stipulation voluntarily entered into...will be respected and enforced by the courts when such stipulation is not contrary to sound public policy.
- Generally, settlements in domestic cases are binding on the court unless unconscionable, but ...terms of a settlement concerning support and custody of children are excepted from that rule. (*Citing* ***Walters v. Walters***, 12 Neb. App. 340, 673 N.W.2d 585 (2004)).
- Public policy at work here is well established-that the child support guidelines control the setting of child support, including whether there are grounds for a deviation. Paragraph C [now § 4-203] is very specific about the requirements for employing a deviation from the guidelines.
- Worksheet 3 'Calculation for Joint Physical Custody' shall not be utilized in the calculation of child support unless the parties have specifically been awarded "joint physical custody." Child support calculated on the basis of joint custody is fundamentally incorrect, absent a finding of a deviation which would justify such calculation. (where father awarded 5 overnight visits every 14 days and half of summer vacation, plus alternating holidays, held *not* joint custody)

- With respect to child support, the facts and the guidelines control the calculation – the parties cannot control the calculation by stipulation, unless the stipulation comports with the guidelines.
- Where child spends 50% of summer vacation time with noncustodial parent, that parent should receive a 50% **abatement** in his child support for the months of June, July and August.

Anderson v. Anderson, 290 Neb. 530, 860 N.W.2d 712 (2015)

- A court may deviate from the Nebraska Child Support Guidelines if their application in an individual case would be unjust or inappropriate.
- The court must specifically find that a deviation is warranted based on the evidence and state the reason for the deviation in the decree. A deviation without a clearly articulated justification is an abuse of discretion.

Brandt v. Brandt, 227 Neb. 325, 327, 417 N.W.2d 339, 341 (1988), *overruled on other grounds*, **Druba v. Druba**, 238 Neb. 279, 470 N.W.2d 176 (1991).

- A judge may not satisfy his duty to act equitably toward all concerned, i.e., the parties and the children, by blindly following suggested guidelines.

Brockman v. Brockman, 264 Neb. 106, 646 N.W.2d 594 (2002)

- [F]ood stamps are means-tested public assistance benefits that are excluded from income pursuant to [§ 4-204] of the Guidelines.

Brooks v. Brooks, 261 Neb. 289, 622 N.W.2d 670 (2001)

- The guidelines offer flexibility and guidance, with the understanding that not every child support scenario will fit neatly into the calculation structure.

- There is no precise mathematical formula applicable to situations where a court deviates from the guidelines when children from subsequent relationships are involved. Subsequent familial relationships vary widely from case to case.
- When a deviation from the guidelines is appropriate, the trial court should consider both parents' support obligations to all children involved in the relationships. In considering the obligation to those subsequent children, the trial court should take into consideration the income of the other parent of these children as well as any other equitable considerations.
  - When a trial court deviates from the child support guidelines in setting support, the court shall also state the amount of support that would have been required under the guidelines, absent the deviation. The reason for the deviation should also be stated, and/or the court should create worksheet 5 from the guidelines and file it in the court file. (See also ***Rutherford v. Rutherford***, 277 Neb. 301 (Feb. 2009).

Claborn v. Claborn, 267 Neb. 201, 673 N.W.2d 533 (2004)

- [§ 4-204] of the guidelines also provides that if applicable, earning capacity may be considered in lieu of a parent's actual, present income and may include factors such as work history, education, occupational skills, and job opportunities.

Coffey v. Coffey, 11 Neb. App. 788, 661 N.W.2d 327 (2003)

- Alimony paid to the non-custodial parent by the custodial parent is not income for purposes of calculating the child support obligation of the non-custodial parent. ***Kelly v. Kelly***, 2 Neb. App. 399, 510 N.W.2d 90 (1993), *reversed on other grounds* 246 Neb. 55, 516 N.W.2d 612 (1994).
- Because alimony is not properly considered as income when child support is established, the cessation of alimony cannot be considered a diminution in income when determining whether there has been a material change of circumstances justifying a modification of child support. See also ***Gallner v. Hoffman***, 264 Neb. 995, 653 N.W.2d 838 (2002)

Czaplewski v. Czaplewski, 240 Neb. 629, 483 N.W.2d 751 (1992)
Wilkins v. Wilkins, 269 Neb. 937, 697 N.W.2d 280 (2005)

- Child support guidelines are just that – guidelines. A trial judge does not satisfy his duty to equitably determine child support by blindly following suggested guidelines. The court may deviate from the guidelines where one or both parties have provided sufficient evidence to rebut the presumption that the guidelines should be applied.
- Trial court's allowance for the father's present family when determining child support for the previous family is allowed.
- Modification of an award of child support is not justified unless the applicant proves that a material change in circumstances has occurred since the entry of the decree or a previous modification.

Note: In July 2008 the Federal Child Support Regulations were changed to define the term "***reasonable in cost***" as it pertains to the cost of a parent paying for dependent health insurance, or in the alternative, being ordered to pay "***Cash Medical Support***" for his or her minor child(ren). This new definition at last puts to rest much confusion about just what is a reasonable cost for dependent health insurance. See (45 CFR 303.31(a)(3)) for the federal definition.

Changes to Nebraska's child support guidelines effective September 30, 2009 reflect these updated federal definitions. Nebraska's Unicameral passed LB 288 (codified at § 42-369), effective September 30, 2009. The law incorporates the concept of **"Cash Medical Support"** into our child support law. Cash Medical Support will have to be addressed, and likely ordered to be paid by the parent obligated to pay child support in all IV-D child support cases where the obligated parent is unable due to financial limitations or the lack of access to dependent health insurance to provide dependent health insurance for his or her minor child(ren). **Note**: A court may satisfy the federal requirement of Cash Medical by merely ordering the parent to share in a % of the uncovered medical expenses of the minor child, or the court can choose to order the parent to pay **3%** of the parent's gross monthly income. If a dollar figure is set, cash medical support will be paid like child support, through income withholding where possible, to the Nebraska Child Support Payment Center.

Under Nebraska law, "Cash medical support or the cost of private health insurance is considered reasonable in cost if the cost to the party responsible for providing medical support does not exceed **three percent** of his or her **gross income**. In applying the three-percent standard, the cost is the cost of adding the children to existing health care coverage or the difference between self-only and family health care coverage. Cash medical support payments shall not be ordered if, at the time that the order is issued or modified, the responsible party's income is or such expense would reduce the responsible party's net income below the basic subsistence limitation provided in Nebraska Court Rule section 4-218."

Drew on Behalf of Reed v. Reed, 16 Neb. App. 905, 755 N.W.2d 420 (2008)

- **Joint physical custody** means the child lives day in and day out with both parents on a rotating basis.
- Numerous parenting times with a child do not constitute joint physical custody. Liberal parenting time does not justify a joint custody child support calculation.

Elsome v. Elsome, 257 Neb. 889, 601 N.W.2d 537 (1999)

- Deviations from the child support guidelines are to be ordered with explicitness.

Erica J. v. Dewitt, 265 Neb. 728, 659 N.W.2d 315 (2003)

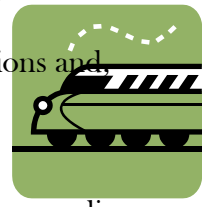
- A court is not justified in crediting $100 of the NCP's bankruptcy plan payment *directly* against the initial child support that was computed based upon the combined monthly net income of both parents, in order to reduce the NCP's child support obligation.

Faaborg v. Faaborg; 254 Neb. 501, 576 N.W.2d 826 (1998)

- Discusses high income cases, where a party has monthly income exceeding $10,000. *(note: present guidelines address net income up to $15,000 per month)*

Gartner v. Hume, 12 Neb. App. 741, 686 N.W.2d 58 (2004)

- The main principle behind the Nebraska Child Support Guidelines is to recognize the equal duty of both parents to contribute to the support of their children in proportion to their respective net incomes.
- Under certain circumstances, an amendment to the Nebraska Child Support Guidelines can itself be considered a material change in circumstances warranting modification of a parent's child support obligation.
- [T]ier II railroad retirement contributions constitute mandatory retirement contributions and, as such, are deductible under paragraph E(4) of the Guidelines.



Gase v. Gase, 266 Neb. 975, 671 N.W.2d 223 (2003)

- Interpretation of the Nebraska Child Support Guidelines presents a question of law, regarding which an appellate court is obligated to reach a conclusion independent of the determination reached by the court below.
- The owner of a wholly owned subchapter S corporation is self-employed within the meaning of the child support guidelines.

Gress v. Gress, 274 Neb. 686, 743 N.W.2d 67 (2007)

- Absent a clearly articulated justification, any deviation from the NCSG is an abuse of discretion.
- (the trial) court abused its discretion if its child support order drives (the noncustodial parent's) income below the poverty line set forth in paragraph R.
- (Reviewing) a 3-year average (income) tends to be the most common approach in cases where a parent's income tends to fluctuate. It is not necessary for a court to look back more than three years.
- Daycare and medical reimbursement obligations are also subject to paragraph R's [now § 4-218's] basic subsistence limitation.

Henderson v. Henderson, 264 Neb. 916, 653 N.W.2d 226 (2002)

- The Nebraska Child Support Guidelines provide that in calculating the amount of support to be paid, a court must consider the total monthly income, defined as the income of both parties derived from all sources, except all means-tested public assistance benefits. Social Security disability insurance program benefits are not means-tested public assistance benefits, but are based on prior earnings of the recipient, not on the financial need of the recipient.
- A noncustodial parent is entitled to credit against a monthly child support obligation for Social Security benefits paid to his or her minor child as a result of the noncustodial parent's disability.

In re Interest of Tamika S. et al., 3 Neb. App. 624, 529 N.W.2d 147 (1995)

- The Nebraska Child Support Guidelines apply in juvenile cases where child support is ordered.

In Re Petition of Anonymous 5, 286 Neb. 640, 838 N.W.2d 226 (2013)

- The equity jurisdiction of the district court is granted by the Constitution and cannot be legislatively limited or controlled.

Jensen v. Jensen, 275 Neb. 921, 750 N.W.2d 335, (2008)

- [W]e have never held that the absence of a **child support worksheet** provides a basis for a collateral attack on a final judgment. Once the [child support] order became final, even without a worksheet, it was enforceable.

Kearney v. Kearney, 11 Neb. App. 88, 644 N.W.2d 171 (2002)

- A court may **deviate from** the Nebraska Child Support Guidelines whenever the application of the guidelines in an individual case would be unjust or inappropriate.

Lasu v. Issak, 23 Neb. App. 83, 867 N.W.2d 651 (July 2015)

- All orders for child support obligations shall be established in accordance with the provisions of the Nebraska Child Support Guidelines unless the court finds that one or both parties have produced sufficient evidence to rebut the presumption that the guidelines should be applied.
- If the district court fails to indicate that a deviation from Neb. Ct. R. § 4-218 (rev. 2014) is warranted, it abuses its discretion if its child support order drives the obligor's income below the poverty line set forth in § 4-218.
- There is no precise mathematical formula for calculating child support when subsequent children are involved.
- Calculation of child support when subsequent children are involved is left to the discretion of the court as long as the court considered the obligations to both families and the income of the other parent of the subsequent children.
- When a deviation from the Nebraska Child Support Guidelines is appropriate, the trial court should consider both parents' support obligations to all children involved in the relationships.
- In considering the obligation to subsequent children, the trial court should take into consideration the income of the other parent of these children as well as any other equitable considerations.
- The specific formula for making calculations for the obligation to subsequent children is left to the discretion of the trial court, as long as the basic principle that both families are treated as fairly as possible is adhered to.
- In ordering child support, a trial court has discretion to choose if and how to calculate the deviation, but must do so in a manner that does not benefit one family at the expense of the other.
- A parent's support, childcare, and health care obligation shall not reduce his or her net income below the minimum net monthly obligation for one person, or the poverty guidelines updated annually in the Federal Register by the U.S. Department of Health and Human Services under authority of 42 U.S.C. § 9902(2), except minimum support may be ordered as defined in Neb. Ct. R. § 4-209.
- When an obligor's combined household income is below the poverty guidelines as updated annually in the Federal Register, the district court should order minimum support pursuant to Neb. Ct. R. § 4-209 or otherwise set forth specific reasons for deviating from the basic subsistence requirement.

Lebrato v. Lebrato, 3 Neb. App. 505, 529 N.W.2d 90 (1995)

- A payment to a bankruptcy plan in and of itself is not sufficient to rebut the presumption that the guidelines should be applied or to require a deviation from the guidelines to avoid an unjust result.

Lucero v. Lucero, 16 Neb. App. 706, 750 N.W.2d 377 (2008)

- [§ 4-203] of the Nebraska Child Support Guidelines provides that all stipulated agreements for child support must be reviewed against the guidelines and if a deviation exists and is approved by the court, specific findings giving the reason for the deviation must be made.
- [§ 4-212] of the Nebraska Child Support Guidelines provides that when a specific provision for joint physical custody is ordered and each party's parenting time exceeds 142 days per year, it is a rebuttable presumption that support shall be calculated using worksheet 3. Paragraph L of the Nebraska Child Support Guidelines provides that when a specific provision for joint physical custody is ordered and one party's parenting time is 109 to 142 days per year, the use of worksheet 3 to calculate support is at the discretion of the court.
- [§ 4-210] of the Nebraska Child Support Guidelines provides that when there are visitation or parenting time periods of 28 days or more in any 90-day period, support payments may be reduced by up to 80 percent.
- The parent claiming a deduction for health insurance must show that he or she has incurred an increased cost to maintain the coverage for the children over what it would cost to insure himself or herself.

Molczyk v. Molczyk, 285 Neb. 96, 825 N.W.2d 435 (2013)

- Under the Nebraska Child Support Guidelines, unless the minimum support rule applies, a parent's total support, child care, and health care obligations cannot reduce the obligor's net income below the minimum net monthly income for one person that will exceed the federal poverty threshold.
- In a marital dissolution action, to determine an obligor's net income for calculating support obligations, a court subtracts the following annualized deductions from the obligor's gross income: taxes, FICA, allowable retirement contributions, previous court-ordered child support to other children, and allowable voluntary support payments to other children.

Molina v. Salgado-Bustamonte, 21 Neb. App. 75, 837 N.W.2d 553 (2013)

- To direct courts in establishing and enforcing child support, the Nebraska Supreme Court has adopted the Nebraska Child Support Guidelines. See Neb. Ct. R. § 4-101(C). The main principle behind the guidelines is to recognize the equal duty of both parents to contribute to the support of their children in proportion to their respective net incomes. Neb. Ct. R. § 4-201
- If the court approves a stipulation which deviates from the child support guidelines, specific findings giving the reason for the deviation must be made.
- The main principle behind the child support guidelines is to recognize the equal duty of both parents to contribute to the support of their children in proportion to their respective net incomes.
- The guidelines include various worksheets that are to be used when establishing child support obligations. Nebraska law requires a trial court to attach the necessary child support worksheets to a child support order. *Pearson v. Pearson*, 285 Neb. 686, 828 N.W.2d 760 (2013);

Rutherford v. Rutherford, 277 Neb. 301, 761 N.W.2d 922 (2009); *Jones v. Belgum*, 17 Neb. App. 750, 770 N.W.2d 667 (2009).

Moore v. Bauer, 11 Neb. App. 572, 657 N.W.2d 25 (2003)

- Under certain circumstances, it may be appropriate for a trial court to consider **subsequently born children** of a party when determining child support. This determination is entrusted to the discretion of the trial court. The party requesting a **deviation** from the Nebraska Child Support Guidelines based upon an obligation to support offspring of a subsequent relationship **bears the burden of providing evidence regarding the obligation, including the income of the other parent** of the child or children of the subsequent relationship.
- *See also* ***Brooks v. Brooks***, 261 Neb. 289, 622 N.W.2d 670 (2001).

Morrill County v. Darsaklis, 7 Neb. App. 489, 584 N.W.2d 36 (1998)

- A parent is required to provide his or her child with the basic necessities of life. Both parents have a duty to support their minor children, and the amount of child support awarded is a function of the status, character, and situation of the parties.
- The primary consideration in determining the level of child support payments is the best interests of the child.
- Nebraska courts have consistently examined a parent's earning capacity, as well as actual wages, to determine child support. This is particularly apposite when a parent receives **valuable benefits** which are **not paid as cash**, and also when a parent unjustifiably chooses to be **underemployed** or unemployed. See, also, Nebraska Child Support Guidelines, paragraph C(5), which allows deviation from application of the guidelines if application of them would result in an unjust or inappropriate result.

Patton v. Patton, 20 Neb. App. 51, 818 N.W.2d 624 (2012)

Held: Even if the parties don't call their parenting plan "joint physical custody", if dad has the children 160 days a year that is what it is, and he is entitled to use the joint custody worksheet.

- An appellate court's review in an action for dissolution of marriage is de novo on the record to determine whether there has been an abuse of discretion by the trial judge. This standard of review applies to the trial court's determinations regarding custody, child support, division of property, alimony, and attorney fees.
- Interpretation of the Nebraska Child Support Guidelines presents a question of law, regarding which an appellate court is obligated to reach a conclusion independent of the determination reached by the court below.
- The Nebraska Child Support Guidelines relative to joint physical custody provide that a "day" shall be generally defined as including an overnight period.
- When a specific provision for joint physical custody is ordered and each party's parenting time exceeds 142 days per year, it is a rebuttable presumption that support shall be calculated using the joint custody worksheet of the Nebraska Child Support Guidelines.
- The Nebraska Child Support Guidelines offer flexibility and guidance, with the understanding that not every child support scenario will fit neatly into the calculation structure.
- Although the division of property is not subject to a precise mathematical formula, the general rule is to award a spouse one-third to one-half of the marital estate, the polestar being fairness and reasonableness as determined by the facts of each case.

Pearson v. Pearson, 285 Neb. 686, 828 N.W.2d 760 (2013)

Facts: Mom remarried and wanted to move to Alaska with the kids. The District Court allowed her to, but in return canceled Dad's child support obligation. No work sheet was attached.

Held: A worksheet must be attached, showing how the trial court reached the conclusion that travel/visitation expenses equaled what the Dad would have paid in support.

- Only reasonable transportation expenses may reduce or abate a child support obligation. Allowing unlimited abatement of child support, to the point where the custodial parent receives substantially reduced or no child support, is contrary to the children's best interests. . . . a custodial parent has some fixed and constant expenses in raising children, and these expenses do not decrease during extended periods of visitation with the noncustodial parent. These expenses certainly do not decrease simply because transportation costs significantly increase.

Peter v. Peter, 262 Neb. 1017, 637 N.W.2d 865 (2002)

- In using Nebraska Child Support Guidelines to set or modify support, it is in- appropriate and contrary to the best interests of the children to use income averaging when the obligor's income is consistently increasing.
- As a general matter, the parties' current earnings are to be used in setting support.

Riggs v. Riggs, 261 Neb. 344, 622 N.W.2d 861 (2001)

- For purposes of [§ 4-204] of the Nebraska Child Support Guidelines, a "means-tested public assistance benefit" is a benefit that includes a payment in money, or by assistance in kind, to, or for the benefit of, a person where (1) the eligibility for the benefit or (2) the amount of the benefit is determined on the basis of the income or resources of the recipient, such that the benefit decreases as the recipient's income increases.
- The earned income credit under the federal Internal Revenue Code is a means-tested public assistance benefit under [§ 4-204] of the Nebraska Child Support Guidelines.

Rutherford v. Rutherford, 277 Neb. 301, 761 N.W.2d 922 (2009)

- If a trial court fails to prepare the applicable worksheets, the parties are required to request that such worksheet be included in the trial court's order. Orders for child support or modification which do not contain such worksheets will on appeal be summarily remanded to the trial court so that it can prepare the worksheets as required by the guidelines. Such requirement is set forth in this court's rules. [§4-203}
- Under the guidelines, a deviation in the amount of child support is allowed "'whenever the application of the guidelines in an individual case would be unjust or inappropriate.'"
- "Deviations from the guidelines must take into consideration the best interests of the child."
- In the event of a deviation from the guidelines, the trial court should "state the amount of support that would have been required under the guidelines absent the deviation and include the reason for the deviation in the findings portion of the decree or order, or complete and file worksheet 5 in the court file."
- The guidelines provided that a parent who requests an adjustment in child support for health insurance premiums "must submit proof of the cost of the premium."

Sears v. Larson, 259 Neb. 760, 612 N.W.2d 474 (2000)

- Paragraph C (5) [now § 4-203 (E)] of the guidelines allows a trial court in an appropriate case to deviate from the guidelines to allow a deduction from income based on a parent's student loan payment. [§4-203] of the guidelines provides that the guidelines shall be applied as a rebuttable

presumption. However, pursuant to [§4-203 (E)], deviations from the guidelines are permissible "whenever the application of the guidelines in an individual case would be unjust or inappropriate."

Sellers v. Sellers, 23 Neb. App. 219, 869 N.W.2d 703 (September 2015)

This case presents classic child support modification facts: an increase in income; a second family, with a step-child; the federal poverty guidelines; health insurance issues and a history of health problems for the obligated parent. The discussion and resolution of these issues is handled very well by the Court of Appeals. An understanding of this case will be crucial for attorneys who work with child support modification facts.

- Neb. Ct. R. § 4-203 (rev. 2011) provides in part:

  > The child support guidelines shall be applied as a rebuttable presumption. All orders for child support obligations shall be established in accordance with the provisions of the guidelines unless the court finds that one or both parties have produced sufficient evidence to rebut the presumption that the guidelines should be applied.

- [T]here is no provision in the guidelines that would allow a deduction for a child other than a biological or adopted child.
- No precise mathematical formula exists for calculating child support when subsequent children are involved, but the court must perform the calculation in a manner that does not benefit one family at the expense of the other. The party requesting a deduction for his or her obligation to support subsequent children bears the burden of providing evidence of the obligation, including the income of the other parent of the child. ***Schwarz v. Schwarz***, 289 Neb. 960, 857 N.W.2d 802 (2015) [T]he district court considered Jason's income alone and what his obligation would be for his four biological children and divided that total obligation by four to arrive at an amount per child. ... The State argues that this formula treats all of Jason's children fairly and does not provide a benefit to either his previous children or his subsequently born child. We agree.
- Because Jason did not present sufficient evidence to support a deviation for extraordinary medical expenses, the court did not abuse its discretion in declining to allow such a deviation.
- Following our decision in ***Lasu v. Issak,*** 23 Neb. App. 83, ___ N.W.2d ___ (2015), we agree with Jason that it is appropriate to consider the poverty guidelines as updated in the Federal Register that were in place at the time of this modification proceeding. ... In further applying the poverty guidelines as updated annually in the Federal Register, we are also faced with the question of how to determine the household income and size. ... [W]e determine that for purposes of setting child support, the questions of how to define income and how to count a family or household under the poverty guidelines as updated annually in the Federal Register should be determined in a manner consistent with the Nebraska Child Support Guidelines.
- [I]n considering application of the poverty guidelines as a mechanism to limit Jason's child support obligation for his three prior children in this case, we also consider whether it is appropriate to impute income to Jason's current wife. ... [T]he Nebraska Child Support Guidelines recognize that earning capacity may be considered in lieu of a parent's actual, present income. Neb. Ct. R. § 4-204. In applying the child support guidelines, courts in Nebraska often attribute income to a nonworking parent in calculating child support. See, e.g., *Muller v. Muller*, 3 Neb. App. 159, 524 N.W.2d 78 (1994)
- In this case, both parties attributed earning capacity income to Stephanie as if she were working full time and earning minimum wage. Under the circumstances of this case, we conclude that it is appropriate, in applying the poverty guidelines, to likewise attribute earning capacity income

to Jason's current wife. The only evidence in the record is that she is a stay-at-home mother; there is no evidence that she could not attain minimum-wage earning capacity by reasonable efforts. ... For the sake of completeness, we considered the household size as four to include Jason's stepson, since we imputed income to Jason's current wife.

Smith-Helstrom v. Yonker, 249 Neb. 449**,** 544 N.W.2d 93 (1996)

- The proper amount of child support is determined not necessarily by a parent's earnings, but by a parent's earning capacity.

Sneckenberg v. Sneckenberg, 9 Neb. App. 609, 616 N.W.2d 68 (2000)

- [A]n upward revision of the guidelines constitutes a material change of circumstances that can warrant upward modification of a parent's child support obligation, independent of changes in that parent's income.

Snyder v. Chandler, No. A-00-460 (Not designated for permanent publication, 2001)

- [§ 4-218] prohibits the setting of child support payments which will reduce a parent's net monthly income below a certain amount and further provides that the $50 minimum payment provided for in [§ 4-209] is permissive and within the trial court's discretion. See Neb. Rev. Stat. §49-802(1)

State v. Oglesby, 244 Neb. 880, 510 N.W.2d 53 (1994)

Facts: *Mother got pregnant out of wedlock in 1976. Child born in 1977 and had little contact with bio father. Mother did not want bio father in the child's life. Nearly thirteen years later mother went on state assistance and state filed paternity action. Father shown to be bio dad and trial court sets support in strict compliance with child support guidelines, giving no consideration to the fact that father was supporting his family of 5 on just his paychecks. Held: strict compliance with child support guidelines would be inequitable under the facts of this case.*

- ... the support ordered by the court in this case gives no consideration at all to the present children, we find that the trial court abused its discretion in not first determining that, under the particular facts of this case, the strict application of the guidelines would be unjust or inappropriate, as set out in the Nebraska Child Support Guidelines, paragraph C(5).

State on Behalf of Martinez v. Martinez-Ibarra, 281 Neb. 547, 797 N.W.2d 222 (2011)

- The child support guidelines do not allow for a deduction on Worksheet #1 for cash medical support. *But see changes to the guidelines effective 09/01/11, that do!*
- The requirement that the custodial parent pay the first $480 of nonreimbursed medical expenses per year does not serve to reduce the amount of cash medical support ordered.

Stuczynski v. Stuczynski, 238 Neb. 368, 471 N.W.2d 122 (1991)

- The child support guidelines set out a rebuttable presumption of a fair and equitable child support order.

Wilkins v. Wilkins, 269 Neb. 937, 697 N.W.2d 280 (2005)

The twists and turns in the facts of this case are far too long to repeat here.

- Any deviation from the guidelines must take into consideration the best interests of the children.
- The party requesting a deviation from the Nebraska Child Support Guidelines based upon an obligation to support offspring of a subsequent relationship bears the burden of providing

evidence regarding the obligation, including the income of the other parent of the child or children of the subsequent relationship.

- Whether a child support order should be retroactive is entrusted to the discretion of the trial court and will be affirmed absent an abuse of discretion.

Willcock v. Willcock, 12 Neb. App. 422, 675 N.W.2d 721 (2004)

- Interpretation of the Nebraska Child Support Guidelines presents a question of law, regarding which an appellate court is obligated to reach a conclusion independent of the determination reached by the court below.

Workman v. Workman, 262 Neb. 373, 381, 632 N.W.2d 286, 294 (2001)

- This court has not set forth a rigid definition of what constitutes "income," but has instead relied on a flexible, fact-specific inquiry that recognizes the wide variety of circumstances that may be presented in child support cases.
- The reasonable contributions of a parent's [new spouse] to household expenses should not be included in the parent's gross income for purposes of determining child support, but may be considered in determining whether the circumstances warrant a deviation from the Guidelines.

Health Insurance/Cash Medical Support
(See also Medicaid Reimbursement/ Medical Support)

§42-369

. . .

(2) (a) If the party against whom an order, decree, or judgment for child support is entered or the custodial party has health insurance available to him or her through an employer, organization, or other health insurance entity which may extend to cover any children affected by the order, decree, or judgment and the health care coverage is accessible to the children and is available to the responsible party at reasonable cost, the court shall require health care coverage to be provided. Health care coverage is accessible if the covered children can obtain services from a plan provider with reasonable effort by the custodial party. When the administrative agency, court, or other tribunal determines that the only health care coverage option available through the noncustodial party is a plan that limits service coverage to providers within a defined geographic area, the administrative agency, court, or other tribunal shall determine whether the child lives within the plan's service area. If the child does not live within the plan's service area, the administrative agency, court, or other tribunal shall determine whether the plan has a reciprocal agreement that permits the child to receive coverage at no greater cost than if the child resided in the plan's service area. The administrative agency, court, or other tribunal shall also determine if primary care is available within thirty minutes or thirty miles of the child's residence. For the purpose of determining the accessibility of health care coverage, the administrative agency, court, or other tribunal may determine and include in an order that longer travel times are permissible if residents, in part or all of the service area, customarily travel distances farther than thirty minutes or thirty miles. If primary care services are not available within these constraints, the health care coverage is presumed inaccessible. If health care coverage is not available or is inaccessible and one or more of the parties are receiving Title IV-D services, then cash medical support shall be ordered. Cash medical support or the cost of

private health insurance is considered reasonable in cost if the cost to the party responsible for providing medical support does not exceed three percent of his or her gross income. In applying the three-percent standard, the cost is the cost of adding the children to existing health care coverage or the difference between self-only and family health care coverage. Cash medical support payments shall not be ordered if, at the time that the order is issued or modified, the responsible party's income is or such expense would reduce the responsible party's net income below the basic subsistence limitation provided in Nebraska Court Rule section 4-218. If such rule does not describe a basic subsistence limitation, the responsible party's net income shall not be reduced below nine hundred three dollars net monthly income for one person or below the poverty guidelines updated annually in the Federal Register by the United States Department of Health and Human Services under the authority of 42 U.S.C. 9902(2).

(b) For purposes of this section:

(i) Health care coverage has the same meaning as in section 44-3,144; and

(ii) Cash medical support means an amount ordered to be paid toward the cost of health insurance provided by a public entity or by another parent through employment or otherwise or for other medical costs not covered by insurance.

. . .

Source: Laws 1972, LB 820, § 23; Laws 1983, LB 371, § 11; Laws 1991, LB 457, § 4; Laws 1993, LB 435, § 1; Laws 2000, LB 972, § 15; Laws 2007, LB554, § 35; Laws 2009, LB288, § 6.
Operative Date: Sept. 30, 2009

Please Note, the amendments to 42-369 (2) mandated by the Unicameral in 2009 changes the way new support orders address the medical coverage needs of children in all Title IV-D cases. The goal of both the federal and state child support agencies is to work to enact regulations and laws designed to reflect the general consensus that parents have the primary responsibility to meet their children's needs, including health care coverage, and that when one or both parents can provide "**accessible and affordable health care**," that coverage should not be replaced by the expenditure of public funds from Medicaid or other programs.

Nebraska's Unicameral, after much resistance from the State Bar Association, decided to adopt a **3% state standard**, effective 9/30/09. This new definition has been worked into the Nebraska Child Support Guidelines. See the complete rule as amended **here**. The newest language, effective September 1, 2011, states as follows:

§ 4-215. Child(ren)'s health insurance, nonreimbursed health care expenses, and cash medical support in Title IV-D cases.

. . .

I Cash Medical Support and Health Care Costs for Title IV-D Cases Only.

(i) All child support orders in the Title IV-D program must address how the parties will provide for the child(ren)'s health care needs through health care coverage and/or through cash medical support. Cash medical support or the cost of private health insurance is considered reasonable in cost if the cost to the party responsible for providing medical support for the child(ren) does not exceed 3 percent of his or her gross income. In applying the 3-percent standard, the cost is the cost of adding the child(ren) to existing health care coverage or the difference between self-only and family health care coverage. Cash medical support payment shall not be ordered if, at the time that the order is issued or modified, the responsible party's income is, or such expense would reduce the responsible party's net income, below the basic subsistence limitation provided in § 4-218. If a court orders a parent

to pay cash medical support, it shall be in lieu of, and not in addition to, requiring the parent to also pay reimbursement for reasonable and necessary children's health care costs as set forth in subsection (B), above.

(ii) The amount of cash medical support ordered in the case shall be prorated between the parents. When worksheet 1 is used, it shall be added to the monthly support from line 7, then prorated between the parents to arrive at each party's share of monthly support on line 10 of worksheet 1. The parent paying the cash medical support receives a credit against his or her share of the monthly support.

See also federal rules and regulations for Qualified Medical Child Support Orders (QMCSO) at 29 U.S.C. 1169(a). Every employer group health plan must honor a properly prepared QMCSO that requires a plan participant to provide coverage for a dependent child. (See 29 U.S.C. 1169(a)) A child may no longer be denied insurance coverage due to the child residing in another state from the insuring parent, or the child not being listed on the parent's federal income tax return, for example.

Note: **§ 44-3,146 (2) i** provides that funds deducted from an employee's paycheck for the cost of dependent health insurance coverage must stand in line behind monies withheld pursuant to a standard withholding order for child support. **If there is not enough income to go around, the health insurance stops.** You can take steps to prevent this from happening in instances where having dependent health insurance coverage is more important to the custodial parent than receiving child support.

The child support guidelines define the terms "health insurance" and "health care costs":

§ 4-215. Child(ren)'s health insurance, nonreimbursed health care expenses, and cash medical support in Title IV-D cases.

(A) Health Insurance. The increased cost to the parent for health insurance for the child(ren) of the parent shall be prorated between the parents. When worksheet 1 is used, it shall be added to the monthly support from line 7, then prorated between the parents to arrive at each party's share of monthly support on line 10 of worksheet 1. The parent requesting an adjustment for health insurance premiums must submit proof of the cost for health insurance coverage of the child(ren). The parent paying the premium receives a credit against his or her share of the monthly support. If not otherwise specified in the support order, "health insurance" includes coverage for medical, dental, orthodontic, optometric, substance abuse, and mental health treatment.

(B) Health Care. Children's health care expenses are specifically included in the guidelines amount of up to $480 per child per year. Children's health care needs are to be met by requiring either parent to provide health insurance as required by state law. All nonreimbursed reasonable and necessary children's health care costs in excess of $480 per child per year shall be allocated to the obligor parent as determined by the court, but shall not exceed the proportion of the obligor's parental contribution (worksheet 1, line 6). If not otherwise specified in the support order, "health care costs" includes coverage for medical, dental, orthodontic, optometric, substance abuse, and mental health treatment.

…

Druba v. Druba , 238 Neb. 279, 470 N.W.2d 176 (1991)

- It is obvious that in this day and age, if a parent does not wish to provide such [health] insurance for his children, that parent must be ready to pay for health care for the children.

Henke v. Guerrero, 13 Neb. App. 337, 692 N.W.2d 762 (2005)

- Because paragraph O [now § 4-215] of the child support guidelines provides that "either parent" must carry health insurance on the child, the trial court had discretion in determining which parent should pay for it.
- [P]aragraph O of the child support guidelines, regarding health insurance, is subject to paragraph R [now § 4-218] of the guidelines, the basic subsistence limitation guideline. ***Kearney v. Kearney,*** 11 Neb. App. 88, 644 N.W.2d 171 (2002). *In other words, if making the parent pay part of uncovered medical expenses would cause them to fall below the* ***federal poverty guidelines****, then the court cannot make them pay a portion of uncovered medical expenses.*

Rutherford v. Rutherford, 277 Neb. 301, 761 N.W.2d 922 (2009)

- The guidelines provided that a parent who requests an adjustment in child support for health insurance premiums "must submit proof of the cost of the premium."

State on Behalf of Andrew D. v. Bryan B., 22 Neb. App. 914, 864 N.W.2d 249 (2015)

Held: 1. If a parent wants the trial court to consider the cost of dependent health insurance, they need to offer specific evidence as to those costs, or the trial court should not include a health insurance deduction in the worksheet support calculation.
2. When a parent fails to file income tax returns, the trial court is given wide discretion in determining that parent's income for child support calculation purposes.

- While a paternity action is one at law, the award of child support in such an action is equitable in nature.
- A trial court's award of child support in a paternity case will not be disturbed on appeal in the absence of an abuse of discretion by the trial court.
- The Nebraska Child Support Guidelines provide that the increased cost to the parent for health insurance for the children shall be prorated between the parents. The parent paying the premium receives a credit against his or her share of the monthly support, provided that the parent requesting the credit submits proof of the cost of health insurance coverage for the children.
- We conclude that Monica failed to prove the cost of health insurance for Andrew and that the trial court erred in relying on a document that was not in evidence. The trial court erred in granting Monica a health insurance deduction without any evidence of the cost of such insurance.

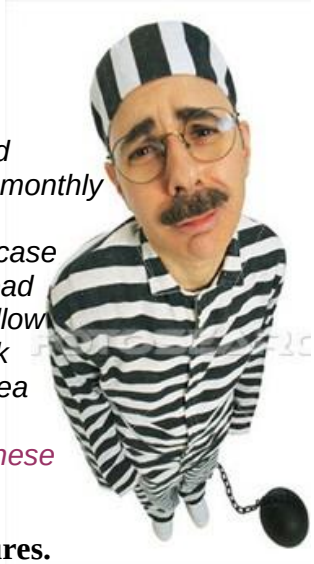
State on Behalf of Martinez v. Martinez-Ibarra, 281 Neb. 547, 797 N.W.2d 222 (2011)

[Please note: This case predates the present child support guidelines, which modified the way cash medical support is treated.]

- The child support guidelines do not allow for a deduction on Worksheet #1 for cash medical support.
- The requirement that the custodial parent pay the first $480 of nonreimbursed medical expenses per year does not serve to reduce the amount of cash medical support ordered.

Ward v. Ward, 7 Neb. App. 821, 585 N.W.2d 551 (1998)

- Pursuant to subsection (2) of this section, in a divorce case, a judge may not order both parties to provide health insurance for the child or children, but must direct which party shall provide such insurance.



Incarceration

Up until 2008 the law in Nebraska absolutely prohibited an incarcerated prisoner from returning to court to seek a reduction in his or her ongoing monthly child support obligation due solely to the fact that the obligated parent was incarcerated and unable to work as they did prior to their incarceration. The case law below reflects this long legacy of refusing to award people for their own bad behavior. However, recently the legislature has amended Nebraska law to allow for parents who are incarcerated for long periods of time to successfully seek downward modification in their child support orders. This represents a true sea change in the way this issue will be addressed by our courts.

It is crucial to note that IV-D attorneys shall not in any way assist in these attempts to reduce child support. The changes are set forth in § 43-512.15:

§ 43-512.15 Title IV-D child support order; modification; when; procedures.
(1) The county attorney or authorized attorney, upon referral from the Department of Health and Human Services, shall file a complaint to modify a child support order unless the attorney determines in the exercise of independent professional judgment that:
(a) The variation from the Supreme Court child support guidelines pursuant to section 42-364.16 is based on material misrepresentation of fact concerning any financial information submitted to the attorney;
(b) The variation from the guidelines is due to a voluntary reduction in net monthly income. For purposes of this section, a person who has been incarcerated for a period of one year or more in a county or city jail or a federal or state correctional facility shall be considered to have an involuntary reduction of income unless (i) the incarceration is a result of a conviction for criminal nonsupport pursuant to section 28-706 or a conviction for a violation of any federal law or law of another state substantially similar to section 28-706 or (ii) the incarcerated individual has a documented record of willfully failing or neglecting to provide proper support which he or she knew or reasonably should have known he or she was legally obligated to provide when he or she had sufficient resources to provide such support, or (iii) the incarceration is a result of a conviction for a crime in which the child who is the subject of the child support order was victimized;…. . .

(2) The department, a county attorney, or an authorized attorney shall not in any case be responsible for reviewing or filing an application to modify child support for individuals incarcerated as described in subdivision (1)(b) of this section.

Practice Note: §42-358 (3) indicates that where the child support payment history shows that the obligated parent is in arrears, a prima facie case of contempt is made. *Arguendo* that should be all that is needed to shift the burden to the incarcerated parent to disprove that he or she was acting willfully or neglectfully with regard to their child support obligation at the time

they walked (shackled) into prison. (Hat tip to Tyler Jacobsen in the Lancaster Co. Attorney's office)

Newer Case Law re. Incarceration and Modification

Hopkins v. Stauffer, 18 Neb. App. 116, 775 N.W.2d 457 (2009)
Facts: Proving he is a failure at everything, Father tries unsuccessfully to murder his wife, is arrested, tried, convicted and sentenced to 20-40 years incarceration. Obviously he wants his child support reduced. Under the new legislation he succeeds! A split opinion of the Court of Appeals. They immediately all went home and took showers.

- We conclude that the Legislature intended for an incarcerated inmate to be able to file his or her own complaint to modify child support and for the incarceration to be considered an involuntary reduction of income when the conditions of § 43-512.15 (1)(b) are met. We cannot ignore the evident intent of the legislative act merely because the Legislature could have chosen a better section in which to codify its amendment. Having settled the meaning of the statute, an appellate court must give effect to the purpose and intent of the Legislature.
  - A change in law, rather than the actions of the parties, may itself constitute a material change in circumstances such to justify a modification of child support. Even though the inmate's circumstances have not changed from his last action to modify his support obligation, the change of law constitutes a material change of circumstances.

Rouse v. Rouse, 18 Neb. App. 128, 775 N.W.2d 445 (2009)
Facts: Decided the same day as ***Hopkins v. Stauffer.*** The prisoner was sentenced to 38 years incarceration. He was behind in his support payments by over $3,000 at the time of his incarceration. The District court denied him a downward modification due, in part, to the fact he owed past due child support at the time he was first incarcerated.
Held: Reversed and remanded. Presentence incarceration must be considered by the trial court when evaluating any allegation of a lack of "clean hands" by the prisoner.

- [T]he change of law making incarceration an involuntary reduction in income under certain conditions rather than a voluntary reduction constituted a material change of circumstances.
- A person continuously jailed while awaiting trial faces the same reduction in income as a person continuously incarcerated after sentencing, and the statute specifically references incarceration in jails in addition to incarceration in federal or state correctional facilities.
- Because there is no documented record of Rouse's willfully failing or neglecting to provide proper support when he had sufficient resources to provide such support, we reverse, and remand for further proceedings.

Still good law:

Smith v. Smith, 12 Neb. App. 597, 681 N.W.2d 57 (2004)

- When obligated parent was incarcerated, but not yet sentenced, child support maybe based upon his regular rate of income pre-incarceration.
- Distinguished from ***State v. Porter***, below. In ***Smith***, "There was no evidence from which the court could determine whether James would be sentenced to a term of incarceration." ..."this case presents a factual scenario more akin to where an individual is not incarcerated at the time of the initial child support award."

State v. Porter, 259 Neb. 366, 610 N.W.2d 23 (2000)

- When earning capacity is used as a basis for *an initial determination* of child support under the Nebraska Child Support Guidelines, there must be some evidence that the parent is capable of realizing such capacity through reasonable effort. When an individual is incarcerated at the time *initial child support is determined*, the individual's preincarceration earnings cannot be considered.

Other Incarceration Related Cases:

Conn v. Conn, 13 Neb. App. 472, 695 N.W.2d 674 (2005)

Stands for the proposition that incarcerated prisoners may have a right to participate in court hearings via telephone if the court determines it to be necessary to protect their due process rights.

In Re Interest of Gabriella H., 289 Neb. 323, 855 N.W.2d 368 (2014)

- For purposes of Neb. Rev. Stat. § 43-292(1) (Cum. Supp. 2012), "abandonment" is a parent's intentionally withholding from a child, without just cause or excuse, the parent's presence, care, love, protection, maintenance, and the opportunity for the display of parental affection for the child.
- Incarceration does not insulate an inmate from the termination of his or her parental rights if the record contains the clear and convincing evidence that would support the termination of the rights of any other parent. Incarceration does not excuse a parent's obligation to provide the child with a continuing relationship.

State v. Kudlacz, 288 Neb. 656, 850 N.W.2d 755 (2014)

- A case is not authority for any point not necessary to be passed on to decide the case or not specifically raised as an issue addressed by the court.
- We therefore hold that confinement in the county jail as a condition of probation does not bar a person from seeking to have a conviction set aside pursuant to § 29-2264.

Income "from all Sources…"

Disposable income, defined.

Disposable income shall mean that part of the income of any individual remaining after the deduction from such income of any amounts required by law to be withheld, excepting the amounts required to be deducted and withheld pursuant to the Income Withholding for Child Support Act or those provisions of law allowing garnishment, attachment, or execution.

Source: Laws 1985, Second Spec. Sess., LB 7, § 27.

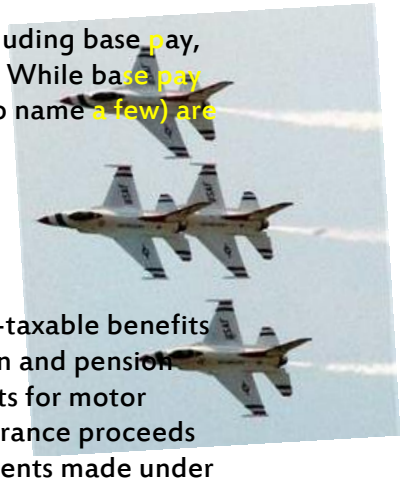
§43-1711 Income, defined.

Income shall mean (1) compensation paid, payable, due, or to be due for personal services, whether denominated as wages, salary, earnings, income, commission, bonus, or otherwise, and shall include any periodic payments pursuant to a pension or a retirement program and dividends, and (2) any other income from whatever source derived.

Source: Laws 1985, Second Spec. Sess., LB 7, § 31; Laws 1993, LB 523, § 13

Total Monthly Income is defined as the "income of both parties derived from all sources, except all means-tested public assistance benefits and payments received for children of prior marriages." – Nebraska Child Support Guidelines, §4-204

A note about Military Pay and Benefits:



Members of the military are often eligible for multiple types of pay, including base pay, BAS (Basic Allowance for Subsistence) and BAH (Basic Allowance for Housing). While base pay and other types of pay (incentive pay, enlistment bonuses, hardship duty pay, to name a few) are taxable income, BAH and BAS are not.
See the following IRS publication for a complete breakdown:
www.irs.gov/publications/p3/ar02.html#en_US_publink100095947

All veterans *benefits*, of whatever type or source, are tax **EXEMPT**. See **www.military.com/veterans-report/veterans-benefits-not-taxable**. These non-taxable benefits include education, training and subsistence allowances; disability compensation and pension payments for disabilities; grants for homes designed for wheelchair living; grants for motor vehicles for veterans who lost their sight or the use of their limbs; veterans' insurance proceeds and dividends; benefits under a dependent-care assistance program; and payments made under the compensated work therapy program. Tax information for members of the military is available on the IRS website.

A link to DFAS and military pay charts is available here> www.dfas.mil/dfas.html

Brockman v. Brockman, 264 Neb. 106, 646 N.W.2d 594 (2002)

- [F]ood stamps are means-tested public assistance benefits that are excluded from income pursuant to paragraph D of the Guidelines.

Dueling v. Dueling, 257 Neb. 862, 601 N.W.2d 516 (1999)

- All income from employment, whether full time or part time, must be included in the initial calculation, which then becomes a rebuttable presumption of appropriate support. A parent who believes that the inclusion of certain income would be unjust or inappropriate may rebut the presumption by offering evidence in support of his or her position that a deviation from the guidelines is warranted for that reason.
- A determination of whether to include income from a second job should be made on a case-by-case basis, in the context of whether deviation from the guidelines by exclusion of such income is necessary to achieve a fair and equitable child support order.
- Relevant considerations include the previous history of employment, the qualifications for the second job, the extent to which the parent may be under employed in the primary job, the health of the individual, the needs of the family, the rigors of the primary job and the second job, and all other circumstances. See *Cochran v. Cochran,* 14 Va. App. 827, 419 S.E.2d 419 (1992).
- There is a presumption that income from multiple jobs should be included in determining a child support obligor's child support obligation, unless the presumption is rebutted.

Gangwish v. Gangwish, 267 Neb. 901, 678 N.W.2d 503 (2004)

- We have not set forth a rigid definition of what constitutes "income," but have instead relied on a flexible, fact-specific inquiry that recognizes the wide variety of circumstances that may be present in child support cases. ***Workman v. Workman***, 262 Neb. 373, 632 N.W.2d 286 (2001). Thus, **income for the purpose of child support is** ***not necessarily synonymous with taxable income***. ***Gase v. Gase***, 266 Neb. 975, 671 N.W.2d 223 (2003); ***Rhoades v. Rhoades***, 258 Neb. 721, 605 N.W.2d 454 (2000); ***Rauch v. Rauch***, 256 Neb. 257, 590 N.W.2d 170 (1999).
- We take a flexible approach in determining a person's "income" for purposes of child support, because child support proceedings are, despite the child support guidelines, equitable in nature. Thus, a court is allowed, for example, to add **"in-kind" benefits** derived from an employer or third party to a party's income. *See also* ***Workman v. Workman***, 262 Neb. 373, 632 N.W.2d 286 (2001).
- Equity allows a court to disregard the corporate veil when necessary to do justice.

Gase v. Gase, 266 Neb. 975, 671 N.W.2d 223 (2003)

- While the decision to participate in a *retirement plan* may be voluntary in the first instance, where contributions made to the plan thereafter become mandatory, the minimum contribution required by the plan in effect at the time child support is calculated is deducted from income in determining a party's net income.

Gress v. Gress, 274 Neb. 686, 743 N.W.2d 67 (2007)

Issue: How many years back should a court go in ***averaging income*** *of parents with fluctuating income.*

- As a general matter, in the determination of child support, income from a self-employed individual is determined by looking to that person's **tax returns**.
- (Reviewing) a **3-year average** (income) tends to be the most common approach in cases where a parent's income tends to fluctuate. It is not necessary for a court to look back more than three years.

Hartman v. Hartman, 261 Neb. 359, 622 N.W.2d 871 (2001)

- Social Security benefits made to a child on account of the custodial parent's disability should be included in calculating that parent's income. In reaching this conclusion, the court determined that dependency benefits are based upon a parent's disability and her prior earnings; therefore, they are in lieu of a party's income. *Id.* Relying upon *Riggs v. Riggs*, 261 Neb. 344, 622 N.W.2d 861 (2001), the *Hartman* court reasoned that Social Security benefits made to a child on account of a parent's disability are not a "means-tested public assistance benefit" which are excluded under § 4-204 of the guidelines and therefore should be included as income when calculating child support.

Henderson v. Henderson, 264 Neb. 916, 653 N.W.2d 226 (2002)

- The Nebraska Child Support Guidelines provide that in calculating the amount of support to be paid, a court must consider the total monthly income, defined as the income of both parties derived from all sources, except all means-tested public assistance benefits. **Social Security disability** insurance

program benefits are not means-tested public assistance benefits, but are based on prior earnings of the recipient, not on the financial need of the recipient.

Mehne v. Hess, 4 Neb. App 935, 553 N.W.2d 482 (1996)

- Entire net amount received from personal injury settlement award constitutes income for child support purposes

Robbins v. Robbins, 3 Neb App. 953, 536 N.W.2d 77 (1995)

- Findings regarding an employee's level of income should not be based on the inclusion of income that is entirely speculative in nature and over which the employee has little or no control.

Simpson v. Simpson, 275 Neb. 152, 744 N.W.2d 710 (2008)

- Paragraph D [now § 4-204] of the Nebraska Child Support Guidelines defines total monthly income as income "derived from all sources, except all means-tested public assistance benefits which includes any earned income tax credit and payments received for children of prior marriages." The guidelines are very specific — all income from all sources is to be included except for those incomes specifically excluded. Not excluded under the guidelines is compensation meant to offset a spouse's increased cost of living while residing in a different locale. We conclude, therefore, that ... expatriate compensation is income for purposes of support calculations.

But...

- Under the facts of this case, we cannot say that the district court abused its discretion when it determined that Robert's expatriate compensation is not reasonably available for child support payments.

State o/b/o Joseph F. v. Rial, 251 Neb. 1, 554 N.W.2d 769 (1996)

- It is appropriate to consider overtime wages in setting child support *if the overtime is a regular part of the employment* and the employee can actually expect to regularly earn a certain amount of income for working overtime.

Stuczynski v. Stuczynski, 238 Neb. 368, 471 N.W.2d 122 (1991)

- A party obligated to furnish child support is not required to undertake two separate employments when the party has one full-time job. A spouse with a full-time job, which job also furnishes substantial overtime, may not be required to work at a second job to furnish child support.
- Deviations are permissible under circumstances enumerated in the guidelines, including, "whenever the application of the guidelines in an individual case would be unjust or inappropriate." *Nebraska Child Support Guidelines*, § 4-203 (E).
- speculative income that the husband employee has no control over should not be considered for purposes of setting child support

Workman v. Workman, 262 Neb. 373, 632 N.W.2d 286 (2001)

- If the moving party, i.e., the party seeking to have a particular source of support included as income under the Nebraska Child Support Guidelines, shows that the nonmoving party earns

or can reasonably expect to earn a certain amount of income on a regular basis, a rebuttable presumption of including such income arises under the guidelines.

- The Nebraska Supreme Court has not set forth a rigid definition of what constitutes "income," but has instead relied on a flexible, fact-specific inquiry that recognizes the wide variety of circumstances that may be presented in child support cases.
- The reasonable contributions of a parent's cohabitant to household expenses should not be included in the parent's gross income for purposes of determining child support, but may be considered in determining whether the circumstances warrant a deviation from the Nebraska Child Support Guidelines.

Income Withholding/ Employer Services

Automatic income withholding was the best development in the child support world since the founding of the Republic. More child support is collected via income withholding orders than all other forms of enforcement combined! Over the years it has lost the stigma of being evidence of a deadbeat parent. Since 1993 income withholding has generally been required in ALL Nebraska child support cases, unless the court explicitly finds grounds not to require it. Of course income withholding does not work when the obligated parent is self employed, and it may not work perfectly when the obligated parent has only part-time employment. Still, it is worth its weight in gold. Cited below are some of the more important statutes on the subject.

A helpful federal link for employers, explaining the income withholding forms in detail, can be found at: www.acf.hhs.gov/programs/cse/newhire/employer/contacts/contact_map.htm

§ 42-364.01. Child support; withholding of earnings; court; powers.

In any proceeding when a district court, county court, or separate juvenile court has ordered, temporarily or permanently, a parent, referred to as parent-employee in sections 42-364.01 to 42-364.12, to pay any amount for the support of a minor child, that court shall, following application, hearing, and findings, as required by sections 42-364.02 to 42-364.12, order the employer of such parent:

(1) To withhold, from the parent-employee's nonexempt, disposable earnings presently due and to be due in the future, such amounts as shall reduce and satisfy the parent-employee's previous arrearage in child support payments arising from the parent-employee's failure to comply fully with an order previously entered to pay child support, the parent-employee's obligation to pay child support as ordered by the court as such obligation accrues in the future;

(2) To pay to the parent-employee, on his or her regularly scheduled payday such earnings then due which are not ordered withheld;

(3) To deduct from the sums so withheld an amount set by the court, but not to exceed two dollars and fifty cents in any calendar month, as compensation for the employer's reasonable cost incurred in complying with such order;

(4) To remit within seven calendar days after the date the obligor is paid such sums withheld, less the deduction as allowed by the court pursuant to subdivision (3) of this section, to the State Disbursement Unit;

(5) To refrain from dismissing, demoting, disciplining, and in any way penalizing the parent-employee on account of the proceeding to collect child support, on account of any order or

orders entered by the court in such proceeding, and on account of employer compliance with such order or orders; and

(6) To notify in writing the clerk of the court entering such order of the termination of the employment of such parent-employee, the last-known address of the parent-employee, and the name and address of the parent-employee's new employer, if known, and to provide such written notification within thirty days after the termination of employment.

Source: Laws 1974, LB 1015, § 6; Laws 1983, LB 371, § 4; Laws 2000, LB 972, § 12.

§ 42-364.06. Child support; withholding of earnings; court order.

. . . Noncompliance with a child support order shall not be found if the child support payments are automatically withheld from the paycheck if (1) any delinquency or arrearage is solely caused by a disparity between the schedule of the regular pay dates and the scheduled date the child support is due, (2) the total amount of child support to be withheld from the paychecks and the amount ordered by the support order are the same on an annual basis, and (3) the automatic deductions for child support are continuous and occurring. . . .

Source: Laws 1974, LB 1015, § 11; Laws 1983, LB 371, § 6; Laws 1984, LB 845, § 29; Laws 1997, LB 18, § 2.

§42-364.08. Child support; withholding of earnings; limitations.

The amount to be withheld from the parent-employee's disposable income under any order to withhold and transmit earnings entered pursuant to sections 42-364.01 to 42-364.12 shall not in any case exceed the maximum amount permitted to be withheld under section 303(b) of the Consumer Protection Credit Act, 15 U.S.C. 1673 (b)(2)(A) and (B), nor shall any amount withheld to satisfy a child or spousal support arrearage, when added to the amount withheld to pay current support and the fee provided for in subdivision (3) of section 42-364.01, exceed such maximum amount.

Source: Laws 1974, LB 1015, § 13; Laws 1986, LB 600, § 8.

§42-364.09. Child support; withholding of earnings; priority.

Any order to withhold and transmit earnings shall have priority over any attachment, execution, garnishment, or wage assignment, unless otherwise ordered by the court.

Source: Laws 1974, LB 1015, § 14.

§42-364.10. Child support; withholding of earnings; order; dissolution; revocation; modification; service.

An order to withhold and transmit earnings shall dissolve without any court action thirty days after the parent-employee ceases employment with the employer. . . .

Source: Laws 1974, LB 1015, § 15; Laws 1983, LB 371, § 7.

§42-364.11. Child support; withholding of earnings; terms, defined.

For the purposes of sections 42-364.01 to 42-364.14, unless the context otherwise requires:

(1) Earnings shall mean compensation paid or payable for personal services, whether denominated as wages, salary, commission, bonus, or otherwise, and shall include any periodic payments pursuant to a pension or a retirement program and any payments made to an independent contractor for services performed;

(2) Disposable earnings shall mean that part of the earnings of any individual remaining after the deduction from those earnings of any amounts required by law to be withheld, excepting the

amounts required to be deducted and withheld pursuant to sections 42-357 and 42-363 to 42-365 or those provisions allowing garnishment, attachment, or execution;
(3) Employer shall mean any person, partnership, limited liability company, firm, corporation, association, political subdivision, or department of the state in possession of earnings;
(4) Employee shall mean any person who is compensated by an employer for services performed, regardless of how such compensation is denominated, and **shall include independent contractors** who receive compensation for services;
…
Source: Laws 1974, LB 1015, § 16; ; Laws 1983, LB 371, § 8; Laws 1993, LB 121, § 215; Laws 2004, LB 1207, § 26. Operative date April 16, 2004

§42-364.12 Child support; withholding of earnings; employer; civil contempt; liability for damages; injunction.
Any employer failing to make answer truthfully and completely to the interrogatories propounded pursuant to section 42-364.03 may be punished by the court for civil contempt. The court shall first afford such employer a reasonable opportunity to purge itself of such contempt. Any employer who shall fail or refuse to deliver earnings pursuant to an order to withhold and transmit earnings, when such employer has had in its possession such earnings, shall be personally liable for the amount of such earnings which the employer failed or refused to deliver, together with costs, interest, and reasonable attorney's fees. Any employer who fails to notify in writing the clerk of the court entering an order to withhold and transmit earnings of the termination of the parent-employee and the name and address of the parent-employee's new employer, if known, within thirty days after the termination of employment, may be punished by the court for civil contempt. Any employer who dismisses, demotes, disciplines, or in any way penalizes a parent-employee on account of any proceeding to collect child support, on account of any order or orders entered by the court in such proceeding, or on account of the employer's compliance with such order or orders, shall be liable to the parent-employee for all damages, together with costs, interest thereon, and a reasonable attorney's fee, resulting from the employer's action and may be enjoined by any court of competent jurisdiction from continuing such action. Any proceeding to punish an employer for contempt, to hold the employer liable for earnings not withheld and transmitted, to hold the employer liable for actions taken against the parent-employee, or to enjoin the employer from continuing such actions, must be commenced within ninety days after the employer's act or failure to act upon which such proceeding is based.
Source: Laws 1974, LB 1015, § 17

§ 42-734.01 Employer's compliance with income withholding order of another state.
(a) Upon receipt of an income withholding order, the obligor's employer shall immediately provide a copy of the order to the obligor.
(b) The employer shall treat an income withholding order issued in another state which appears regular on its face as if it had been issued by a tribunal of this state.
I Except as otherwise provided in subsection (d) of this section and section 42-734.02, the employer shall withhold and distribute the funds as directed in the withholding order by complying with the terms of the order which specify:
(1) the duration and amount of periodic payments of current child support, stated as a sum certain;
(2) the person designated to receive payments and the address to which the payments are to be forwarded;

(3) medical support, whether in the form of periodic cash payment, stated as a sum certain, or ordering the obligor to provide health insurance coverage for the child under a policy available through the obligor's employment;
(4) the amount of periodic payments of fees and costs for a support enforcement agency, the issuing tribunal, and the obligee's attorney, stated as sums certain; and
(5) the amount of periodic payments of arrearages and interest on arrearages, stated as sums certain.
(d) An employer shall comply with the law of the state of the obligor's principal place of employment for withholding from income with respect to:
(1) the employer's fee for processing an income withholding order;
(2) the maximum amount permitted to be withheld from the obligor's income; and
(3) the times within which the employer shall implement the withholding order and forward the child support payment.
Source: Laws 1997, LB 727, § 11; Laws 2003, LB 148, § 72.

42-734.03 Immunity from civil liability.
An employer who complies with an income withholding order issued in another state in accordance with sections 42-734 to 42-735 is not subject to civil liability to any individual or agency with regard to the employer's withholding of child support from the obligor's income.
Source: Laws 1997, LB 727, § 13.

§43-1702. Purpose of act.
It is the intent of the Legislature to encourage the use of all proven techniques for the collection of child, spousal, and medical support and monetary judgments. While income withholding is the preferred technique, other techniques such as liens on property and contempt proceedings should be used when appropriate. The purpose of the Income Withholding for Child Support Act is to provide a simplified and relatively automatic procedure for implementing income withholding in order to guarantee that child, spousal, and medical support obligations and monetary judgments are met when income is available for that purpose, to encourage voluntary withholding by obligors, and to facilitate the implementation of income withholding based on foreign support orders. **Source:** Laws 1985, Second Spec. Sess., LB 7, § 22; Laws 1991, LB 457, § 18; Laws 2010, LB712, § 28

§43-1709. Employer or other payor, defined.
Employer or other payor shall mean any person, partnership, limited liability company, firm, corporation, association, political subdivision, or department or agency of the state or federal government in possession of income and shall include an obligor if he or she is self-employed.
Source: Laws 1985, Second Spec. Sess., LB 7, §29; Laws 1991, LB 457, §22; Laws 1993, LB 121, §217.

§43-1711. Income, defined.
Income shall mean (1) compensation paid, payable, due, or to be due for personal services, whether denominated as wages, salary, earnings, income, commission, bonus, or otherwise, and shall include any periodic payments pursuant to a pension or a retirement program and dividends, and (2) any other income from whatever source derived.
Source: Laws 1985, Second Spec. Sess., LB 7, § 31; Laws 1993, LB 523, § 13.

***Spousal support** is subject to enforcement on an equal basis as child support…*

§43-1715. Spousal support, defined.

Spousal support shall mean alimony or maintenance support for a spouse or former spouse if the provision for support is a part of an order, decree, or judgment which provides for child support and the child and spouse or former spouse are living in the same household.

Source: Laws 1985, Second Spec. Sess., LB 7, § 35.

Since the early 1990s mandatory income withholding has pretty much been the standard for all support orders. It is NOT required by law, however. See below:

§ 43-1718. Support order; operate as assignment of income; effect; duties.

. . . The Title IV-D Division of the Department of Health and Human Services or its designee shall be responsible for administering income withholding. In administering income withholding, the Title IV-D Division or its designee shall keep accurate records to document, track, and monitor support payments.

Source: Laws 1985, Second Spec. Sess., LB 7, § 38; Laws 1991, LB 457, § 26; Laws 1994, LB 1224, § 66; Laws 1997, LB 18, § 3; Laws 2000, LB 972, § 22.

§43-1718.01. Obligor; subject to income withholding; when; notice.

(1) In any case in which services are provided under Title IV-D of the federal Social Security Act, as amended, and a support order has been issued or modified on or after September 6, 1991, the obligor's income shall be subject to income withholding regardless of whether or not payments pursuant to such order are in arrears, and the court shall require such income withholding in its order *unless:*

(a) One of the parties demonstrates and the court finds that there is good cause not to require immediate income withholding; *or*

(b) A written agreement between the parties, including the state if there is an assignment of support pursuant to section 43-512.07, providing an alternative arrangement is incorporated into the support order.

(2) In any case in which services are provided under Title IV-D of the federal Social Security Act, as amended, the income of an obligor not subject to withholding pursuant to subsection (1) of this section shall become subject to income withholding:

(a) On the date on which the payments are delinquent in an amount equal to the support due and payable for a one-month period of time; or

(b) Regardless of whether payments are in arrears, on the earliest of (i) the date as of which the obligor requests that income withholding begin, (ii) the date as of which the obligee requests that income withholding begin if the department determines that such request should be approved, or (iii) any earlier date after September 6, 1991, which the department selects. The obligor shall receive notice of income withholding and his or her right to a hearing pursuant to section 43-1720 when his or her income is withheld pursuant to subdivision (b)(ii) or (b)(iii) of this subsection.

(3) No obligor whose child support payments are automatically withheld from his or her paycheck shall be regarded or reported as being delinquent or in arrears if (a) any delinquency or arrearage is solely caused by a disparity between the schedule of the obligor's regular pay dates and the scheduled date the child support is due, (b) the total amount of child support to be withheld from the paychecks of the obligor and the amount ordered by the support order are the

same on an annual basis, and (c) the automatic deductions for child support are continuous and occurring.

(4) The department shall adopt and promulgate rules and regulations necessary to carry out this section.

Source: Laws 1991, LB 457, § 27; Laws 1997, LB 18, § 4.

See §43-1718.02 for income withholding provisions in Non IV-D cases. Note: if the parties have not applied for IV-D services to your office or to NDHHS, then it is the obligated parent's responsibility to prepare his/her own notice to withhold income, and to deliver it to the employer. §43-1718.02 spells this out. This section details when and under what conditions child support orders may forego income withholding, and sets out penalties for employers who do not comply with the mandate to withhold. This statute was updated effective July 15, 2010.

§43-1723. Notice to employer or other payor; contents; compliance; effect.

Except as otherwise provided in this section, the county attorney, the authorized attorney, or the department shall notify the obligor's employer or other payor, by first-class mail or by electronic means, within the time determined by the department which shall comply with the requirements of Title IV-D of the federal Social Security Act, as amended. The notice shall specify the basis for the assignment of income and shall direct:

(1) That the employer or other payor shall withhold from the obligor's disposable income the amount stated by the county attorney, the authorized attorney, or the department for the purpose of reducing and satisfying the obligor's (a) previous arrearage in child, spousal, or medical support payments arising from the obligor's failure to fully comply with a support order previously entered, (b) ongoing obligation for support payments as they become due, and (c) then any monetary judgment;

(2) That the employer or other payor shall implement income withholding no later than the first pay period that begins following the date on the notice;

(3) That the employer or other payor shall pay to the obligor, on his or her regularly scheduled payday, such income then due which is not stated to be withheld pursuant to section 43-1722 or any court order;

(4) That the employer or other payor may assess an additional administrative fee from the obligor's disposable income not to exceed two dollars and fifty cents in any calendar month as compensation for the employer's or other payor's reasonable cost incurred in complying with the notice;

(5) That the employer or other payor shall remit, within seven days after the date the obligor is paid and in the manner specified in the notice, the income withheld, less the deduction allowed as an administrative expense by subdivision (4) of this section, to the State Disbursement Unit as designated in the notice and shall notify the unit of the date such income was withheld;

(6) That the employer or other payor shall notify the county attorney, the authorized attorney, or the department in writing of the termination of the employment or income of the obligor, the last-known address of the obligor, and the name and address of the obligor's new employer or other payor, if known, and shall provide such written notification within thirty days after the termination of employment or income;

(7) That income withholding is binding on the employer or other payor until further notice by the county attorney, the authorized attorney, or the department;

(8) That the employer or other payor may combine amounts required to be withheld from the income of two or more obligors in a single payment to the unit as designated in an income withholding notice if the portion of the single payment which is attributable to each individual obligor is separately identified;

(9) That an employer or other payor who fails to withhold and remit income of an obligor after receiving proper notice or who discriminates, demotes, disciplines, or terminates an employee or payee after receiving an income withholding notice shall be subject to the penalties prescribed in sections 43-1724 and 43-1725; and

(10) That if the employer or other payor receives more than one notice to withhold income of a single obligor and the amount of income available to be withheld pursuant to the limits specified in section 43-1722 is insufficient to satisfy the total support amount stated in the notices, the income available shall first be applied to current support. If the total amount of income available to be withheld is insufficient to satisfy the total amount of current support stated by the notices, the employer or other payor shall withhold for each notice the proportion that the amount of the current support stated in such notice bears to the total amount of current support stated in all notices received for the obligor. Any remaining income available to be withheld after current support is satisfied for all notices shall be applied to arrearages. If arrearages are stated in more than one notice, the employer or other payor shall withhold for each notice the proportion that the amount of the arrearage stated in such notice bears to the total amount of arrearage stated in all notices received for the obligor. Any income available to be withheld after the obligor's support obligation is current shall be applied to any monetary judgment. If a monetary judgment is stated in more than one notice, the employer or other payor shall withhold for each notice the proportion that the amount of the monetary judgments stated in such notice bears to the total amount of monetary judgments stated in all notices received for the obligor.

Compliance with the order by the employer or other payor shall operate as a discharge of the employer's or other payor's liability to the obligor as to the portion of the obligor's income withheld. The county attorney, the authorized attorney, or the department need not notify the Commissioner of Labor as a payor if the commissioner is withholding for child support from the obligor under section 48-647 for the same support order.

Source: Laws 1985, Second Spec. Sess., LB 7, § 43; Laws 1986, LB 600, § 5; Laws 1991, LB 457, § 32; Laws 1993, LB 523, § 17; Laws 1996, LB 1155, § 14; Laws 1997, LB 752, § 105; Laws 2000, LB 972, § 24; Laws 2003, LB 245, § 3; Laws 2010, LB712, § 35. Operative Date: July 15, 2010

§43-1724. Employer or other payor; failure to withhold and remit income; effect.

Any employer or other payor who fails to withhold and remit any income of an obligor receiving income from the employer or other payor, after proper notice as provided in section 43-1723, shall be required to pay the stated amount to the State Disbursement Unit. The county attorney or authorized attorney may file an action in district court to enforce this section. The court may sanction an employer or other payor twenty-five dollars per day, up to five hundred dollars per incident, for failure to comply with proper notice.

Source: Laws 1985, Second Spec. Sess., LB 7, § 44; Laws 1991, LB 457, § 33; Laws 1993, LB 523, § 18; Laws 2005, LB 116, § 20; Laws 2010, LB712, § 36. Operative Date: July 15, 2010

§43-1725. Employer or other payor; prohibited actions; penalty.

An employer or other payor shall not use an income withholding notice or order or the possibility of income withholding as a basis for (1) discrimination in hiring, (2) demotion of an

employee or payee, (3) disciplinary action against an employee or payee, or (4) termination of an employee or payee.

Upon application by the county attorney or authorized attorney and after a hearing on the matter, the court may impose a civil fine of up to five hundred dollars for each violation of this section.

An employer or other payor who violates this section may be required to make full restitution to the aggrieved employee or payee, including reinstatement and backpay.

Source: Laws 1985, Second Spec. Sess., LB 7, § 45; Laws 1991, LB 457, § 34; Laws 1993, LB 523, §19.

§43-1726 Notice to withhold income; termination; exception; procedure.

When an obligor ceases employment with or is no longer entitled to income from an employer or other payor, the notice to withhold income shall not cease to operate against the obligor and income withholding shall continue to apply to any subsequent employment or income of the obligor. The notice to withhold income shall terminate with respect to the employer or other payor without any court action or action by the county attorney, the authorized attorney, or the department thirty days after the obligor ceases employment with or is no longer entitled to income from such employer or other payor, except that a notice to withhold income shall not terminate with respect to unemployment compensation benefits being withheld by the Commissioner of Labor pursuant to section 48-647. The employer or other payor shall return a copy of the notice to withhold income to the county attorney, the authorized attorney, or the department, indicate that the employment or obligation to pay income has ceased, and cooperate in providing any known forwarding information. The county attorney, the authorized attorney, or the department shall notify the clerk of the appropriate district court that such employment or obligation to pay income has ceased. A notice to withhold income shall also terminate when the child, spousal, or medical support obligation terminates, all past-due support has been paid, and any monetary judgments have been paid, in which case the county attorney, the authorized attorney, or the department shall notify the employer or other payor to cease withholding income.

Source: Laws 1985, Second Spec. Sess., LB 7, § 46; Laws 1986, LB 600, § 6; Laws 1991, LB 457, § 35; Laws 1993, LB 523, § 20; Laws 1996, LB 1155, § 15; Laws 2010, LB712, § 37. Operative Date: July 15, 2010

§43-1727. Income withholding notice; modification or revocation; notice.

1) An income withholding notice may be modified or revoked by a court of competent jurisdiction or by the county attorney, the authorized attorney, or the department as a result of a review conducted pursuant to sections 43-512.12 to 43-512.18. An income withholding notice may also be modified or revoked by a court of competent jurisdiction, for other good cause shown, after notice and a hearing on the issue. An income withholding notice may also be modified or revoked by the county attorney, the authorized attorney, or the department as provided in subsection (2) of this section or for other good cause. Payment by the obligor of overdue support or any monetary judgment, other than through income withholding, after receipt of notice of income withholding shall not by itself constitute good cause for modifying or revoking an income withholding notice.

(2) When income withholding has been implemented and, as a result, a support delinquency has been eliminated, the Title IV-D Division or its designee shall notify the county attorney, the authorized attorney, or the department. Upon receipt of such notification, the county attorney, the authorized attorney, or the department shall modify the income withholding notice to require

income withholding for current support and any monetary judgments and shall notify the employer or other payor of the change in the same manner as provided in section 43-1723.
Source: Laws 1985, Second Spec. Sess., LB 7, § 47; Laws 1991, LB 457, § 36; Laws 1991, LB 715, § 24; Laws 1996, LB 1155, § 16; Laws 2000, LB 972, § 25; Laws 2010, LB712, § 38. Operative Date: July 15, 2010

§42-734. Employer's receipt of income withholding order of another state.
An income withholding order issued in another state may be sent by or on behalf of the obligee or by the support enforcement agency to the person defined as the obligor's employer under the Income Withholding for Child Support Act or sections 42-347 to 42-381 without first filing a petition or comparable pleading or registering the order with a tribunal of this state.
Source: Laws 1993, LB 500, § 34; Laws 1997, LB 727, § 10; Laws 2003, LB 148, § 71.

§42-734.01. Employer's compliance with income withholding order of another state.
(a) Upon receipt of an income withholding order, the obligor's employer shall immediately provide a copy of the order to the obligor.
(b) The employer shall treat an income withholding order issued in another state which appears regular on its face as if it had been issued by a tribunal of this state.
I Except as otherwise provided in subsection (d) of this section and section 42-734.02, the employer shall withhold and distribute the funds as directed in the withholding order by complying with the terms of the order which specify:
(1) the duration and amount of periodic payments of current child support, stated as a sum certain;
… ….
(d) An employer shall comply with the law of the state of the obligor's principal place of employment for withholding from income with respect to:
(1) the employer's fee for processing an income withholding order;
(2) the maximum amount permitted to be withheld from the obligor's income; and
(3) the times within which the employer shall implement the withholding order and forward the child support payment.
Source: Laws 1997, LB 727, § 11; Laws 2003, LB 148, § 72

§42-734.02. Compliance with two or more income withholding orders.
If an obligor's employer receives two or more income withholding orders with respect to the earnings of the same obligor, the employer satisfies the terms of the orders if the employer complies with the law of the state of the obligor's principal place of employment to establish the priorities for withholding and allocating income withheld for two or more child support obligees.
Source: Laws 1997, LB 727, § 12; Laws 2003, LB 148, § 73.

§48-149. Compensation payments; nonassignable; not subject to attachment; exceptions.
No proceeds or interest thereon from payments or lump-sum settlements under the Nebraska Workers' Compensation Act or law of another state which provides compensation and benefits for employees sustaining job-related injuries shall be assignable, subject to attachment or garnishment, or held liable in any way for any debts, except (1) as provided in section 48-108 and (2) payments under the act or any law of another state which provides compensation and benefits for employees sustaining job-related injuries shall be subject to income withholding…

Source: Laws 1913, c. 198, § 50, p. 600; R.S.1913, § 3691; C.S.1922, § 3073; C.S.1929, § 48-150; R.S.1943, § 48-149; Laws 1986, LB 811, § 76; Laws 1993, LB 523, § 24; Laws 1993, LB 118, § 2; Laws 1997, LB 752, § 124.

48-2302 Terms, defined. For purposes of the New Hire Reporting Act:

(1) Date of hire means the day an employee begins employment with an employer;

(2) Department means the Department of Health and Human Services;

(3) Employee means an independent contractor or a person who is compensated by or receives income from an employer or other payor, regardless of how such income is denominated;

(Practice Tip: this definition now includes independent contractors)

(4) Employer means any individual, partnership, limited liability company, firm, corporation, association, political subdivision, or department or agency of the state or federal government, labor organization, or any other entity with an employee;

(5) Income means compensation paid, payable, due, or to be due for labor or personal services, whether denominated as wages, salary, earnings, income, commission, bonus, or otherwise;

(6) Payor includes a person, partnership, limited partnership, limited liability partnership, limited liability company, corporation, or other entity doing business or authorized to do business in the State of Nebraska, including a financial institution, or a department or an agency of state, county, or city government; and

(7) Rehire means the first day an employee begins employment with the employer following a termination of employment with such employer. Termination of employment does not include temporary separations from employment, such as an unpaid medical leave, an unpaid leave of absence, a temporary layoff, or an absence for disability or maternity.

Source: Laws 1997, LB 752, § 41; Laws 2009, LB288, § 16

In Forma Pauperis

State o/b/o Jakai C. v. Tiffany M, 292 Neb. 68, 871 N.W.2d 230 (November 2015)

Neb. Rev. Stat. § 25-2301.02 Application; objection; hearing; appeal.

(1) An application to proceed in forma pauperis shall be granted unless there is an objection that the party filing the application (a) has sufficient funds to pay costs, fees, or security or (b) is asserting legal positions which are frivolous or malicious. The objection to the application shall be made within thirty days after the filing of the application or at any time if the ground for the objection is that the initial application was fraudulent. Such objection may be made by the court on its own motion or on the motion of any interested person. The motion objecting to the application shall specifically set forth the grounds of the objection. An evidentiary hearing shall be conducted on the objection unless the objection is by the court on its own motion on the grounds that the applicant is asserting legal positions which are frivolous or malicious. If no hearing is held, the court shall provide a written statement of its reasons, findings, and conclusions for denial of the applicant's application to proceed in forma pauperis which shall become a part of the record of the proceeding. If an objection is sustained, the party filing the application shall have thirty days after the ruling or issuance of the statement to proceed with an action or appeal upon payment of fees, costs, or security notwithstanding the subsequent expiration of any statute of limitations or deadline for appeal. In any event, the court shall not deny

an application on the basis that the appellant's legal positions are frivolous or malicious if to do so would deny a defendant his or her constitutional right to appeal in a felony case.

(2) In the event that an application to proceed in forma pauperis is denied and an appeal is taken therefrom, the aggrieved party may make application for a transcript of the hearing on in forma pauperis eligibility. Upon such application, the court shall order the transcript to be prepared and the cost shall be paid by the county in the same manner as other claims are paid. The appellate court shall review the decision denying in forma pauperis eligibility de novo on the record based on the transcript of the hearing or the written statement of the court.

- We determined that the district court had erred when it did not conduct a hearing before denying Damian's motion to proceed *in forma pauperis* on appeal on the grounds of his ability to pay.
- The term "in forma pauperis" is defined by statute as "the permission given by the court for a party to proceed without prepayment of fees and costs or security." § 25-2301(2).
- We have often observed that the filing of a poverty affidavit, properly confirmed by oath or affirmation, serves as a substitute for the docket fee for an appeal. *In re Interest of Edward B.*, 285 Neb. 556, 827 N.W.2d 805 (2013). See, also, *In re Interest of Fedalina G.*, 272 Neb. 314, 721 N.W.2d 638 (2006); *Glass v. Kenney*, 268 Neb. 704, 687 N.W.2d 907 (2004).
- Except in certain circumstances, the provisions of § 25-2301.02(1) generally direct the trial court to grant an application to proceed *in forma pauperis*.

In Loco Parentis

In Re Interest of Sarah H., 21 Neb.App. 441, 838 N.W.2d 389 (2013)

- In the absence of a biological or adoptive relationship between a husband and his wife's child, certain rights and responsibilities may arise where a husband elects to stand in loco parentis to his wife's child.
- It is a husband's desire to remain in an in loco parentis relationship with his wife's child that gives rise to the rights and corresponding responsibilities usually reserved for natural or adoptive parents.
- Termination of the in loco parentis relationship also terminates the corresponding rights and responsibilities afforded thereby.
- In the absence of a biological or adoptive relationship between a husband and his wife's child, Nebraska appellate courts have recognized that certain rights and responsibilities may arise where a husband elects to stand in loco parentis to his wife's child. *Quintela v. Quintela*, 4 Neb. App. 396, 544 N.W.2d 111 (1996). A person standing in loco parentis to a child is one who has put himself or herself in the situation of a lawful parent by assuming the obligations incident to the parental relationship, without going through the formalities necessary to a legal adoption, and the rights, duties, and liabilities of such person are the same as those of the lawful parent. ... The assumption of the relation is a question of intention, which may be shown by the acts and declarations of the person alleged to stand in that relation.
- It is a husband's desire to remain in an in loco parentis relationship with his wife's child that gives rise to the rights and corresponding responsibilities usually reserved for natural or adoptive parents. *In re Interest of Destiny S., supra*; *Quintela v. Quintela, supra*. See *Cavanaugh v. deBaudiniere*, 1 Neb. App. 204, 493 N.W.2d 197 (1992)

There is now a 30 day grace period on the imposition of interest for judgments of child support, alimony and medical support. See **42-358.02 (2)**

§ 42-358.02. Delinquent child support payments, spousal support payments, and medical support payments; interest; rate; report; Title IV-D Division; duties.

(1) All delinquent child support payments, spousal support payments, and medical support payments shall draw interest at the rate specified in section 45-103 in effect on the date of the most recent order or decree. Such interest shall be computed as simple interest.

(2) All child support payments, spousal support payments, and medical support payments shall become delinquent the day after they are due and owing, except that no obligor whose support payments are automatically withheld from his or her paycheck shall be regarded or reported as being delinquent or in arrears if (a) any delinquency or arrearage is solely caused by a disparity between the schedule of the obligor's regular pay dates and the scheduled date the support payment is due, (b) the total amount of support payments to be withheld from the paychecks of the obligor and the amount ordered by the support order are the same on an annual basis, and (c) the automatic deductions for support payments are continuous and occurring. Interest shall not accrue until thirty days after such payments are delinquent.

(3) The court shall order the determination of the amount of interest due, and such interest shall be payable in the same manner as the support payments upon which the interest accrues subject to subsection (2) of this section or unless it is waived by agreement of the parties. The Title IV-D Division of the Department of Health and Human Services shall compute interest and identify delinquencies pursuant to this section on the payments received by the State Disbursement Unit pursuant to section 42-369. The Title IV-D Division shall provide the case information in electronic format, and upon request in print format, to the judge presiding over domestic relations cases and to the county attorney or authorized attorney.

(4) …

§45-103 Interest; judgments; decrees; rate; exceptions.

For decrees and judgments rendered before July 20, 2002, interest on decrees and judgments for the payment of money shall be fixed at a rate equal to one percentage point above the bond equivalent yield, as published by the Secretary of the Treasury of the United States, of the average accepted auction price for the last auction of fifty-two-week United States Treasury bills in effect on the date of entry of the judgment. For decrees and judgments rendered on and after July 20, 2002, interest on decrees and judgments for the payment of money shall be fixed at a rate equal to two percentage points above the bond investment yield, as published by the Secretary of the Treasury of the United States, of the average accepted auction price for the first auction of each annual quarter of the twenty-six-week United States Treasury bills in effect on the date of entry of the judgment. The State Court Administrator shall distribute notice of such rate and any changes to it to all Nebraska judges to be in effect two weeks after the date the

auction price is published by the Secretary of the Treasury of the United States. This interest rate shall not apply to:
(1) An action in which the interest rate is specifically provided by law; or
(2) An action founded upon an oral or written contract in which the parties have agreed to a rate of interest other than that specified in this section.

See: http://www.supremecourt.ne.gov/5017/judgment-interest-ratel for the present and past interest rates. [**2.345**% as of July 2016, valid until mid-October 2016]

Servicemembers Civil Relief Act of 2003 Section 207 (a)

Notwithstanding the above, when the obligated parent is an active duty member of the US Military, the interest rate shall be capped by federal law at 6.000%. See below for rules and restrictions on this.

§207 (a) INTEREST RATE LIMITATION-

(1) LIMITATION TO 6 PERCENT- An obligation or liability bearing interest at a rate in excess of 6 percent per year that is incurred by a servicemember, or the servicemember and the servicemember's spouse jointly, before the servicemember enters military service shall not bear interest at a rate in excess of 6 percent per year during the period of military service.

(2) FORGIVENESS OF INTEREST IN EXCESS OF 6 PERCENT- Interest at a rate in excess of 6 percent per year that would otherwise be incurred but for the prohibition in paragraph (1) is forgiven

(b) IMPLEMENTATION OF LIMITATION-

(1) WRITTEN NOTICE TO CREDITOR- In order for an obligation or liability of a servicemember to be subject to the interest rate limitation in subsection (a), the servicemember shall provide to the creditor written notice and a copy of the military orders calling the servicemember to military service and any orders further extending military service, not later than 180 days after the date of the servicemember's termination or release from military service.

(2) LIMITATION EFFECTIVE AS OF DATE OF ORDER TO ACTIVE DUTY- Upon receipt of written notice and a copy of orders calling a servicemember to military service, the creditor shall treat the debt in accordance with subsection (a), effective as of the date on which the servicemember is called to military service.

. . .

(d) INTEREST- As used in this section, the term `interest' includes service charges, renewal charges, fees, or any other charges (except bona fide insurance) with respect to an obligation or liability.

Bowers v. Lens, 264 Neb. 465, 648 N.W.2d 294 (2002)

- A court of equity does not have discretion to withhold interest on decrees or judgments for the payment of money.

Laschanzky v. Laschanzky, 246 Neb. 705, 523 N.W.2d 29 (1994)

- A court of equity does not have discretion to allow or withhold interest in cases where interest is recoverable as a matter of right.

State on Behalf of Kayla T. v. Risinger, 273 Neb. 694, 731 N.W.2d 892 (2007)

- The district court abused its discretion in ordering the retroactive child support to be paid in future monthly installments. Thus, we conclude that the order should be modified and judgment entered for the full amount due, with interest to accrue on the full amount from the date of judgment.

International Law & Related

See Page 206

Intervention

§43-512.08. Intervention in matters relating to child, spousal, or medical support; when authorized.

The county attorney or authorized attorney, acting for or on behalf of the State of Nebraska, may intervene without leave of the court in any proceeding for dissolution of marriage, paternity, separate maintenance, or child, spousal, or medical support for the purpose of securing an order for child, spousal, or medical support, modifying an order for child or medical support, or modifying an order for child support as the result of a review of such order under sections 43-512.12 to 43-512.18. Such proceedings shall be limited only to the determination of child or medical support. Except in cases in which the intervention is the result of a review under such sections, the county attorney or authorized attorney shall so act only when it appears that the children are not otherwise represented by counsel.

Source: Laws 1976, LB 926, § 10; Laws 1985, Second Spec. Sess., LB 7, § 72; Laws 1991, LB 457, § 12; Laws 1991, LB 715, § 11; Laws 1994, LB 1224, § 54, Laws 2007, LB554, § 41 Effective January 1, 2008

Cammarata v. Chambers, 6 Neb. App. 467, 574 N.W.2d 530 (1998)

Facts: Dad was ordered to pay support pursuant to decree entered in 1984. In 1992 the court modified the order, switched custody to the dad, and effectively set support at $0 until the mother became employed. Later the child moved out of Dad's home and into Mom's, and Mom applied for Medicaid. The State then filed an action to establish a child support order pursuant to Neb. Rev. Stat. § 43-512.03 et seq, alleging the child was now with Mom and in need of support. Dad appealed, claiming CSE agency had no authority to file for new support order, as the parties' 1992 modification order addressed child support.

Held: The state was acting beyond its authority; accordingly, the new support order was vacated.

- The nonexistence of a support order is a prerequisite to an action under Neb. Rev. Stat. § 43-512.03.
- A court has subject matter jurisdiction over an action brought pursuant to Neb. Rev. Stat. § 43-512.03 *only* when there is no existing child support order.
- If there is an existing child support order, the State is not authorized to file a petition for payment of support pursuant to Neb. Rev. Stat. § 43-512.03.
- [T]he dissolution decree and the modification orders address the issue of child support. Even if it was the case that the orders provided that no support is due from either parent, that does not change the fact that there is an existing support order.

Note: Section 43-512.01 may allow a CSE attorney to intervene to modify the existing child support order, but this necessarily involves a change in legal custody of the minor child, which we are expressly prohibited from becoming involved with, and which requires the court to make a "best interests" determination before placing physical/legal custody of the child with a parent. This appears to be a "catch 22" for CSE attorneys.

Nebraska v. Garcia, 238 Neb. 455, 471 N.W.2d 388 (1991)

- We agree with the Nebraska State Bar Association's advisory opinion that the county attorney may not represent both the interests of the child and the interests of a parent when the issue of custody of the child is raised. The county attorney's duties are clearly set forth in the statutes above. These duties do not include involvement in the determination of custody of a dependent child.
- We do not find any statute in which the Legislature has permitted a judgment for attorney fees to be entered against the State in an action for child support payments. ... any judgment against the State for these fees violates state sovereignty.

Judgments

(see also *Jurisdiction*)

25-1301. Judgment, rendition of judgment, entry of judgment, decree, or final order, defined; records.

(1) A judgment is the final determination of the rights of the parties in an action.

(2) Rendition of a judgment is the act of the court, or a judge thereof, in making and signing a written notation of the relief granted or denied in an action.

(3) The entry of a judgment, decree, or final order occurs when the clerk of the court places the file stamp and date upon the judgment, decree, or final order. For purposes of determining the

time for appeal, the date stamped on the judgment, decree, or final order shall be the date of entry.

…

Source: R.S.1867, Code § 428, p. 465; R.S.1913, § 7994; C.S.1922, § 8935; C.S.1929, § 20-1301; R.S.1943, § 25-1301; Laws 1961, c. 111, § 1, p. 350; Laws 1999, LB 43, § 3.

25-1902 Final order, defined.

An order affecting a substantial right in an action, when such order in effect determines the action and prevents a judgment, and an order affecting a substantial right made in a special proceeding, or upon a summary application in an action after judgment, is a final order which may be vacated, modified or reversed, as provided in this chapter.

Source: R.S.1867, Code § 581, p. 496; R.S.1913, § 8176; C.S.1922, § 9128; C.S.1929, § 20-1902.

In re Guardianship & Conservatorship of Bowman, 12 Neb. App. 891, 686 N.W.2d 642 (2004)

- Trial courts are without authority to reopen their files and enter orders **"interpreting" or "clarifying" prior orders** after the time for a proper appeal has passed.
- "neither what the parties thought the judge meant nor what the judge thought he or she meant, after time for appeal has passed, is of any relevance" and that "[w]hat the decree, as it became final, means as a matter of law as determined from the four corners of the decree is what is relevant." *Citing* **Neujahr v. Neujahr**, 223 Neb. 722, 728, 393 N.W.2d 47, 51 (1986). *See also* **Bhuller v. Bhuller**, 17 Neb. App. 607, 767 N.W.2d 813 (2009), **Pearson v. Archer-Daniels-Midland Milling Co.**, 282 Neb. 400, 803 N.W.2d 489 (2011)

I.P. Homeowners v. Morrow, 12 Neb. App. 119, 668 N.W.2d 515 (2003)

- A judgment must respond to the pleadings. A judgment based upon an issue not pled is a nullity.

Neujahr v. Neujahr, 223 Neb. 722, 393 N.W.2d 47 (1986)

*Trial courts cannot later be asked to **reinterpret or clarify** their orders, even if both sides want them to.*

- Litigation must be put to an end, and it is the function of a final judgment to do just that. A judgment is the final consideration and determination of a court on matters submitted to it in an action or proceeding. [Citation omitted.] If a judgment can mean one thing one day and something else on another day, there would be no reason to suppose that the litigation had been set at rest. The same must be said if the judgment can mean one thing to one judge and something else to another judge. All are bound by the original language used, and all ought to interpret the language the same way. No court should express an opinion of what the judgment means until the judgment is called into question by some factual situation relating thereto. The judge who tried the case and who ought to know what he meant to say, after the time for appeal, etc., has passed cannot any more change or cancel one word of the judgment than can any other judge. (citing Crofts v. Crofts, 21 Utah 2d 332, 335, 445 P.2d 701, 702-03 (1968))
- Neither what the parties thought the judge meant nor what the judge thought he or she meant, after time for appeal has passed, is of any relevance. What the decree, as it became final, means as a matter of law as determined from the four corners of the decree is what is relevant.

State v. Wulf, 22 Neb. App. 211, 849 N.W.2d 588 (2014)

- When a judgment is attacked in a manner other than by a proceeding in the original action to have it vacated, reversed, or modified, or by a proceeding in equity to prevent its enforcement, the attack is a collateral attack.

Judicial Notice

Burns v. Burns, 293 Neb. 633, 879 N.W.2d 375 (May 2016)
In Re Adoption of Jaelyn B., 293 Neb. 917, ___ N.W.2d ___ (June 2016)

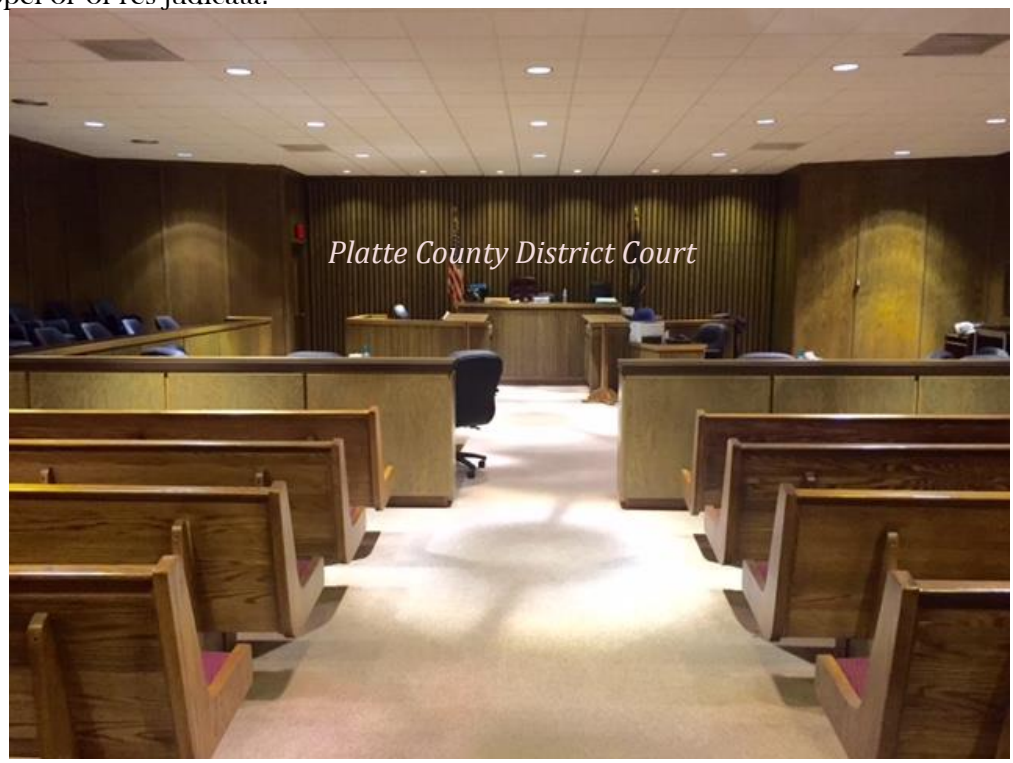
- A court may judicially notice adjudicative facts, which are not subject to reasonable dispute, at any stage of the proceeding.

Merie B. on Behalf of Brayden O. v. State, 290 Neb. 919, 863 N.W.2d 171 (2015)

- Every court of this state may take judicial notice of any rule or regulation that is signed by the Governor and filed with the Secretary of State.

State v. McMillion, 23 Neb. App. 687, 875 N.W.2d 877 (March 2016**)**

- a court may judicially notice existence of its records and the records of another court, but judicial notice of facts reflected in a court's records is subject to the doctrine of collateral estoppel or of res judicata.



Jurisdiction

(See also the *Civil Procedure and Related* section)

§ 24-517 County Court: Jurisdiction

§ 25-217. Action; commencement; defendant not served; effect.
An action is commenced on the date the complaint is filed with the court. The action shall stand dismissed without prejudice as to any defendant not served within six months from the date the complaint was filed.

§ 25-403.01 Actions; venue; transfer; payment of expenses
Any action, other than the actions mentioned in sections 25-401 to 25-403 [relating to real estate], may be brought (1) in the county where any defendant resides, (2) in the county where the cause of action arose, (3) in the county where the transaction or some part of the transaction occurred out of which the cause of action arose, or (4) if all defendants are nonresidents of this state, in any county. When an action has been commenced in any other county, the court in which the action has been commenced shall have jurisdiction over the action, but upon timely motion by a defendant, the court shall transfer the action to the proper court in a county in which such action might have been properly commenced. …

§ 43-247 Juvenile Court: Jurisdiction
…
The juvenile court in each county as herein provided shall have jurisdiction of:
(3) Any juvenile…whose parent, guardian, or custodian neglects or refuses to provide proper or necessary subsistence, education, or other care necessary for the health, morals, or well-being of such juvenile…
…
(5) The parent, guardian, or custodian of any juvenile described in this section;

§42-348 Proceedings; where brought; transfer of proceedings; orders; how treated.
All proceedings under sections 42-347 to 42-381 shall be brought in the district court of the county in which one of the parties resides. Proceedings may be transferred to a separate ***juvenile court*** or county court sitting as a juvenile court which has acquired jurisdiction pursuant to section 43-2,113. Certified copies of orders filed with the clerk of the court pursuant to such section shall be treated in the same manner as similar orders issued by the court.
Source: Laws 1972, LB 820, § 2; Laws 1985, Second Spec. Sess., LB 7, § 9; Laws 1996, LB 1296, § 10;
Laws 1997, LB 229, § 8.

§42-351 County or district court; jurisdiction.
(1) In proceedings under sections 42-347 to 42-381, the court shall have jurisdiction to inquire into such matters, make such investigations, and render such judgments and make such orders, both temporary and final, as are appropriate concerning the status of the marriage, the custody and support of minor children, the support of either party, the settlement of the property rights of the parties, and the award of costs and attorney's fees. The court shall determine jurisdiction for child custody proceedings under the Uniform Child Custody Jurisdiction and Enforcement Act.

(2) When final orders relating to proceedings governed by sections 42-347 to 42-381 are on appeal and such appeal is pending, the court that issued such orders shall retain jurisdiction to

provide for such orders regarding support, custody, parenting time, visitation, or other access, orders shown to be necessary to allow the use of property or to prevent the irreparable harm to or loss of property during the pendency of such appeal, or other appropriate orders in aid of the appeal process. Such orders shall not be construed to prejudice any party on appeal.

Source: Laws 1972, LB 820, § 5; Laws 1984, LB 276, § 1; Laws 1991, LB 732, § 100; Laws 1992, LB 360, § 10; Laws 1996, LB 1296, § 11; Laws 1997, LB 229, § 11; Laws 2002, LB 876, § 73; Laws 2003, LB 148, § 42; Laws 2007, LB554, § 29. Operative date January 1, 2008

§42-705 Basis for jurisdiction over nonresident.
(a) In a proceeding to establish or enforce a support order or to determine parentage, a tribunal of this state may exercise personal jurisdiction over a nonresident individual or the individual's guardian or conservator if:
(1) The individual is personally served with notice within this state;
(2) The individual submits to the jurisdiction of this state by consent, by entering a general appearance, or by filing a responsive document having the effect of waiving any contest to personal jurisdiction;
(3) The individual resided with the child in this state;
(4) The individual resided in this state and provided prenatal expenses or support for the child;
(5) The child resides in this state as a result of the acts or directives of the individual;
(6) The individual engaged in sexual intercourse in this state and the child may have been conceived by that act of intercourse;
(7) The individual asserted parentage in this state pursuant to section 43-104.02, 71-628, 71-640.01, or 71-640.02 with the Department of Health and Human Services Finance and Support; or
(8) There is any other basis consistent with the constitutions of this state and the United States for the exercise of personal jurisdiction.
(b) The basis of personal jurisdiction set forth in subsection (a) of this section or in any other law of this state shall not be used to acquire personal jurisdiction for a tribunal of this state to modify a child support order of another state unless the requirements of section 42-746 or 42-747.03 are met.
Source: Laws 1993, LB 500, § 5; Laws 1996, LB 1044, § 101; Laws 2003, LB 148, § 46.

Bayliss v. Bayliss, 8 Neb. App. 269, 592 N.W.2d 165 (1999)

- (Appellate Jurisdiction) Generally, once an appeal has been perfected, the trial court has no jurisdiction to determine any issues regarding the subject matter of the litigation.
- (District court could not entertain an application to modify child support filed while a previous modification of child support was on appeal. It could still address issues such as visitation that were not subject of the appeal.)

Charlene J. v. Blake O., 289 Neb. 454, 855 N.W.2d 587 (2014)
Notes: Default paternity decree/child support order entered in Boone County. Later the parents each moved to Madison County, where Mom sought a custody order. Madison Co. D.Ct. determined it lacked jurisdiction to hear the case. Mom appealed.

- [U]nder the doctrine of jurisdictional priority, [the Madison Co. D.ct] was precluded in the exercise of its subject matter jurisdiction. Thus, the district court for Madison County was

correct in vacating its previous orders and dismissing the mother's complaint. However, because all of the district courts of Nebraska have concurrent subject matter jurisdiction, the parties are free to petition the district court for Boone County to transfer venue to Madison County.

- Subject matter jurisdiction is the power of a tribunal to hear and determine a case in the general class or category to which the proceedings in question belong and to deal with the general subject matter involved.
- The paternity statutes modify common law and, therefore, must be strictly construed. The statutes must accordingly indicate what questions can be decided in a paternity action. Matters not indicated, such as division of property, cannot be decided in a paternity action.
- There is a difference between original jurisdiction and exclusive jurisdiction.
- Jurisdictional priority is neither a matter of subject matter jurisdiction nor personal jurisdiction.
- Under the doctrine of jurisdictional priority, when different state courts have concurrent original jurisdiction over the same subject matter, basic principles of judicial administration require that the first court to acquire jurisdiction should retain it to the exclusion of another court.
- We have not before been presented with the question of whether the first court in a prior paternity action maintains continuing jurisdictional priority over custody of the child when it did not explicitly determine custody in its first order. ...[W]e hold that the matter of the minor child's custody remained "pending" in the district court for Boone County and that thus, the district court for Madison County could not simultaneously entertain a separate action by the mother for the child's custody.
- The rule of jurisdictional priority does not apply unless there are two cases pending at the same time. The doctrine does not apply if the first action terminates, is resolved, or is disposed of before the second action commences. Furthermore, two pending cases fall under the doctrine of jurisdictional priority only when they involve the same "'whole issue.'" In other words, the two actions must be materially the same, involving substantially the same subject matter and the same parties.
- [A]ction concerning custody of the child is not terminated, resolved, or disposed of until the age of majority.
- We hold that it is consistent with the principles of judicial comity and courtesy underlying the doctrine of jurisdictional priority to consider the matter of a child's custody still "pending" in the district court wherein the original action for paternity was brought until that court relinquishes its jurisdictional priority or the child reaches the age of majority.

See, also, *State ex rel. Storz v. Storz*, 235 Neb. 368, 455 N.W.2d 182 (1990).

Currie v. Chief School Bus Serv., 250 Neb. 872, 553 N.W.2d 469 (1996),

- Although an extrajurisdictional act of a lower court cannot vest an appellate court with jurisdiction to review the merits of an appeal, the appellate court has jurisdiction
  and, moreover, the duty to determine whether the lower court had the power, that is, the subject matter jurisdiction, to enter the judgment or other final order sought to be reviewed.

Davis v. Choctaw Constr., 280 Neb. 714,789 N.W.2d 698 (2010)

Judgment entered for employee in contract dispute. Employer appeals, and for the first time on appeal raises issue of court jurisdiction, because there was no service within 6 months of the filing of the lawsuit. Employee argued issue was waived because the employer rolled the dice at trial in the district court and lost, so they couldn't raise it on appeal. Held: No jurisdiction; case dismissed.

- Neb. Rev. Stat. § 25-217 (Reissue 2008) is self-executing, so that an action is dismissed by operation of law, without any action by either the defendant or the court, as to any defendant who is named in the action and not served with process within 6 months after the complaint is filed.
- After dismissal of an action by operation of law under Neb. Rev. Stat. § 25-217 (Reissue 2008), there is no longer an action pending and the district court has no jurisdiction to make any further orders except to formalize the dismissal. If any orders are made following the dismissal, they are a nullity.
- Lack of subject matter jurisdiction may be raised at any time by any party or by the court *sua sponte*.

Friedman v. Friedman, 290 Neb. 973, **863** N.W.2d 153 (2015)

- We have...said that district courts in domestic dissolution actions retain equitable jurisdiction to determine amounts due under an ambiguous decree. But we have never directly addressed whether such jurisdiction can be exercised over a foreign decree pursuant to the Nebraska Uniform Enforcement of Foreign Judgments Act. We have noted in other contexts that the Nebraska Uniform Enforcement of Foreign Judgments Act has no provision for modification or alteration of a foreign judgment, decree, or order.
- Whether a judgment is ambiguous is a question of law for which the appellate court has an obligation to reach a conclusion independent from the lower court's conclusion.

Gurnon v. Harrison, 245 Neb. 295, 512 N.W.2d 386 (1994)

- We see no reason to treat the modification of a filiation decree differently than the modification of a divorce decree. In divorce proceedings, we view an application to modify as a supplementary proceeding. We, therefore, hold that this modification proceeding is supplementary to the filiation proceeding and not an independent proceeding or a new action. Since this is a supplementary proceeding, the district court retained the personal jurisdiction acquired in the original proceeding.

Harvey v. Harvey, 6 Neb. App. 524, 575 N.W. 2d 167 (1998)

- Before any other pleading or motion, a defendant may file a special appearance for the sole purpose of objecting to a court's assertion or exercise of personal jurisdiction over the defendant. A defendant's participation in proceedings on any issue other than jurisdiction over the person, as well as the defendant's request for other relief, constitutes a general appearance.
- Lack of personal jurisdiction can be waived, but lack of subject matter jurisdiction cannot be waived.
- A decree of divorce rendered in another state may be collaterally attacked by showing that the court was without jurisdiction, either of the subject matter of the suit or of the person of the defendant, without violating the Full Faith and Credit Clause of the federal Constitution.
- Where a judgment rendered in one state is challenged in another, a want of jurisdiction over either the person or the subject matter is open to inquiry.
- The divisibility doctrine holds that while a state court may have jurisdiction over a marriage to cause its termination, that same court may lack personal jurisdiction to adjudicate personal matters such as support or alimony.

Herman Trust v. Brashear 711 Trust, 22 Neb. App. 758, 860 N.W.2d 431 (2015)

- For an appellate court to acquire jurisdiction of an appeal, there must be a final order entered by the court from which the appeal is taken; conversely, an appellate court is without jurisdiction to entertain appeals from nonfinal orders.
- An order is final for purposes of appeal if it affects a substantial right and (1) determines the action and prevents a judgment, (2) is made during a special proceeding, or (3) is made on summary application in an action after judgment is rendered.
- A denial of a motion to dismiss is not a final order.
- A denial of a motion for summary judgment is not a final order and therefore is not appealable.
- The collateral order doctrine is a narrow exception that should never be allowed to swallow the general rule that a party is entitled to a single appeal, to be deferred until final judgment has been entered.

In re Guardianship of Rebecca B. et al., 260 Neb. 922, 621 N.W.2d 289 (2000)

- Under § 43-247, once a minor is adjudged to be within the jurisdiction of the juvenile court, the juvenile court shall have exclusive jurisdiction as to any such juvenile and as to the parent, guardian, or custodian who has custody of any juvenile described within this section.

In re interest of Tegan V., 18 Neb. App. 857, 794 N.W.2d 190 (2011)

Note: this case involves jurisdiction under the Juvenile Code. It is included because some child support cases start in, or end up in, juvenile court.

- [J]urisdiction is the inherent power or authority to decide a case. See ***Chicago Lumber Co. v. School Dist. No. 71***, 227 Neb. 355, 417 N.W.2d 757 (1988)
- "Jurisdiction of the subject matter" means the authority to hear and determine both the class of actions to which the action before the court belongs and the particular question which it assumes to decide. *State v. Smith*, 269 Neb. 773, 779, 696 N.W.2d 871, 879 (2005).
- In ***Jones v. State***, 175 Neb. 711, 717, 123 N.W.2d 633, 637 (1963), the court said:

  > The jurisdiction of a state to regulate the custody of an infant found within its territory does not depend upon the domicile of the parents. It has its origin in the protection that is due to the incompetent or helpless. As we said in [***In re Application of Reed***, 152 Neb. 819, 43 N.W.2d 161 (1950)]: "The jurisdiction of a state to regulate the custody of infants found within its territory does not depend upon the domicile of the child, but it arises out of the power that every sovereignty possesses as parens patriae to every child within its borders to determine its status and the custody that will best meet its needs and wants, and residence within the state suffices even though the domicile may be in another jurisdiction."
- [N]either the domicile of the parent nor that of the child is determinative of the court's subject matter jurisdiction.
- "in a proceeding under the Nebraska Juvenile Code, the State is **not** required to prove proper venue."
- [W]e construe the Nebraska Juvenile Code liberally to accomplish its purpose of serving the best interests of the juveniles who fall within it. See ***In re Interest of Gabriela H.***, 280 Neb. 284, 785 N.W.2d 843 (2010).

J & H Swine v. Hartington Concrete*, 12 Neb. App. 885, 687 N.W.2d 9 (2004)
Rule: Timing is everything. This case, if anything, may teach the necessity for patience.

- For an appellate court to acquire jurisdiction of an appeal, there must be a final order entered by the court from which the appeal is taken; conversely, an appellate court is without jurisdiction to entertain appeals from nonfinal orders.
- A notice of appeal filed before the trial court announced a "decision or final order" within the meaning of Neb. Rev. Stat. § 25-1912(2) (Cum. Supp. 2002) in final determination of an issue of costs cannot relate forward.

Lamb v. Lamb, 14 Neb. App. 337, 707 N.W.2d 423 (2005)

- The Nebraska Child Custody Jurisdiction Act (UCCJA) does not confer subject matter jurisdiction upon a Nebraska court to modify a child support order issued by another state.

This case also includes a good discussion of the differences between UIFSA and the UCCJA

- Lack of subject matter jurisdiction may be raised at any time by any party or by the court *sua sponte*.

Mohr v. Mohr, 22 Neb. App. 772, 859 N.W.2d 377 (February 2015)

- To determine whether we have jurisdiction, we must examine § 25-217. This statute states that an "action is commenced on the date the complaint is filed with the court. The action shall stand dismissed without prejudice as to any defendant not served within six months from the date the complaint was filed."
- The language of § 25-217 providing for dismissal of unserved petitions is self-executing and mandatory. . . . The only way to ensure that an unserved action stands dismissed, as required by statute, is to hold that such dismissal occurs by operation of law, without predicate action by the trial court. See ***Vopalka v. Abraham***, 260 Neb. 737, 619 N.W.2d 594 (2000). Once an action is dismissed by operation of law, any further orders by the district court, except to formalize the dismissal, are a nullity.
- the district court in which the original divorce decree was entered has continuing jurisdiction until all of the children of the marriage are of legal age or emancipated. See ***Nemec v. Nemec***, 219 Neb. 891, 367 N.W.2d 75 (1985).
- service of process of a modification complaint is to comply with the requirements for a dissolution action.
- We find no authority to except dissolution actions from the requirement of § 25-217, and we therefore determine that the requirement of service within 6 months is applicable to modification actions.

Molczyk v. Molczyk, 285 Neb. 96, 825 N.W.2d 435, (2013)
Jurisdiction, Jurisdiction. Who has the jurisdiction?

- Under Neb. Rev. Stat. § 42-348 (Reissue 2008), a plaintiff can commence a marital dissolution action in the district court of any county in which one of the parties resides.
- Under the doctrine of jurisdictional priority, when different state courts have concurrent original jurisdiction over the same subject matter, basic principles of judicial administration require that the first court to acquire jurisdiction should retain it to the exclusion of another court. That is, a second court lacks jurisdiction over the same matter involving the same parties.
- An order of dismissal or dismissal by operation of law divests a court of jurisdiction to take any further action in the matter.

- In civil cases, a court of general jurisdiction has inherent power to vacate or modify its own judgment at any time during the term in which the court issued it.
- [W]e hold that a motion to reinstate a dismissed action, of which the opposing party has notice, has jurisdictional priority over a later complaint filed in a different court involving the same subject matter and the same parties.
- Under Neb. Rev. Stat. § 25-2740(3) (Reissue 2008), the jurisdiction conferred on a county court to decide custody issues refers to a county court sitting as a juvenile court and provides the juvenile court with concurrent jurisdiction over a custody determination for an adjudicated juvenile, not exclusive jurisdiction.
- Under Neb. Rev. Stat. § 43-2,113(2) (Reissue 2008), if a juvenile court judge consents to a transfer of a custody case and the district court transfers the case to juvenile court, the case is "filed" with the county court, sitting as a juvenile court, or the separate juvenile court when a certified copy of the district court's transfer order is filed in the juvenile court.
- Juvenile courts do not acquire jurisdiction over a marital dissolution action or a custody proceeding unless three conditions are met: (1) The juvenile court has already acquired jurisdiction over the parties' child; (2) the juvenile court judge consented to transferring the case to juvenile court; and (3) the district court has issued a transfer order, a certified copy of which has been filed in the county court, sitting as a juvenile court, or in the separate juvenile court.
- in 2008, the Legislature enacted L.B. 280, which was intended to expand the juvenile court's jurisdiction to include custody determinations for juveniles whom the court has adjudicated under § 43-247(3).
- Under § 25-2740(3), the jurisdiction conferred on a county court to decide custody issues clearly refers to a county court sitting as a juvenile court because the court *must have already obtained* jurisdiction over the child. But § 25-2740(3) provides a juvenile court with concurrent jurisdiction over a custody determination for an adjudicated juvenile, not exclusive jurisdiction.
- the juvenile court cannot acquire jurisdiction over a custody determination unless a party has previously filed a complaint for a dissolution or a custody modification in district court.

Nebraska v. Storz, 235 Neb. 368, 455 N.W.2d 182 (1990)

- Child conceived after the divorce decree was signed but before the parents' divorce decree was final is a child of the marriage, and only the court which heard the divorce has the jurisdiction to address issues relating to the support of the child.

O'Neal v. State, 290 Neb. 943, 863 N.W.2d 162 (2015)

- Unlike jurisdiction, venue is a personal privilege which, if not raised by a party, is waived unless prohibited by law. *Hofferber v. Hastings Utilities*, 282 Neb. 215, 803 N.W.2d 1 (2011). In particular, "[a] claim of improper venue is a matter that may be waived by failure to make a timely objection." See *Krajicek v. Gale*, 267 Neb. 623, 628, 677 N.W.2d 488, 492 (2004). For an objection to venue to be timely in a civil case, it must be raised "before or in the defendant's answer." See *State v. Vejvoda*, 231 Neb. 668, 673, 438 N.W.2d 461, 466 (1989).
- Jurisdiction and venue are not synonymous and interchangeable functions in litigation. ... And the difference between a jurisdictional argument and a venue argument is "significant." See *Anderson v. Houston*, 274 Neb. at 922, 744 N.W.2d at 416.
- [A]n objection to jurisdiction did not preserve an objection to venue. See *In re Interest of Adams*, 230 Neb. 109, 430 N.W.2d 295 (1988).

Rozsnyai v. Svacek, 272 Neb. 567, 723 N.W.2d 329 (2006)

- Pursuant to Neb. Rev. Stat. § 42-351 (Reissue 2004), full and complete general jurisdiction over the entire marital relationship and all related matters is vested in the county or district court in which a petition for dissolution of marriage is properly filed.
- Neb. Rev. Stat. §42-349 (Reissue 2004) provides that in order to maintain an action for divorce in Nebraska, one of the parties must have had "actual residence in this state with a bona fide intention of making this state his or her permanent home for at least one year prior to the filing of the complaint."
- A nonimmigrant alien authorized to reside in this country on a visitor's visa does so on a temporary basis and on the condition that he or she is not abandoning his or her foreign residence. 8 U.S.C. §1101(a)(15)(B); 8 C.F.R. §214.2(b) (2006). The residency restrictions placed on a nonimmigrant alien residing on a visitor's visa negates the inference that a nonimmigrant alien intends to reside in Nebraska on a permanent basis merely because he or she has resided in this state for more than 1 year.
- There may be instances where a nonimmigrant alien is able to establish an intention to reside in a state permanently when the alien has offered proof of that intent apart from his or her presence in that state.

☆ **Small v. Small**, 229 Neb. 344, 427 N.W.2d 42 (1988)

- A district court cannot acquire jurisdiction over dissolution of marriage proceedings unless one of the parties is a resident of the county in which the court is located at the time the original petition is filed. [See also ***Barth v. Barth***, 22 Neb. App. 241, 851 N.W.2d 104 (2014)]

State v. Wulf, 22 Neb. App. 211, 849 N.W.2d 588 (2014)

- When a judgment is attacked in a manner other than by a proceeding in the original action to have it vacated, reversed, or modified, or by a proceeding in equity to prevent its enforcement, the attack is a collateral attack.
- Collateral attacks on previous proceedings are impermissible unless the attack is grounded upon the court's lack of jurisdiction over the parties or subject matter.
- A decree of court which is void for want of jurisdiction may be attacked in any proceeding in which any person seeks to assert a right under it. It may be attacked whenever it is sought to be enforced, or in any suit in which its validity is drawn in question.

State, Dept. of Social Services v. Cummings, 2 Neb. App. 820, 515 N.W.2d 680 (1994)

- Act of sexual intercourse in Nebraska that leads to conception constitutes sufficient minimum contacts with state of Nebraska to give our court jurisdiction over out-of-state resident in paternity action.

☆ **State ex rel. Storz v. Storz**, 235 Neb. 368, 455 N.W.2d 182 (1990)

Facts: *Parents divorce in Hall County, but continue doing "the hanky-panky" during the (then) 6 month waiting period before their divorce became final. Child was conceived during the waiting period and born afterward. Later the State brought paternity case in Seward County, seeking to have ex-husband named as father and to pay support. He admitted paternity but alleged mother was homeless,*

so obtained custody of the child. Mother was not amused, and responded by raising issue of lack of jurisdiction of Seward Co. to hear case where issues flowed out of Hall Co. divorce case.

- Recalling that the Hall County dissolution decree was rendered on September 22, 1983, the marriage continued for 6 months following that date, until March 22, 1984. See, Neb. Rev. Stat. § 42-372. ... Consequently, the record establishes that the child was conceived while the father and mother were married.
- Because the father and mother were married when the child was conceived, the child is their legitimate son, and he is a product of their marriage. So only the Hall Co. district court had jurisdiction to address issues of custody and support. [citing also § 42-377]
- parties cannot confer subject matter jurisdiction upon a judicial tribunal by either consent or acquiescence.

State on Behalf of Joseph F. v. Rial, 251 Neb. 1, 554 N.W.2d 769 (1996)

- A district court retains jurisdiction for orders regarding child support notwithstanding the fact that a paternity determination is on appeal.

Templeton v. Templeton, 9 Neb. App. 937, 622 N.W.2d 424 (2001)

- An appellate court is without jurisdiction to entertain appeals from nonfinal orders.
- To constitute a final, appealable order..., the case must involve an order which affects a substantial right in an action and which determines the action and prevents a judgment. O'Connor v. Kaufman, 255 Neb. 120, 582 N.W.2d 350 (1998); *Hake v. Hake*, 8 Neb. App. 376, 594 N.W.2d 648 (1999). Such an order must dispose of the whole merits of the case and must leave nothing for further consideration of the court, and thus, the order is final when no further action of the court is required to dispose of the pending cause; however, if the cause is retained for further action, the order is interlocutory.

Wharton v. Jackson, 107 Neb. 288, 185 N.W. 428 (1921)

- [J]urisdiction of the court in matters relating to divorce and alimony is given by statute, and every power exercised by the court in reference thereto must look to the statute or it does not exist. [Citation omitted.] We cannot change it; we must therefore take the decree as we find it, inasmuch as the interested parties have made no move to change it but have treated it as final.

Young v. Govier & Milone, 286 Neb. 224, 835 N.W.2d 684 (2013)

- Personal jurisdiction is the power of a tribunal to subject and bind a particular person or entity to its decisions. Subject matter jurisdiction is the power of a tribunal to hear and determine a case in the general class or category to which the proceedings in question belong and to deal with the general subject matter involved.

Juvenile Court & Related

Many headaches are caused in attorneys when juvenile courts become involved in matters previously governed by county or district courts.

§ 42-348. Proceedings; where brought; transfer of proceedings; orders; how treated.
All proceedings under sections 42-347 to 42-381 shall be brought in the district court of the county in which one of the parties resides. Proceedings may be transferred to a separate juvenile court or county court sitting as a juvenile court which has acquired jurisdiction pursuant to section 43-2,113. Certified copies of orders filed with the clerk of the court pursuant to such section shall be treated in the same manner as similar orders issued by the court.
Source: Laws 1972, LB 820, § 2; Laws 1985, Second Spec. Sess., LB 7, § 9; Laws 1996, LB 1296, § 10; Laws 1997, LB 229, § 8.

In Re Interest of Montana S., 21 Neb. App. 315, 837 N.W.2d 860 (2013)

- A party has standing to invoke a court's jurisdiction if it has a legal or equitable right, title, or interest in the subject matter of the controversy. See *In re Interest of Jorius G. & Cheralee G.*, 249 Neb. 892, 546 N.W.2d 796 (1996).
- Foster parents of children who have been adjudicated as being without proper support have standing to object to a plan to change foster care placement of the children.
- Because a foster parent has standing to object to a plan recommending a change in placement, a foster parent also has standing to appeal the juvenile court's decision to adopt such a plan and change the child's placement.
- A proceeding before a juvenile court is a "special proceeding" for appellate purposes.
- The foremost purpose and objective of the Nebraska Juvenile Code is to promote and protect the juvenile's best interests, and the code must be construed to assure the rights of all juveniles to care and protection.

In the Interest of Ethan M., 18 Neb.App. 63, 774 N.W.2d 766 (2009)

- We begin by noting that a county court sitting as a juvenile court has the power to conduct a child custody modification proceeding because it has been granted subject matter jurisdiction to do so. Pursuant to 2008 Neb. Laws, L.B. 280, the Legislature modified the jurisdiction of juvenile courts and county courts sitting as juvenile courts so that these courts could exercise jurisdiction over custody matters when the court already has jurisdiction over the juvenile for

another purpose. See Neb.Rev.Stat. §§ 24-517, 25-2740, and 43-247 (Reissue 2008). In this regard, § 25-2740(3) provides that "a county court or separate juvenile court which already has jurisdiction over the child whose paternity or custody is to be determined has jurisdiction over such paternity or custody determination." Pursuant to § 25-2740(1)(b), a custody determination is defined as a proceeding "to determine custody of a child under [Neb.Rev.Stat. §] 42-364 [(Reissue 2008)]." Neb.Rev.Stat. § 42-364 (Reissue 2008) pertains to custody actions including those involving " [m]odification proceedings." Prior to the passage of L.B. 280, juvenile courts and county courts sitting as juvenile courts did not have subject matter jurisdiction over such proceedings.

In re Interest of Tamika S. et al., 3 Neb.App. 624, 529 N.W.2d 147 (1995)

- Guidelines apply in juvenile cases where child support is ordered.

Law of the Case Doctrine

Sickler v. Sickler, 293 Neb. 521, ___ N.W.2d ___ (May 2016)

- The law of the case doctrine reflects the principle that an issue that has been litigated and decided in one stage of a case should not be relitigated at a later stage.

License Suspension

See generally Nebraska Revised Statutes §§43-3301 through 43-3326. The intent of the law is to collect all support owed, and not to suspend licenses. It is an enforcement tool especially effective for non-wage earning and self-employed individuals who hold such licenses. It can be imposed through an administrative or judicial process. In my experience, very few license holders understand their rights with regard to the license suspension process. A simple phone call by an obligated parent to the DHHS Child Support Customer Call Center (877-631-9973) would stave off further actions to suspend the parent's licenses for up to one year.

§43-3314 **Delinquent or past-due support; notice to license holder; contents.**

(1) When the department or a county attorney or authorized attorney has made reasonable efforts to verify and has reason to believe that a license holder in a case receiving services under Title IV-D of the Social Security Act, as amended, (a) is delinquent on a support order in an amount equal to the support due and payable for more than a **three-month** period of time, (b) is not in compliance with a payment plan for amounts due as determined by a county attorney, an authorized attorney, or the department for such past-due support, or (c) is not in compliance with a payment plan for amounts due under a support order pursuant to a court order for such past-due support, and therefore determines to certify the license holder to the appropriate licensing authority, the department, county attorney, or authorized attorney shall send written notice to the license holder by certified mail to the last-known address of the license holder or to the last-known address of the license holder available to the court pursuant to section 42-364.13. For purposes of this section, reasonable efforts to verify means reviewing the case file and having written or oral communication with the clerk of the court of competent jurisdiction and with the license holder. Reasonable efforts to verify may also include written or oral communication with custodial parents.

(2) The notice shall specify:

(a) That the Department of Health and Human Services, county attorney, or authorized attorney intends to certify the license holder to the Department of Motor Vehicles and to relevant licensing authorities pursuant to subsection (3) of section 43-3318 as a license holder described in subsection (1) of this section;

(b) The court or agency of competent jurisdiction which issued the support order or in which the support order is registered;

(c) That an enforcement action for a support order will incorporate any amount delinquent under the support order which may accrue in the future;

(d) That a license holder who is in violation of a support order can come into compliance by:

(i) Paying current support if a current support obligation exists; and

(ii) Paying all past-due support or, if unable to pay all past-due support and if a payment plan for such past-due support has not been determined, by making payments in accordance with a payment plan determined by the county attorney, the authorized attorney, or the Department of Health and Human Services for such past-due support; and

(e) That within thirty days after issuance of the notice, the license holder may either:

(i) Request administrative review in the manner specified in the notice to contest a mistake of fact. Mistake of fact means an error in the identity of the license holder or an error in the determination of whether the license holder is a license holder described in subsection (1) of this section; or

(ii) Seek judicial review by filing a petition in the court of competent jurisdiction of the county where the support order was issued or registered or, in the case of a foreign support order not registered in Nebraska, the court of competent jurisdiction of the county where the child resides if the child resides in Nebraska or the court of competent jurisdiction of the county where the license holder resides if the child does not reside in Nebraska.

Source: Laws 1997, LB 752, § 14; Laws 1999, LB 594, § 30; Laws 2007, LB296, § 154.

§ 43-3315 License holder; judicial review; notice; effect.

If the license holder makes a timely request for judicial review after receiving a notice under section 43-3314, the court of competent jurisdiction as specified in subdivision (2)(e)(ii) of section 43-3314 shall have jurisdiction to hear the license holder's petition. Upon the timely notification by the license holder to the Department of Health and Human Services that the license holder is seeking judicial review as provided under this section, the Department of Health and Human Services shall stay the action to certify the license holder to the Department of Motor Vehicles and relevant licensing authorities as a license holder described in subsection (1) of section 43-3314 pending the outcome of judicial review.

Source: Laws 1997, LB 752, § 15

43-3318. Certification to relevant licensing authorities; when; procedure; effect.

(1) The Department of Health and Human Services, county attorney, authorized attorney, or court of competent jurisdiction may certify in writing to the Department of Motor Vehicles, relevant licensing authorities, and, if the license holder is a member of the Nebraska State Bar Association, the Counsel for Discipline of the Nebraska Supreme Court, that a license holder is a license holder described in subsection (1) of section 43-3314 if:

(a) The license holder does not timely request either administrative review or judicial review upon issuance of a notice under subsection (2) of section 43-3314, is still a license holder described in subsection (1) of section 43-3314 thirty-one days after issuance of the notice, and

does not obtain a written confirmation of compliance from the Department of Health and Human Services, county attorney, or authorized attorney pursuant to section 43-3320 within thirty-one days after issuance of the notice;

(b) The Department of Health and Human Services issues a decision after a hearing that finds the license holder is a license holder described in subsection (1) of section 43-3314, the license holder is still a license holder described in such subsection thirty-one days after issuance of that decision, and the license holder does not seek judicial review of the decision within the ten-day appeal period provided in section 43-3317; or

(c) The court of competent jurisdiction enters a judgment on a petition for judicial review, initiated under either section 43-3315 or 43-3317, that finds the license holder is a license holder described in subsection (1) of section 43-3314.

. . .

(4) If the Department of Health and Human Services, county attorney, authorized attorney, or court of competent jurisdiction certifies the license holder to the Department of Motor Vehicles, the Department of Motor Vehicles shall suspend the operator's license of the license holder ten working days after the date of certification.

. . .

§ 43-3319 License holder; motion or application to modify support order; effect.
If the license holder files a motion or application to modify a support order, the department, county attorney, or authorized attorney, upon notification by the license holder, shall stay the action to certify the license holder under section 43-3318 until disposition of the motion or application by the court or agency of competent jurisdiction. If the license holder requests review of the support order under section 43-512.12, the department shall stay the action to certify the license holder pending final disposition of the review and modification process.
Source: Laws 1997, LB 752, § 19; Laws 2007, LB296, § 157. Operative July 1, 2007

§ 43-3320 License holder; written confirmation of compliance.
(1) When a license holder comes into compliance with the support order as provided in section 43-3314, the department, county attorney, or authorized attorney shall provide the license holder with written confirmation that the license holder is in compliance.
…
Source: Laws 1997, LB 752, § 20; Laws 2007, LB296, § 158.

Liens, Garnishment & Related

§ 42-358.06. Delinquent permanent child or spousal support payments; lien.
A lien upon the property of one who is delinquent in permanent child or spousal support payments may be instituted and enforced according to the terms of section 42-371.
Source: Laws 1975, LB 212, § 8; Laws 1985, Second Spec. Sess., LB 7, § 13.

§ 42-371 *

(1) All judgments and orders for payment of money shall be liens, as in other actions, upon real property and any personal property registered with any county office and may be enforced or collected by execution and the means authorized for collection of money judgments;

(2)(a) The judgment creditor may execute a partial or total release of the judgment or a document subordinating the lien of the judgment to any other lien, generally or on specific real or personal property.

(b) Release of a judgment for child support or spousal support or subordination of a lien of a judgment for child support or spousal support may, if all such payments are current, be released or subordinated by a release or subordination document executed by the judgment creditor, and such document shall be sufficient to remove or subordinate the lien. A properly executed, notarized release or subordination document explicitly reciting that all child support payments or spousal support payments are current is prima facie evidence that such payments are in fact current.

I Release of a judgment for child support or spousal support or subordination of a lien of a judgment for child support or spousal support shall be approved by the court which rendered the judgment if all such payments are not current. The judgment debtor may file a motion in the court which rendered the original judgment for an order releasing or subordinating the lien as to specific real or personal property. The court shall grant such order upon a showing by the judgment debtor that sufficient real or personal property or property interests will remain subject to the lien or will maintain priority over other liens sufficient to cover all support due and which may become due;

(3) Whenever a judgment creditor refuses to execute a release of the judgment or subordination of a lien as provided in this section, the person desiring such release or subordination may file an application for the relief desired. A copy of the application and a notice of hearing shall be served on the judgment creditor either personally or by registered or certified mail no later than ten days before the date of hearing. If the court finds that the release or subordination is not requested for the purpose of avoiding payment and that the release or subordination will not unduly reduce the security, the court may issue an order releasing real or personal property from the judgment lien or issue an order subordinating the judgment lien. As a condition for such release or subordination, the court may require the posting of a bond with the clerk in an amount fixed by the court, guaranteeing payment of the judgment. For purposes of this section, a current certified copy of support order payment history from the Title IV-D Division of the Department of Health and Human Services setting forth evidence that all support payments are current is prima facie evidence that such payments are in fact current and is valid for thirty days after the date of certification;

(4) Full faith and credit shall be accorded to a lien arising by operation of law against real and personal property for amounts overdue relating to a support order owed by an obligor who resides or owns property in this state when another state agency, party, or other entity seeking to enforce such lien complies with the procedural rules relating to the filing of the lien in this state. The state agency, party, or other entity seeking to enforce such lien shall send a certified copy of the support order with all modifications, the notice of lien prescribed by 42 U.S.C. 652(a)(11) and 42 U.S.C. 654(9)(E), and the appropriate fee to the clerk of the district court in the jurisdiction within this state in which the lien is sought. Upon receiving the appropriate documents and fee, the clerk of the district court shall accept the documents filed and such acceptance shall constitute entry of the foreign support order for purposes of this section only. Entry of a lien arising in another state pursuant to this section shall result in such lien being afforded the same treatment as liens arising in this state. The filing process required by this section shall not be construed as requiring an application, complaint, answer, and hearing as

might be required for the filing or registration of foreign judgments under the Nebraska Uniform Enforcement of Foreign Judgments Act or the Uniform Interstate Family Support Act;

(5) Support order judgments shall cease to be liens on real or registered personal property ten years from the date (a) the youngest child becomes of age or dies or (b) the most recent execution was issued to collect the judgment, whichever is later, and such lien shall not be reinstated;

(6)…

(7) The court may in any case, upon application or its own motion, after notice and hearing, order a person required to make payments to post sufficient security, bond, or other guarantee with the clerk to insure payment of both current and any delinquent amounts. Upon failure to comply with the order, the court may also appoint a receiver to take charge of the debtor's property to insure payment. Any bond, security, or other guarantee paid in cash may, when the court deems it appropriate, be applied either to current payments or to reduce any accumulated arrearage;

(8) …

(9) Any lien authorized by this section against personal property registered with any county consisting of a motor vehicle or mobile home shall attach upon notation of the lien against the motor vehicle or mobile home certificate of title and shall have its priority established pursuant to the terms of section 60-164 or a subordination document executed under this section.

Source: Laws 2008, LB1014, § 35. Operative Date: April 17, 2008

Doksansky v. Norwest Bank Neb., 260 Neb. 100, 615 N.W.2d 104 (2000)
also see **Smith v. Smith**, 246 Neb. 193, 517 N. W. 2d 394 (1994)

Underlying Facts*: Two cases involving the same family. In* ***Smith*** *the court ruled that the CP could not utilize a garnishment procedure to compel payments from the trusts for the purpose of satisfying a child support arrearage. In* **Dokansky** *the same CP attempted to petition for an equitable assets creditor's bill against cotrustees, which would require application of future trust distributions to the judgment for $93,000 in child support arrearages. The CP was the principal beneficiary of all of these trusts, which totaled $600,000 in value. She again failed, because the NCP had no control as to when trust money was to be distributed to him. This proved fatal to the efforts of the CP to collect $93,000 is child support arrears.*

- A **creditor's suit or bill** is generally defined as "an equitable proceeding brought by a creditor to enforce the payment of a debt out of property or interests of his debtor which cannot be reached by ordinary legal process." 21 Am. Jur. 2d Creditors' Bills § 1 at 6 (1998). "A creditor's bill is in the nature of an equitable execution," and its purpose is to "bring into exercise the equitable powers of the court to enforce the satisfaction of judgments by means of equitable execution" when execution at law cannot be obtained. Id., § 2 at 7.
- In Nebraska, a creditor's bill is statutorily authorized by Neb. Rev. Stat. § 25-1564 (Reissue 1995), which provides:

  > Where a judgment debtor has not personal or real property subject to levy on execution, sufficient to satisfy the judgment, any interest which he may have in any banking, turnpike, bridge, or other joint-stock company, or any interest he may have in any money, contracts, claims or choses in action, due or to become due to him, or in any judgment or decree, or any money, goods or effects which he may have in possession of any person, body politic or corporate, shall be subject to the payment of such judgment by proceedings in equity, or as in this chapter prescribed.
- Nebraska recognizes **two types of creditor's bills**. The first is used to reach **equitable assets** or property of a debtor on which execution at law cannot be levied. The second is used in **aid of**

an execution at law, as to set aside an encumbrance or a transfer of property made to defraud creditors.

- There are **three requirements** for an equitable assets creditor's bill. First, the creditor must have a judgment against the debtor: second, the creditor must "`allege and show that he has exhausted his remedy at law,'" i.e., the creditor must show that execution has not satisfied the judgment: and finally, the debtor must have some interest in property that the creditor is unable to reach through execution.
- The dispositive issue here is whether [the NCP's] beneficial interest in the discretionary support trusts is an "interest in property" which may be reached by an equitable assets creditor's bill to satisfy [the CP's] judgment for child support arrearage.
- [W]e held that an equitable assets creditor's bill may reach a judgment debtor's beneficial interest in a resulting trust which came into being because of the debtor's failed attempt to dispose of real estate by *inter vivos* trust, reasoning that the debtor remained the equitable owner of property which could be used to satisfy the judgment. We have also held that a debtor's contingent interest as an heir in an estate under administration may be reached by an equitable assets creditor's bill, reasoning that while such interest was contingent, it was still an interest in property which was not exempt from being applied to the payment of the debt.
- Our jurisprudence is consistent with the following statement of the general rule for determining whether a beneficiary's interest in a trust created by a third party is a property interest which may be reached by an equitable assets creditor's bill:

  > [I]n order for equity to subject to the claims of creditors the interest of the beneficiary, it is essential that it be such an interest as could be enforced by the beneficiary himself: **creditors cannot reach the beneficiary's interest if the trustee has complete discretion not only as to the time and manner of conferring the intended benefit but also as to whether it shall be conferred at all,** or if disbursements are restricted to such amounts as are necessary for the comfortable maintenance and support of the *cestui que* trust.
  >
  > 21 Am. Jur. 2d Creditors' Bills § 35 at 30 (1998).

Fox v. Whitbeck, 280 Neb. 75, 783 N.W.2d 774 (2010)

Facts: Dad owed back child support to two mothers. Mom #1 had a lien on his real estate, but the lien had lapsed. Mom #2 initiated an execution and sheriff's sale of the real estate, and purchased the property at a fire sale price. Mom #1 objected.

Held: Even though Mom #1 no longer had a valid lien on the real estate, she had standing to object to the fire sale price of the dad's property.

- The term "execution" is not specifically defined in § 42-371, but it is generally defined by Neb. Rev. Stat. § 25-1501(Reissue 2008) as a "process of the court." This statutory definition is consistent with the commonly accepted understanding of the term as a "formal document issued by the court that authorizes a sheriff to levy upon the property of a judgment debtor" or a "court order directing a sheriff or other officer to enforce a judgment, usu[ally] by seizing and selling the judgment debtor's property."
- Garnishment is a legal remedy which involves issuance of a summons and a court order as a means of enforcing the authority of a court with respect to a judgment.
- The Legislature has stated that while income withholding under the IWCSA is the "preferred technique" for enforcement of such obligations, "other techniques such as liens on property and contempt proceedings should be used when appropriate."

- We read the language of §§ 42-371and 43-1702 as a recognition by the Legislature that execution is one of several means of collecting child support, not as a statement that all methods of collecting child support are executions. Thus, while the income withholding notices in this case are part of a legally authorized administrative remedy for the collection of child support, they are not "executions" within the meaning of § 42-371(5) because they are not processes of the court.
- [The custodial parent] argues that even if she no longer had an enforceable lien, she still had an enforceable child support judgment, and that therefore, the district court erred in confirming the sheriff's sale without conducting a hearing on her objections to confirmation based upon irregularities in the sale and the amount of the sale price. We find merit in this argument.
- Child support judgments do not become dormant by lapse of time, and the fact that a child support judgment ceases to be a lien by operation of § 42-371(5) does not extinguish the judgment itself or cause it to become dormant.
- Although [Mom #1] did not have an enforceable lien at the time of the sheriff's sale, she was a judgment creditor with an interest in any potential proceeds of the sale exceeding the amount necessary to satisfy [the other custodial parent's] lien. Accordingly, she had standing to object to the confirmation of the sale on the ground of irregularities which resulted in a sale price lower than fair market value.

Gallner v. Gallner, 257 Neb. 158; 595 N.W.2d 904 (1999)

Underlying Facts*: Noncustodial parent sought to refinance his house, and to subordinate child support liens to new mortgage/deed of trust. Custodial parent objected. There remained approximately $140,000 in child support payments and $42,000 in alimony. The NCP was current on the payments. Trial court ordered child support/ alimony liens to be subordinated to the new mortgage/deed of trust. Mother appealed.*

- The relief sought by (the NCP) involves the equitable powers of the court, and therefore, the standard of review is de novo. In an appeal of an equity action, an appellate court tries factual questions de novo on the record and reaches a conclusion independent of the findings of the trial court.
- [T]he district court abused its discretion in quashing the subpoena [*duces tecum*, seeking NCP's recent tax returns, life insurance info, home appraisal info and related documents as to his earning capacity]. The fact in issue is whether the subordination requested would unduly reduce the security regarding the remaining amount of approximately $182,000 in child support and alimony. Clearly, the items requested by [the mother] were relevant to a determination of [the NCP's] financial status and whether the child support and alimony liens should be subordinated in order to allow Michael to refinance his real estate.
- NCP has the burden to demonstrate that the release or subordination is not requested for the purpose of avoiding payment and that the release or subordination will not unduly reduce the security. The failure to produce an appraised value of the real estate and the failure to produce evidence of income tax returns and projected income tax returns leaves the court without any reasonable basis for determining whether to subordinate the child support and alimony liens. Since [the NCP] is asking for equitable relief, it is his obligation to produce the information which will support such relief. We therefore conclude that the district court erred in subordinating the liens without first having sufficient information before it.

Halsted v. Halsted, 169 Neb. 325, 99 N.W.2d 384 (1959)
Parker v. Parker, 10 Neb. App. 658, 636 N.W.2d 385 (2001)

- A judgment lien does not attach to mere legal title where equitable and beneficial interests are in another. A judgment lien is a lien only on the actual interest of the judgment debtor, and a judgment lien is subject to all existing equities, whether of record or not.
- A lien for unpaid child support comes into existence only upon service of the summons of the action seeking unpaid child support. Also see ***Nowka v. Nowka***, 157 Neb. 57, 58 N.W.2d 600 (1953)

State v. Merrill, 273 Neb. 583, 731 N.W.2d 570 (2007)

Facts: *Merrill was charged with several* ***felony*** *charges, including child abuse. His grandfather posted his $5,000* ***criminal appearance bond****, then Merrill assigned the right to get the bond back to his grandfather. Meantime, the State filed an* ***"Affidavit of Lien for Child Support"*** *in the criminal case. Later, Merrill was sentenced to imprisonment on the felony charges, and his grandfather sought to have the bond money back. The clerk of district court refused, due to the state's lien. Merrill appealed. The district court heard and considered the matter as part of the criminal case, and ordered the bond receipts returned to the grandfather. The state appealed.*

- We conclude that the State was not authorized to appeal the (district court's) order in this criminal case and that therefore, this court lacks jurisdiction over this appeal. Absent specific statutory authorization, the State, as a general rule, has no right to appeal an adverse ruling in a criminal case.
- The district court correctly noted that the State's remedy is in the civil case. (**Note:** the court did not spell out what exactly that remedy is. One possibility would have been to file an *Order to Show Cause* against Merrill, introduce evidence of the bond receipt in his name, then have the court order it held by the court, or clerk of court, until the criminal case was concluded, then instead of giving it back to the father, assign it to the child support Payment Center for disbursement to the custodial parent. Note further, however, that although the bond receipt was *technically* in the name of the defendant/father, it was probably not really his money. State law requires all bond receipts to list the defendant as the owner of the bond money. Absent evidence that the bond money was actually the defendant's to begin with, you might question the propriety of taking the funds from an innocent third party to pay the defendant's child support.)

Marriage
(see also Same Sex Marriage)

Hills v. State, 61 Neb. 589, 85 N.W. 836 (1901)

- If marriage is valid where celebrated, it is valid in this state.

In Re Estate of Everhart, 18 Neb. App. 413, 783 N.W.2d 1 (May 2010)

Facts: you really shouldn't take that keen of an interest in your first cousin. Look what happens when you do…

- A void marriage is not valid for any legal purpose; the marriage is void *ab initio* by statute, and its invalidity may be maintained in any proceeding in any court between any proper parties whether in the lifetime or after the death of the supposed husband and wife, and whether the question arises directly by petition for an annulment or collaterally in other proceedings.

Vlach v. Vlach, 286 Neb. 141, 835 N.W.2d 72 (2013)

Facts: Parties were married in 2985 by a county judge, but no one ever filed a return of the marriage certificate (husband apparently kept the original license in his personal safe, until he decided he didn't want to be married any longer. He sued for a declaratory judgment 26 years later, claiming he was never married to his wife.

- The plain language of § 42-104, both at the time of the Vlachs' application for a marriage license and today, includes only two requirements for a marriage to be valid: the issuance of a marriage license and the subsequent solemnization of the marriage by a person authorized to do so.
- We find no indication in the statutes that the Legislature intended to penalize the parties to a duly licensed and solemnized marriage for an officiant's subsequent failure to complete and file the return.

Medicaid Reimbursement/ Medical Support
(See also Health Insurance/Cash Medical Support)

This area is in a state of flux. Nebraska's DHHS CSE office released a letter in May 2008 which instructed local offices and CSE attorneys to **stop** seeking to obtain, or obtaining, new orders requiring Noncustodial Parents to repay Medicaid/medical debts to the state, and further to discontinue enforcement of existing orders for Medicaid reimbursement. This action was precipitated by the Federal HHS CSE office, which has ruled such enforcement activities are outside the Federal IV-D program mandates. Federal legislation has been proposed that would remove from the IV-D program any mention of collecting birth related medical expenses.

Note: In response to a new federal definition of the term "***reasonable in cost***" as pertains to dependent health insurance or ***"cash medical support",*** which definition was approved in July 2008 in the Federal Child Support Regulations, Nebraska's HHS agency secured an amendment to state law that defines "reasonably available" to equate to **3% or less** of a parent's gross monthly income. This change is contained in LB 288, effective 9/30/2009 (see § 42-369). **Note**: the concept of "cash medical support" ***only applies to "IV-D" cases*** at this time. The Feds have a broad view of what constitutes "cash medical support". It can mean something as simple as ordering a parent to share uncovered medical expenses of the minor child. This is something routinely done in all cases except where the obligated parent has a very low income. Note also that "cash medical" awards cannot have the effect of putting the parent below the poverty guidelines as set forth in state and federal law.

See the section on **Guidelines Issues** and **Health Insurance** in this outline for further information.

State on Behalf of Dunn v. Wiegand, 2 Neb. App. 580, 512 N.W.2d 419 (1994)

- If action is filed on behalf of minor child by the state, the state cannot seek reimbursement by the father for medical expenses of the mother paid by the state if the child is more than 4 years of age.

See also **State v. Oglesby**, 244 Neb. 880, 510 N.W.2d 53 (1994)

- "the trial court ordered judgment 'for medical expenses incurred in relation to the pregnancy, confinement and recovery of [the mother] in the birth of [the child].' That part of the judgment is not based on the rights of the child, but is in relation to the rights of the child's mother. As such, it was barred by the applicable 4-year statute of limitations affecting the rights of the mother or the mother's assignee. Section 43-1411 does not extend the statute of limitations for anyone other than the minor child involved."

Minors

(See also Emancipation & Related)

25-309. Suit against infant; guardian for suit; when appointed; exception.
Except as provided by the Nebraska Probate Code, the defense of an infant must be by a guardian for the suit, who may be appointed by the court in which the action is prosecuted, or by a judge thereof, or by a county judge. The appointment cannot be made until after service of the summons in the action as directed by this code.
Source:R.S.1867, Code § 38, p. 399; R.S.1913, § 7590; C.S.1922, § 8533; C.S.1929, § 20-309; R.S.1943, § 25-309; Laws 1975, LB 481, § 12.

25-310. Suit against infant; guardian; how appointed.
The appointment may be made upon the application of the infant, if he be of the age of fourteen years, and apply within twenty days after the return of the summons. If he be under the age of fourteen or neglect so to apply, the appointment may be made upon the application of any friend of the infant, or on that of plaintiff in the action.
Source:R.S.1867, Code § 39, p. 399; R.S.1913, § 7591; C.S.1922, § 8534; C.S.1929, § 20-310; R.S.1943, § 25-310.

Carlos H. vs. Lindsay M., 203 Neb. 1004, 815 N.W. 2d 168 (2012)
Held: One minor lacks the legal capacity to sue on his/her own behalf. And a minor may not be sued personally. A *guardian ad litem* or next friend must file the action on behalf of the minor.

- Carlos was 15 years old at the time this action was filed. The county court determined that because Carlos was a minor, he was incapable of bringing the action in his own name. Lindsay was also 15 years old. We must therefore decide whether either party had the capacity to sue or be sued.
- §25-307 - Except as provided by the Nebraska Probate Code, the action of an infant shall be commenced, maintained, and prosecuted by his or her guardian or next friend. Such actions may be dismissed with or without prejudice by the guardian or next friend only with approval of the court. When the action is commenced by his or her next friend, the court has power to dismiss it, if it is not for the benefit of the infant, or to substitute the guardian of the infant, or

any person, as the next friend. Any action taken pursuant to this section shall be binding upon the infant.

- In this state an action of an infant must be brought by his guardian or next friend and when such an action is brought by a guardian of the infant, the court has power, for cause, to substitute the next friend in place of the guardian.... The district court has authority to and it should appoint a *guardian ad litem* or permit their next friend to appear for unrepresented, interested infants. *Workman v. Workman,* 167 Neb. 857, 869, 95 N.W.2d 186, 194 (1959).
- " [M]inors and incompetents are considered to be under a legal disability and are therefore unable to sue or be sued in their individual capacities; such persons are required to appear in court through a legal guardian, a ' next friend,' or a guardian ad litem." *Austin Nursing Center, Inc. v. Lovato,* 171 S.W.3d 845, 849 (Tex.2005)
- Nebraska law also provides that "the defense of an infant must be by a guardian for the suit, who may be appointed by the court in which the action is prosecuted."

Modification Issues/ Change in Circumstances/Unclean Hands
(see also Guidelines, Incarceration, Removal of Children, Unclean Hands)

Full Nebraska Child Support Guidelines:

Neb. Ct. R. § 4-217 Modification. Application of the child support guidelines which would result in a variation by 10 percent or more, but not less than $25, upward or downward, of the current child support obligation, child care obligation, or health care obligation, due to financial circumstances which have lasted 3 months and can reasonably be expected to last for an additional 6 months, establishes a rebuttable presumption of a material change of circumstances.
Paragraph Q amended effective Jan. 1, 1996; Paragraph Q amended effective Sept. 1, 2002.

…

Neb. Ct. R. § 4-219 Limitation on Increase. Under no circumstances shall there be an increase in support due from an obligor solely because of an increase in the income of the obligee.
Paragraph S effective Sept. 1, 2002.

Neb. Ct. R. § 4-220 Limitation on Decrease. An obligor shall not be allowed a reduction in an existing support order solely because of the birth, adoption, or acknowledgement of subsequent children of the obligor; however, a duty to provide regular support for subsequent children may be raised as a defense to an action for an upward modification of such existing support order.
Paragraph T effective Sept. 1, 2002.

§ 42-364. Action involving child support, child custody, parenting time, visitation, or other access; parenting plan; legal custody and physical custody determination; rights of parents; child support; termination of parental rights; court; duties; modification proceedings; use of school records as evidence.

(1) . . .

. . .

(6) Modification proceedings relating to support, custody, parenting time, visitation, other access, or removal of children from the jurisdiction of the court shall be commenced by filing a complaint to modify. . . . Service of process and other procedure shall comply with the requirements for a dissolution action. [See § 42-352]

(7) . . .

Source: Laws 1983, LB 138, § 1; Laws 1985, LB 612, § 1; Laws 1985, Second Spec. Sess., LB 7, § 16; Laws 1991, LB 457, § 3; Laws 1991, LB 715, § 1; Laws 1993, LB 629, § 21; Laws 1994, LB 490, § 1; Laws 1996, LB 1296, § 15; Laws 1997, LB 752, § 96; Laws 2004, LB 1207, § 25; Laws 2006, LB 1113, § 35; Laws 2007, LB554, § 32; Laws 2008, LB1014, § 32; Laws 2009, LB288, § 5; Laws 2010, LB901, § 1. Operative Date: July 1, 2010

§ 42-746. Modification of child support order of another state. (Relating to UIFSA)
(a) If section 42-747.01 does not apply, except as otherwise provided in section 42-747.03, upon petition a tribunal of this state may modify a child support order issued in another state which is registered in this state, if after notice and hearing the tribunal finds that:
(1) the following requirements are met:
(i) neither the child, nor the individual obligee, nor the obligor resides in the issuing state;
(ii) a petitioner who is a nonresident of this state seeks modification; and
(iii) the respondent is subject to the personal jurisdiction of the tribunal of this state; or
(2) this state is the state of residence of the child, or a party who is an individual is subject to the personal jurisdiction of the tribunal of this state, and all of the parties who are individuals have filed consents in a record in the issuing tribunal for a tribunal of this state to modify the support order and assume continuing, exclusive jurisdiction.
(b) Modification of a registered child support order is subject to the same requirements, procedures, and defenses that apply to the modification of an order issued by a tribunal of this state and the order may be enforced and satisfied in the same manner.
(c) Except as otherwise provided in section 42-747.03, a tribunal of this state shall not modify any aspect of a child support order that cannot be modified under the law of the issuing state, including the duration of the obligation of support. If two or more tribunals have issued child support orders for the same obligor and the same child, the order that controls under section 42-711 establishes the aspects of the support order which are nonmodifiable.
(d) In a proceeding to modify a child support order, the law of the state that is determined to have issued the initial controlling order governs the duration of the obligation of support. The obligor's fulfillment of the duty of support established by that order precludes imposition of a further obligation of support by a tribunal of this state.
(e) On issuance of an order by a tribunal of this state modifying a child support order issued in another state, the tribunal of this state becomes the tribunal having continuing, exclusive jurisdiction.
Source: Laws 1993, LB 500, § 46; Laws 1997, LB 727, § 18; Laws 2003, LB 148, § 82.

§43-512.12 Title IV-D child support order; review by Department of Health and Human Services; when. (Note: LB 712 amends portions of this statute. Newer language is highlighted)
(1) Child support orders in cases in which a party has applied for services under Title IV-D of the federal Social Security Act, as amended, shall be reviewed by the Department of Health and Human Services to determine whether to refer such orders to the county attorney or authorized attorney for filing of an application for modification. An order shall be reviewed by the department upon its own initiative or at the request of either parent when such review is required by Title IV-D of the federal Social Security Act, as amended. After review the department shall refer an order to a county attorney or authorized attorney when the verifiable financial information available to the department indicates:
(a) The present child support obligation varies from the Supreme Court child support guidelines pursuant to section 42-364.16 by more than the percentage, amount, or other criteria established by Supreme Court rule, and the variation is due to financial circumstances which

have lasted at least three months and can reasonably be expected to last for an additional six months; or

(b) Health care coverage meeting the requirements of subsection (2) of section 42-369 is available to either party and the children do not have health insurance coverage other than the medical assistance program under the Medical Assistance Act. Health care coverage cases may be modified within three years of entry of the order.

(2) Orders that are not addressed under subsection (1) of this section shall not be reviewed by the department if it has not been three years since the present child support obligation was ordered unless the requesting party demonstrates a substantial change in circumstances that is expected to last for the applicable time period established by subdivision (1)(a) of this section. Such substantial change in circumstances may include, but is not limited to, change in employment, earning capacity, or income or receipt of an ongoing source of income from a pension, gift, or lottery winnings. An order may be reviewed after one year if the department's determination after the previous review was not to refer to the county attorney or authorized attorney for filing of an application for modification because financial circumstances had not lasted or were not expected to last for the time periods established by subdivision (1)(a) of this section.

Source: Laws 2010, LB712, § 25.

§43-512.14. Title IV-D child support order; financial information; duty to provide; failure; effect; referral of order; effect.

Each parent requesting review shall provide the financial information as provided in section 43-512.17 to the Department of Health and Human Services upon request of the department. The parent requesting review shall also provide an affidavit regarding the financial circumstances of the nonrequesting parent upon the request of the department. Failure by a nonrequesting parent to provide adequate financial information shall create a rebuttable presumption that such parent's income has changed for purposes of section 43-512.12.

Referral of an order to a county attorney or authorized attorney under this section shall create a rebuttable presumption that there has been a material change in financial circumstances of one of the parents such that the child support obligation shall be increased at least ten percent if there is inadequate financial information regarding the noncustodial parent or that the child support obligation shall be decreased at least ten percent if there is inadequate financial information regarding the custodial parent. Such referral shall also be sufficient to rebut the presumption specified in section 42-364.16, and the court, after notice and an opportunity to be heard, may order a decrease or an increase of at least ten percent in the child support obligation as provided in this section.

Source: Laws 1991, LB 715, § 15; Laws 1993, LB 523, § 9; Laws 1996, LB 1044, § 165; Laws 1997, LB 307, § 66.

§43-512.15. Title IV-D child support order; modification; when; procedures.

(1) The county attorney or authorized attorney, upon referral from the Department of Health and Human Services, shall file a complaint to modify a child support order unless the attorney determines in the exercise of independent professional judgment that:

(a) The variation from the Supreme Court child support guidelines pursuant to section 42-364.16 is based on material misrepresentation of fact concerning any financial information submitted to the attorney;

(b) The variation from the guidelines is due to a voluntary reduction in net monthly income. For purposes of this section, a person who has been incarcerated for a period of one year or more in a county or city jail or a federal or state correctional facility shall be considered to have an involuntary reduction of income unless (i) the incarceration is a result of a conviction for criminal nonsupport pursuant to section 28-706 or a conviction for a violation of any federal law or law of another state substantially similar to section 28-706, (ii) the incarcerated individual has a documented record of willfully failing or neglecting to provide proper support which he or she knew or reasonably should have known he or she was legally obligated to provide when he or she had sufficient resources to provide such support; or (iii) the incarceration is a result of a conviction for a crime in which the child who is the subject of the child support order was victimized; or

(c) When the amount of the order is considered with all the other undisputed facts in the case, no variation from the criteria set forth in subdivisions (1)(a) and (b) of section 43-512.12 exists.

(2) The department, a county attorney, or an authorized attorney shall not in any case be responsible for reviewing or filing an application to modify child support for individuals incarcerated as described in subdivision (1)(b) of this section.

(3) The proceedings to modify a child support order shall comply with section 42-364, and the county attorney or authorized attorney shall represent the state in the proceedings.

(4) After a complaint to modify a child support order is filed, any party may choose to be represented personally by private counsel. Any party who retains private counsel shall so notify the county attorney or authorized attorney in writing.

Source: Laws 2010, LB712, § 26

Practice Note: §42-358 (3) indicates that where the child support payment history shows that the obligated parent is in arrears, a prima facie case of contempt is made. *Arguendo* that should be all that is needed to shift the burden to the **incarcerated parent** to disprove that he or she was acting willfully or neglectfully with regard to their child support obligation at the time they walked (shackled) into prison. (Hat tip to Tyler Jacobsen in the Lancaster Co. Attorney's office) See the ***Incarceration*** section of this outline for an update on changing case law in this area.

§43-512.16 Title IV-D child support order; review of health care coverage provisions.

The county attorney or authorized attorney shall review the health care coverage provisions contained in any child support order which is subject to review under section 43-512.12 and shall include in any application for modification a request that the court order health care coverage or cash medical support as provided in subsection (2) of section 42-369.

Source: Laws 1991, LB 715, § 17; Laws 2009, LB288, § 12. Operative Date: September 30, 2009

§43-512.17. Title IV-D child support order; financial information; disclosure; contents.

Any financial information provided to the Department of Health and Human Services, the county attorney, or the authorized attorney by either parent for the purpose of facilitating a modification proceeding under sections 43-512.12 to 43-512.18 may be disclosed to the other parties to the case or to the court. Financial information *shall include* the following:

(1) An affidavit of financial status provided by the party requesting review;

(2) An affidavit of financial status of the nonrequesting party provided by the nonrequesting party or by the requesting party at the request of the county attorney or authorized attorney;

(3) Supporting documentation such as state and federal income tax returns, paycheck stubs, W-2

forms, 1099 forms, bank statements, and other written evidence of financial status; and (4) Information relating to health care coverage as provided in subsection (2) of section 42-369. **Source**:Laws 1991, LB 715, § 18; Laws 1993, LB 523, § 11; Laws 1996, LB 1044, § 167; Laws 1996, LB 1296, § 23; Laws 1997, LB 307, § 68; Laws 2009, LB288, § 13.

§43-512.18. Title IV-D child support order; communication technology; use authorized. A court may use any available technology that would allow the parties to communicate with each other to conduct a hearing or any proceeding required pursuant to sections 43-512.12 to 43-512.17. **Source:** Laws 1991, LB 715, § 19.

8-002 Criteria for a Review:

All Nebraska IV-D court orders or foreign orders registered under UIFSA or RURESA in Nebraska are eligible for a review for possible modification of the child support amount and inclusion of health insurance if the following criteria are met:

1. The order is for current support;
2. The order is an active Nebraska order;
3. Nebraska maintains continuing exclusive jurisdiction under UIFSA or is the proper state to acquire continuing exclusive jurisdiction under UIFSA for the support order;
4. At least one party resides in Nebraska;
5. The location of all parties involved is known;
6. The non-custodial party is not institutionalized or incarcerated;
7. The order is not a tribal order;
8. **The youngest child in the order will not reach the age of majority within the next 12 months**;
9. The order is not registered for income withholding only; and
10. The order does not require a change in custody to effectuate the modification of support.

8-002.01 Child Support Obligation; Request For Review; Frequency

1. An order will not be reviewed by the Department or County/Authorized Attorney if it has not been three years since the present child support obligation was ordered unless:

a. The newly calculated child support and current support obligations vary by the percentage determined by the Nebraska Supreme Court and the variance is due to financial circumstances which have lasted three months and can be reasonably expected to last an additional six months;
b. Health care coverage is available to either party and the child(ren) do not have health care coverage other than the Medical Assistance Program under the Medical Assistance Act;
c. The requesting party demonstrates a substantial change in circumstances that has lasted for at least three months and is expected to last an additional six months;
d. The present child support obligation does not provide for health care coverage; or
e. Such review is required by Title IV-D of the Social Security Act, as amended.

2. An order may be reviewed one year after the most recent request for review if: the Department's determination after the previous review was not to refer to the County/Authorized Attorney for filing an application for modification because financial circumstances had not lasted for three months or were not expected to last for an additional six months; it has been three years since the present child support obligation was entered; and no exception under 466 NAC 8-002.01 section *1 a* through *e* requires an earlier review.

8-003 TIMEFRAMES FOR REVIEW AND MODIFICATION:
Within 180 calendar days of the date that the Department or the County/Authorized Attorney receives a completed application for review and modification, or location of the non-requesting party, whichever occurs later, the Department or the County/Authorized Attorney will:

1. Conduct a review of the order and modify the order; or
2. Determine that the order should not be adjusted as specified in 466 NAC 8.

An application for review and modification is considered complete when the application has been fully completed and signed by the requesting party, and is accompanied by all required supporting documentation. See 466 NAC 8-005.03.

8-005.03 Information Needed for a Review: All parties must submit financial information and supporting documentation and information about the location of other parties and the financial circumstances of other parties, if known. Supporting financial documentation may include:

1. Two most recent years' tax returns with all IRS schedules;
2. W-2 statements;
3. IRS 1099 forms;
4. Pay stubs or other verification of all sources of income from the last three months;
5. Health care coverage information; and
6. Other items deemed necessary under the Nebraska Child Support Guidelines.

All parties in a Department-initiated review and the non-requesting party in a requested review must return financial information and supporting documentation within 30 calendar days of the date of the notice of intent to review.

8-005.03A Request for Additional Information: If the Department requests additional information, the parties must return the requested information postmarked within 15 calendar days of the date of the request.

8-005.03B Disclosure of Financial Information: Any financial or health care coverage information provided to the Department or the county/authorized attorney by either party may be disclosed to the other parties to the case or to the court.

The **Nebraska Administrative Code** may be found here> http://dhhs.ne.gov/Pages/reg_regs.aspx

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Bohnet v. Bohnet, 22 Neb. App. 846, 862 N.W.2d 99 (2015)

Facts: Following their Lancaster County divorce, father, who was awarded custody of the minor child, accepted a new and better job in So. Sioux City, Nebraska. This resulted in the mother's parenting time being cut from 5 days every 2 weeks to just 2 days. Mother appealed.

Held: Intrastate moves are not subject to the analysis set forth in ***Farnsworth v. Farnsworth***, 257 Neb. 242, 597 N.W.2d 592 (1999).

- Child custody determinations, and visitation determinations, are matters initially entrusted to the discretion of the trial judge, and although reviewed de novo on the record, the trial judge's determination will normally be affirmed absent an abuse of discretion.
- Modification of a dissolution decree is a matter entrusted to the discretion of the trial court, whose order is reviewed de novo on the record, and which will be affirmed absent an abuse of discretion. ***Garza v. Garza***, 288 Neb. 213, 846 N.W.2d 626 (2014).
- We do not disagree that it may seem illogical to require the more extensive *Farnsworth* removal analysis in situations involving some of the short distances noted above simply because a state line has been crossed, but not require such an analysis when a greater intrastate distance is involved, such as in the present case. However, as Katie acknowledges, this court, in unpublished opinions, has declined to apply the *Farnsworth* removal analysis to significant moves within this state's border.
- As indicated previously, while some long-distance intrastate moves might benefit from a thorough *Farnsworth* analysis when considering custody and parenting time issues within the state, neither our Supreme Court nor the Legislature has made that the current state of the law, and therefore, we continue to decline to require the application of the *Farnsworth* analysis to intrastate moves... .

Brewer v. Brewer, 244 Neb. 731, 509 N.W.2d 10 (1993)

- a request to credit Social Security benefits is a request for a change in only the source of payment, paid on behalf of the employee, and therefore does not require a modification hearing, but, rather, only an opportunity for the custodial parent to adduce evidence of any inequity that might occur as the result of crediting those benefits to court-ordered child support.

Brodrick v. Baumgarten, 19 Neb. App. 228, 809 N.W.2d 799 (2011)

Facts: parties modify their support order and indicate the new support amount is an upward deviation from the guidelines. Five months later dad files to modify support back to what the guidelines would have set it at ($0). District court finds a material change in financial circumstances despite the fact the parents' incomes are exactly the same.

Held: No modification is warranted. Parties cannot use a prior deviation from the guidelines as THE grounds to re-modify to a support amount with no deviation when nothing else changes.

- A party seeking to modify a child support order must show a material change in circumstances which (1) occurred subsequent to the entry of the original decree or previous modification and (2) was *not contemplated* when the decree was entered. [also see See *Knaub v. Knaub*, 245 Neb. 172, 512 N.W.2d 124 (1994)]
- Among the factors to be considered in determining whether a material change of circumstances has occurred are (1) changes in the financial position of the parent obligated to pay support, (2)

the needs of the children for whom support is paid, (3) good or bad faith motive of an obligated parent in sustaining a reduction in income, and (4) whether the change is temporary or permanent.

Brooks v. Brooks, 261 Neb. 289, 622 N.W.2d 670 (2001)

- There is no precise mathematical formula for calculating child support when **subsequent children** are involved.
- The calculation is left to the discretion of the court as long as the court considered the obligations to both families and the income of the other parent of the subsequent children.
- The party requesting a deviation from the guidelines based upon an obligation to support offspring of a subsequent relationship bears the burden of providing evidence regarding the obligation, including the income of the other parent of the child or children of the subsequent relationship.

Burns v. Burns, 293 Neb. 633, 879 N.W.2d 375 (May 2016)

- [A] summons is required to be served on the defendant in a modification proceeding. Section 42-364(6) provides: "Modification proceedings relating to support, custody, parenting time, visitation, other access, or removal of children from the jurisdiction of the court shall be commenced by filing a complaint to modify. . . . Service of process and other procedure shall comply with the requirements for a dissolution action." And a dissolution action requires summons to be served upon the other party by personal service or in the manner provided in Neb. Rev. Stat. § 25-517.02 (Reissue 2008).

Caniglia v. Caniglia, 285 Neb. 930, 830 N.W.2d 207 (2013)

- [T]he child support guidelines contemplate that extraordinary or unusual expenses will be addressed outside the guidelines' framework.
- Under our case law, provisions of a divorce decree relating to children can always be modified. As we have stated, "A decree in a divorce case, insofar as minor children are concerned, is never final in the sense that it cannot be changed."
- [T]here is no persuasive reason for treating extraordinary expenses any differently from other issues relating to children. Thus, *we hold that* a party's responsibility under § 42-364.17 for reasonable and necessary medical, dental, and eye care; medical reimbursements; daycare; extracurricular activity; education; and other extraordinary expenses of the child to be made in the future may be modified if the applicant proves that a material change in circumstances has occurred since entry of the decree or a previous modification.

Claborn v. Claborn, 267 Neb. 201, 673 N.W.2d 533 (2004)

- A divorce decree does not require a parent to remain in the same employment, and child support may be calculated based on actual income when a career change is made in good faith.
- If applicable, **earning capacity** may be considered in lieu of a parent's actual, present income and may include factors such as work history, education, occupational skills, and job opportunities.
- Child support may be based on a parent's earning capacity when a parent voluntarily leaves employment and a reduction in that parent's support obligation would seriously impair the needs of the children

- Earning capacity may be used as a basis for an initial determination of child support under the Nebraska Child Support Guidelines *where evidence is presented* that the parent is capable of realizing such capacity through reasonable effort.

Collins v. Collins, 19 Neb. App. 529, 808 N.W.2d 905 (2012)

- Under the Nebraska Child Support Guidelines, if applicable, earning capacity may be considered in lieu of a parent's actual, present income and may include factors such as work history, education, occupational skills, and job opportunities.
- In the initial determination of child support, earning capacity may be used where evidence is presented that the parent is capable of realizing such capacity through reasonable effort.
- The party seeking the modification has the burden to produce sufficient proof that a material change of circumstances has occurred that warrants a modification.
- For a court to modify child support, the material change of circumstances must exist at the time of the modification trial.
- Temporary unemployment is not a material change of circumstances.

Crawford v. Crawford, 263 Neb. 37, 263 Neb. 37 (2002)

- Modification of a dissolution decree and the amount of child support are matters entrusted to the trial court's discretion, and although the issue on appeal is reviewed de novo on the record, the decision of the trial court will be affirmed absent an abuse of discretion
- The party requesting a deviation from the Nebraska Child Support Guidelines based upon an obligation to support offspring of a subsequent relationship bears the burden of providing evidence regarding the obligation, including the income of the other parent of the child or children of the subsequent relationship
- In considering whether to deviate from the Nebraska Child Support Guidelines based on an order of support for a subsequent child, the trial court must have before it the calculations and any worksheets used to determine the child support order for the subsequent child.
- Double Dipping – If (the obligor in a modification action) was able to use his original support obligation to decrease the amount of his subsequent support obligation to (his later born child), it would be inequitable to allow him to turn around and use that subsequent award as the basis for decreasing the original obligation. It would not be in the best interests of the children to permit (the obligor) to effectively "play one family against the other" in order to decrease his child support obligation to both.

Erica J. v. Dewitt, 265 Neb. 728, 659 N.W.2d 315 (2003)

Facts: District court modified child support, but did not do so retro to the date of the filing of the complaint to modify. State appealed, arguing that the court should have back dated the upward modification.
Held: District court acted within its discretion in not back dating modification.

- [T]he delays (in bringing the modification action to trial) do not appear to be the fault of any one individual. We conclude that the district court's determination to make the increase retroactive to the first day of the month of the hearing before the referee...was not an abuse of discretion, and we therefore affirm that portion of the court's judgment.

Ferry v. Ferry, 201 Neb. 595, 271 N.W.2d 450 (1978)

- Where an award for child support is made in one amount for each succeeding month for more than one child, it will be presumed to continue in force for the full amount until the youngest

child reaches his majority. The proper remedy, if this be deemed unjust, is to seek a modification of the decree in the court which entered it on the basis of the changed circumstances.

Freeman v. Groskopf, 286 Neb. 713, 838 N.W.2d. 300 (2013 – Sarpy Co.)
An excellent discussion on bad faith and earning capacity.

- Modification of child support payments is entrusted to the trial court's discretion, and although, on appeal, the issue is reviewed de novo on the record, an appellate court will affirm the trial court's decision absent an abuse of discretion.
- Whether a child support order should be retroactive is entrusted to the discretion of the trial court, and an appellate court will affirm its decision absent an abuse of discretion.
- A party seeking to modify a child support order must show a material change in circumstances which (1) occurred subsequent to the entry of the original decree or previous modification and (2) was not contemplated when the decree was entered.
- Among the factors to be considered in determining whether a material change of circumstances has occurred are changes in the financial position of the parent obligated to pay support, the needs of the children for whom support is paid, good or **bad faith motive** of the obligated parent in sustaining a reduction in income, and whether the change is temporary or permanent.
- Use of **earning capacity** to calculate child support is useful when it appears that the parent is capable of earning more income than is presently being earned.
- Absent equities to the contrary, child support modifications should generally apply retroactively to the first day of the month following the complaint's filing.
- In the absence of a showing of bad faith, it is an abuse of discretion for a court to award retroactive support when the evidence shows the obligated parent does not have the ability to pay the retroactive support and still meet current obligations.
- A trial court has the discretion to choose *not* to award a retroactive increase in child support even when the obligated parent demonstrates bad faith motives in his or her employment choices, when there is evidence that the parent lacks the ability to pay the retroactive support.

Gammel v. Gammel, 259 Neb. 738, 612 N.W.2d 207 (2000)

- Citing Rule Q [now § 4-217] of the child support guidelines, stating that a 10% or greater deviation from the guidelines will justify a modification. A 10% or greater deviation creates a rebuttable presumption of a material change in circumstances justifying a modification.

Gangwish v. Gangwish, 267 Neb. 901, 678 N.W.2d 503 (2004)

- The paramount concern and question in determining child support, whether in the initial marital dissolution action or in the proceedings for modification of decree, is the **best interests of the child**.

Grahovac v. Grahovac, 12 Neb. App. 585, 680 N.W.2d 616 (2004)
(Voluntary Wastage)

- It is well established that a "material change in circumstances" in modification of child support cases is analogous to the "good cause" standard articulated for modification of alimony. See also ***Pope v. Pope***, 251 Neb. 773, 559 N.W.2d 192 (1997)
- Non-custodial parent who lost high paying job due to alcoholism does not qualify for reduction in alimony or child support due to voluntary wastage of his talents.

Grange v. Grange, 15 Neb. App. 297, 725 N.W.2d 823 (2006 – Sarpy Co.)

- A material change in circumstances means the occurrence of something which, had it been known to the dissolution court at the time of the initial decree, would have persuaded the court to decree differently. ***Heistand v. Heistand***, 267 Neb. 300, 673 N.W.2d 541 (2004).
- We bear in mind that the definition refers to "circumstances" in the plural form; ... Where...the party seeking modification advances multiple reasons for modification, we consider all of the facts and circumstances raised by the evidence to determine whether there has been a material change.
- [The custodial parent] contends that the district court correctly granted summary judgment as to modification of child support, because the miscalculation at the time of the last modification does not constitute a material change in circumstances. In the absence of proof of new facts and circumstances arising since the time of the original decree, an allowance of child support therein will be deemed *res judicata*.

Gress v. Gress, 274 Neb. 686, 743 N.W.2d 67 (2007)

- A party who seeks to have a prior child support order modified can prove that a modification is warranted simply by a showing of the conditions described in paragraph Q [now § 4-217] of the Nebraska Child Support Guidelines.
- Absent a clearly articulated justification, any deviation from the Nebraska Child Support Guidelines is an abuse of discretion.
- In determining child support, a court's findings regarding an individual's level of income should not be based on the inclusion of income that is entirely speculative in nature.
- Changes in the financial position of the parent obligated to pay support often warrant a modification of the support order.
- Regarding child support, increased financial obligations, like decreased income, will qualify as a change in one's financial position. ... As a result, if (the NCP) is ever forced to pay for daycare and his income is reduced below the poverty line as a result, (he) may seek a modification of the court's child support order.
- The federal government provides Social Security to special needs children with the intent that it will supplement other income, not substitute for it.

Groseth v. Groseth, 257 Neb. 525, 600 N.W.2d 159 (1999)

- The age of majority is a "nonmodifiable" provision of a support order when a responding state is modifying a support order issued in another state. See, also, Unif. Interstate Family Support Act, § 611

Hall v. Hall, 238 Neb. 686, 472 N.W.2d 217 (1991)

- We hold that a tax dependency exemption is nearly identical in nature to an award of child support or alimony and is thus capable of being modified as an order of support.

Harb v. Harb, 209 Neb. 875, 312 N.W.2d 279 (1981)

- When a change of circumstances is proven calling for a modification of child support payments, said modification is to be determined under the same factors applied in an original establishment of support payments, including the cost to the noncustodial parent of exercising reasonable visitation rights.

Hartman v. Hartman, 261 Neb. 359, 622 N.W.2d 871 (2001)
Kramer v. Kramer, A-05-499, 15 Neb. App. 518 (2007)
Lambert v. Lambert; 9 Neb. App. 661, 617 N.W.2d 645 (2000)

- A party seeking to modify a child support order must show a material change in circumstances which has occurred subsequent to the entry of the original decree or a previous modification and was not contemplated when the prior order was entered.

Incontro v. Jacobs, 277 Neb. 275, 761 N.W.2d 551 (2009)

- Child support orders are always subject to review and modification.
- A decree awarding child support will not be modified because of a change of circumstances which was in the contemplation of the parties at the time the original or preceding order was made, but only those anticipated changes which were specifically noted on the record at the time the previous order was entered will prevent modification.
- The party seeking the modification has the burden to produce sufficient proof that a material change of circumstances has occurred that warrants a modification.
- Courts may consider various factors to determine whether a material change of circumstances has occurred. Among the factors to be considered are (1) changes in the financial position of the parent obligated to pay support, (2) the needs of the children for whom support is paid, (3) good or bad faith motive of the obligated parent in sustaining a reduction in income, and (4) whether the change is temporary or permanent.
- The paramount concern in child support cases, whether in the original proceeding or subsequent modification, remains the best interests of the child.
- If applicable, earning capacity may be considered in lieu of a parent's actual, present income and may include factors such as work history, education, occupational skills, and job opportunities. Earning capacity is not limited to wage-earning capacity, but includes moneys available from all sources.
- If it is shown that a reduction in the obligor parent's income is attributable to his or her personal wishes and not the result of unfavorable or adverse conditions in the economy, his or her health, or other circumstances affecting his or her earning capacity, then a reduction in child support is not warranted.

Jameson v. Jameson, 13 Neb. App. 703, 700 N.W.2d 638 (2005)

A good example of how not to get your child support case modified, even when the custodial parent agrees with you that it should be reduced.

- Obligor was unemployed through apparently no fault of his own. Obligee agreed to a reduction in support, however there was no evidence by either party regarding what obligor's earning capacity was at the time of the hearing or whether his earning capacity has changed since the 1995 modification order. So Application to Modify was denied.

Johnson v. Johnson, 290 Neb. 838, 862 N.W.2d 740 (2015)

- In general, child support payments should be set according to the Nebraska Child Support Guidelines. The guidelines provide that "[i]f applicable, earning capacity may be considered in lieu of a parent's actual, present income and may include factors such as work history, education, occupational skills, and job opportunities. Earning capacity is not limited to wage-earning capacity, but includes moneys available from all sources." Use of earning capacity to

calculate child support is useful "when it appears that the parent is capable of earning more income than is presently being earned." *Freeman v. Groskopf*, 286 Neb. 713, 720, 838 N.W.2d 300, 307 (2013)

- Generally, earning capacity should be used to determine a child support obligation only when there is evidence that the parent can realize that capacity through reasonable efforts. See *Johnson v. Johnson*, 20 Neb. App. 895, 834 N.W.2d 812 (2013).
- Whether a child support order should be retroactive is entrusted to the discretion of the trial court, and we will affirm its decision absent an abuse of discretion. *Freeman v. Groskopf*, 286 Neb. 713, 838 N.W.2d 300 (2013).
- In determining whether to order a retroactive modification of child support, a court must consider the parties' status, character, situation, and attendant circumstances. See, *Wilkins v. Wilkins*, 269 Neb. 937, 697 N.W.2d 280 (2005); *Cooper v. Cooper*, 8 Neb. App. 532, 598 N.W.2d 474 (1999). Absent equities to the contrary, modification of a child support order should be applied retroactively to the first day of the month following the filing date of the application for modification. See *Freeman v. Groskopf, supra*. The children and the custodial parent should not be penalized by delay in the legal process, nor should the noncustodial parent gratuitously benefit from such delay.
- [We] conclude that retroactive modification of Kari's child support obligation and the timing of retroactive modification from the first day of the month following the filing of the application for modification are permissible in this case.
- Nebraska appellate courts have generally considered the application of overpayment credits as a question of law. See, *Jensen v. Jensen*, 275 Neb. 921, 750 N.W.2d 335 (2008); *Jameson v. Jameson*, 13 Neb. App. 703, 700 N.W.2d 638 (2005).
- We believe the circumstances in this case permit the award of a credit upon remand for overpayment of child support if, upon application of the child support guidelines, and in the absence of hardship, the district court finds an overpayment has been made during the pendency of the modification proceedings.
- Upon remand, the district court is instructed that entry of a judgment against Elizabeth for future anticipated unused overpayment is not permitted under Nebraska jurisprudence.
- we note that although lump-sum child support awards are not favored under the law in Nebraska, an obligor may receive credit against future obligations for payments already made, including a lump-sum payment already made where such payment does not preclude future child support awards or adjustments. *Jensen v. Jensen*, 275 Neb. 921, 750 N.W.2d 335 (2008).
- The assumption that there will be no further modifications is not correct and contrary to law.

Johnson v. Johnson, 20 Neb. App. 895, 834 N.W.2d 812 (2013)

***Facts*:** Husband had been earning $140,000/yr, but at the time of the divorce decree he had quit that job due to stress, and was unemployed. He hoped to start up his own business, and resume earning about the same rate of pay as his old job. CS and alimony were by agreement based on him earning $140k a year. He remained unemployed for 3 years before finding a job paying only $75K. So dad then filed for a downward mod. Trial court refused to go along.

Held: Reversed.

- When the evidence demonstrates that the parent is unable to realize a particular earning capacity by reasonable efforts, it is clearly untenable for the trial court to attribute that earning capacity to the parent for purposes of determining child support
- while it is true that Benjamin voluntarily chose to leave the employment through which he had realized the $140,000-per-year earning capacity throughout the marriage, the record is clear

that he did so prior to the dissolution proceedings and the dissolution decree. This is not a case where a parent has voluntarily left employment after a support order was entered and has sought to reduce his or her obligation as a result.

- there is no evidence in the record to demonstrate that Benjamin's voluntarily leaving his prior employment was not done in good faith, and his willingness to contemplate continuing the same earning capacity and exhaust his retirement account to keep his obligations current despite a lack of income for several years suggests that there was no bad faith.
- the decision of whether to modify a child support obligation must be based upon the evidence presented by the parties and that it would be improper for the court to focus on anything but the **most recent circumstances** ascertainable from the evidence. *Collins v. Collins*, 19 Neb. App. 529, 808 N.W.2d 905 (2012).
- *This is where it gets interesting*: Even if [the father's] earning capacity, as opposed to actual income, was the key factor when determining his income, his monthly expenses would clearly be relevant to determining his ability to pay a support award.

Lamb v. Lamb, 14 Neb. App. 337, 707 N.W.2d 423 (2005)

- The modification of another state's child support order must be addressed under the **Uniform Interstate Family Support Act**, Neb. Rev. Stat. §§42-701 to 42-751 (Reissue 2004).
- Upon petition, a tribunal of this state may modify a child **support order issued in another state** which is registered in this state if, after notice and hearing, the tribunal finds that (1) neither the child nor the individual obligee nor the obligor resides in the issuing state, a petitioner who is a nonresident of Nebraska seeks modification, and the respondent is subject to the personal jurisdiction of the Nebraska district court or (2) Nebraska is the state of residence of the child, or a party who is an individual is subject to the personal jurisdiction of the Nebraska district court, and all of the parties who are individuals have filed consents in a record in the issuing tribunal for the Nebraska district court to modify the support order and assume continuing exclusive jurisdiction.
- Failure to **register** an order as required under the Uniform Interstate Family Support Act precludes a Nebraska court from modifying the issuing state's child support order.
- A district court may modify a registered child support order issued in another state when, among other requirements, the petitioner seeking modification is a nonresident of Nebraska.
- A party seeking to modify a child support order must show a material change of circumstances which occurred subsequent to the entry of the original decree or a previous modification and which was not contemplated when the prior order was entered. The party must also show that a **change in custody** is in the child's best interests.
- [T]he **NCCJA** does not confer subject matter jurisdiction upon a Nebraska court to modify a child support order issued by another state. See §43-1202 (repealed 2003. Nebraska has now adopted the **UCCJEA** in place of NCCJA) (for purposes of NCCJA, child custody determination shall not include decision relating to child support or any other monetary obligation of any person).

Lambert v. Lambert; 9 Neb. App. 661, 617 N.W.2d 645 (2000)

- A petition for modification of child support or alimony will be denied if a change in financial condition is due to **fault or voluntary wastage** or dissipation of one's talents and assets. In this case, parent was fired for choosing to smoke marijuana.
- Material change in circumstances in reference to modification of child support is analogous to modification of alimony for good cause.

Lucero v. Lucero, 16 Neb. App. 706, 750 N.W.2d 377 (2008)

- Absent equities to the contrary, the modification of child support orders should be applied **retroactively** to the first day of the month following the filing date of the application for modification.
- In the absence of a showing of bad faith, it is an abuse of discretion for a court to award retroactive child support when the evidence shows the obligated parent **does not have the ability to pay** the retroactive support and still meet current obligations.
- The same principles that apply with respect to retroactivity of a new obligation to pay support, i.e., that the obligation can be retroactive to the first day of the month following the filing of a request to modify to impose (or increase) a child support obligation, should generally apply also when the **request is to terminate** a child support obligation.

Metcalf v. Metcalf, 278 Neb. 258, 769 N.W.2d 386 (2009)

Second attempts to modify support just got harder to justify under this Supreme Court decision

- We determine that in cases where there has been a previous attempt to modify support, the court must first consider whether circumstances have changed since the **most recent [albeit failed] request** for modification. But when considering whether there has been a *material and substantial* change in circumstances justifying modification, the court will consider the change in circumstances since the date of the last order establishing or modifying alimony. In other words, **a judgment for alimony may be modified only upon a showing of facts or circumstances that have changed since the last order granting <u>or denying</u> modification was entered. But once some change has been established since the last request, the analysis focuses on the change in circumstances since alimony was originally awarded or last modified**. We adopt this rule because it recognizes the force of *res judicata*; modification will be considered only when there has been a change in circumstances since the last request for modification. But if there has been no change, modification is not justified, because the request is essentially the same as the last request.
- [A]ny change in circumstances occurring since the first [unsuccessful] modification proceeding should have been compared to the original decree when determining whether the change in circumstances was a material and substantial change warranting modification. Any changes in ... circumstances that occurred prior to the first modification proceeding are settled, and the doctrine of *res judicata* prevents the district court from considering any change based on those circumstances.

Mohr v. Mohr, 22 Neb. App. 772, 859 N.W.2d 377 (2015)

- the district court in which the original divorce decree was entered has continuing jurisdiction until all of the children of the marriage are of legal age or emancipated. See ***Nemec v. Nemec***, 219 Neb. 891, 367 N.W.2d 75 (1985).
- service of process of a modification complaint is to comply with the requirements for a dissolution action.
- We find no authority to except dissolution actions from the requirement of § 25-217, and we therefore determine that the requirement of service within 6 months is applicable to modification actions.

Muller v. Muller, 3 Neb. App. 159, 524 N.W.2d 78 (1994)
Knaub v. Knaub, 245 Neb. 172, 512 N.W.2d 124 (1994)

- Modification of the amount of child support payments is an issue entrusted to the discretion of the trial court, and although, on appeal, the issue is reviewed de novo on the record, the decision of the trial court will be affirmed absent an abuse of discretion.
- A party seeking to modify child support must show a material change in circumstances which has occurred subsequent to the entry of the original order or previous modification and was not contemplated when the most recent support order was entered.
- Among the factors to be considered in determining whether a material change in circumstances has occurred are changes in the financial position of the obligor parent, the needs of the children, good or bad faith motive of the obligor parent in sustaining a reduction in income, and whether the change is temporary or permanent.
- The paramount concern and question in determining child support is the best interests of the child.

Murphy v. Murphy, 17 Neb. App. 279 (2008)

Facts: Father was employed for $70,000 a year at time of divorce. He was also on disciplinary probation and "skating on thin ice" at that time. Within a year he got into more trouble at work and resigned his job in the face of being fired. He could not find other employment paying more than $35,000 per year, so filed to modify his child support and alimony. The District court sided with father, but the Court of Appeals reversed.

- Matthew was clearly involved in "employee misconduct". [A] request to modify child support will be denied if the change in financial circumstances is due to fault or voluntary wastage or dissipation of one's talents and assets. ... We reverse and vacate the district court's downward modification of Matthew's child support and alimony obligation on the ground of Matthew's reduced earnings.

Noonan v. Noonan, 261 Neb. 552, 624 N.W.2d 314 (2001);
Moore v. Bauer, 11 Neb. App. 572, 657 N.W.2d 25 (2003)
Schwarz v. Schwarz, 289 Neb. 960, 857 N.W.2d 802 (2015).

- Modification of child support payments is entrusted to the trial court's discretion, and although, on appeal, the issue is reviewed de novo on the record, the decision of the trial court will be affirmed absent an abuse of discretion.
- The rule, absent equities to the contrary, should generally be that the modification of a child support order should be applied retroactively to the first day of the month following the filing date of the application for modification.

Pearson v. Pearson, 285 Neb. 686, 828 N.W.2d 760 (2013)

Facts: Mom remarried and wanted to move to Alaska with the kids. The District Court allowed her to, but in return canceled Dad's child support obligation. No work sheet was attached.

Held: A worksheet must be attached, showing how the trial court reached the conclusion that travel/visitation expenses equaled what the Dad would have paid in support.

- "the record on appeal from an order imposing or modifying child support shall include any applicable worksheets with the trial court's order. Failure to include such worksheets in the record will result in summary remand of the trial court's order."

- Only reasonable transportation expenses may reduce or abate a child support obligation. Allowing unlimited abatement of child support, to the point where the custodial parent receives substantially reduced or no child support, is contrary to the children's best interests. . . . a custodial parent has some fixed and constant expenses in raising children, and these expenses do not decrease during extended periods of visitation with the noncustodial parent. These expenses certainly do not decrease simply because transportation costs significantly increase.

Peter v. Peter, 262 Neb. 1017, 637 N.W.2d 865 (2002)

- It is not in the best interests of the children to allow income averaging when a father's income was consistently increasing.
- As a general matter, the parties' current earnings are to be used in calculating child support.

Pope v. Pope ; 251 Neb. 773, 559 N.W.2d 192 (1997)

(Voluntary Wastage. Obligated parent fired from high paying job for falling asleep during the night shift. The Supremes offer little sympathy, except in the dissent.)

- An appellate court entrusts the modification of an alimony award to the discretion of the trial court and reviews the trial court's decision de novo on the record for abuse of discretion.
- Orders for alimony may be modified or revoked for good cause shown. Good cause is demonstrated by a material change in circumstances, but any changes in circumstances which were within the contemplation of the parties at the time of the decree, or that were accomplished by the mere passage of time, do not justify a change or modification of an alimony order.
- We therefore extend the rule of ***Ohler*** to cases involving the modification or termination of alimony and find that a petition for the modification or termination of alimony will be denied if the change in financial condition is due to fault or voluntary wastage or dissipation of one's talents and assets.

Rauch v. Rauch; 256 Neb. 257, 590 N.W.2d 170 (1999)

- [E]vidence (that the custodial parent's income has substantially increased since the last modification of child support) raises an inference that a proper calculation under the child support guidelines would result in a variation of (the noncustodial parent's) support obligation by 10 percent or more and $25 or more, which would establish a rebuttable presumption of a material change in circumstances. See **Nebraska Child Support Guidelines, paragraph Q** [now § 4-217].
- Among the factors to be considered in determining whether a material change of circumstances has occurred are changes in the financial position of the parent obligated to pay support, the needs of the children for whom support is paid, good or bad faith motive of the obligated parent in sustaining a reduction in income, and whether the change is temporary or permanent. In the absence of proof of new facts and circumstances arising since the time of the original decree, an allowance of child support therein will be deemed *res judicata.*
- The filing of a motion for summary judgment in opposition to a complaint to modify child support may or may not be a proper pleading, however it cannot be sustained when the evidence, taken in a light most favorable to the other party, is inconclusive in showing a lack of a material change in financial circumstances.
- child's diagnosis with disease which required outlay of additional expense not contemplated at time of original decree or first modification was material change in circumstances

- The support of one's children is a fundamental obligation that takes precedence over almost everything else.
- The court did not abuse its discretion when it deviated from the guidelines by not considering farming losses when calculating the noncustodial parent's monthly income.

Reinsch v. Reinsch, 259 Neb. 564, 611 N.W.2d 86 (2000)

- once a material change of circumstances was demonstrated with respect to amount of child support, trial court was justified in also modifying duration of child support order. (There is no need to find a separate material change in circumstances for each and every modification of a term of the support order, so long as at least one material change in circumstances is found by the trial court. The one change in circumstances opens the door to a modification of any of the terms of the order.)

Rhoades v. Rhoades, 258 Neb. 721, 605 N.W.2d 454 (2000)

- A party seeking to modify a child support order must show a material change in circumstances which has occurred subsequent to the entry of the original decree or a previous modification and was not contemplated when the decree was entered. Among the factors to be considered in determining whether a material change of circumstances has occurred are changes in the financial position of the parent obligated to pay support, the needs of the children for whom support is paid, good or bad faith motive of the obligated parent in sustaining a reduction in income, and whether the change is temporary or permanent.
- As a general rule, the income of a self-employed person can be determined from his or her income tax return. However, income for the purpose of child support is not necessarily synonymous with taxable income.
- We conclude that the district court abused its discretion in allowing a deviation from the current child support guidelines by permitting the obligor to deduct the cost of his tractor in computing his income for child support purposes in the modification proceeding in the absence of a showing that this deduction was utilized at the time of the original child support determination and that application of the deduction was necessary in order to avoid an unjust or inappropriate result.
- Good discussion of how to figure income on the self employed

Riggs v. Riggs, 261 Neb. 344, 622 N.W.2d 861 (2001)

- The child and custodial parent should not be penalized, if it can be avoided, by the delay inherent in our legal system. See **Reinsch v. Reinsch,** 259 Neb. 564, 611 N.W.2d 86 (2000). Therefore, the rule, absent equities to the contrary, should generally be that the modification of a child support order should be applied retroactively to the first day of the month following the filing date of the application for modification.
- [T]he initial determination regarding the retroactive application of the modification order is entrusted to the discretion of the trial court, and the decision of the trial court will be affirmed absent an abuse of discretion. See ***Sears v. Larson,*** 259 Neb. 760, 612 N.W.2d 474 (2000). There are circumstances, for example, when a noncustodial parent may not have the ability to pay retroactive support and meet current obligations. However, the general rule of applying modification of child support orders retroactively to the first day of the month following the filing date of the application for modification is intended to clarify the law and to more accurately reflect the practice regarding the effective date of child support modification orders.

See also: **Wilkins v. Wilkins**, 269 Neb. 937, 697 N.W.2d 280 (2005)

Robbins v. Robbins, 3 Neb App. 953, 536 N.W.2d 77 (1995)

- Findings regarding an employee's level of income should not be based on the inclusion of income that is entirely speculative in nature and over which the employee has little or no control.

Rood v. Rood, 4 Neb. App. 455, 545 N.W.2d 138 (1996)

- When an order for child support provides for the payment of stipulated sums monthly for the support of minor children, such **payments become vested** in the payee as they accrue, and courts are generally without authority to reduce the amounts of such accrued payments.
- The Nebraska Supreme Court has, depending upon the equities involved, approved modification of a child support order retroactive to the filing date of the application for modification.
- Whether or not a child has been emancipated is a question of fact, to be determined on the peculiar facts and circumstances of each case.
- where the father's support obligation had terminated over 1 year before he sought modification, any retroactive modification would have been prohibited.

Rutherford v. Rutherford, 277 Neb. 301, 761 N.W.2d 922 (2009)

- If a trial court fails to prepare the applicable **worksheets**, the parties are required to request that such worksheet be included in the trial court's order. Orders for child support or modification which do not contain such worksheets will on appeal be **summarily remanded** to the trial court so that it can prepare the worksheets as required by the guidelines. Such requirement is set forth in this court's rules. [§4-203}

- Under the guidelines, a deviation in the amount of child support is allowed "'whenever the application of the guidelines in an individual case would be unjust or inappropriate.'"
- In the event of a deviation from the guidelines, the trial court should "state the amount of support that would have been required under the guidelines absent the deviation and include the reason for the deviation in the findings portion of the decree or order, or complete and file worksheet 5 in the court file."
- The guidelines provided that a parent who requests an adjustment in child support for **health insurance** premiums "must submit proof of the cost of the premium."

Sabatka v. Sabatka, 245 Neb. 109, 511 N.W.2d 107 (1994)

An excellent discussion of when a parent should be allowed to change career paths and obtain a reduction of his child support, and when he should not.

Facts: *Noncustodial parent suffered neck and back injuries resulting in a 25% disability, preventing him from working his old job as a warehouse clerk. Rather than seeking another job, even one requiring no lifting, the father, although holding an associate degree in diesel technology, elected to pursue more education in order to get a better job. His tuition was paid in full under the provisions of the Workers' Compensation Act, as are his textbooks. In addition, he received weekly disability benefits. He also received a scholarship from a veterans' group which has paid, or will pay, him $500. He works up to 16 hours a week as a grocery store clerk. He then filed for a reduction in his child support.*

- ""material change in circumstances" is a concept which eludes precise, concise definition." (Citations omitted)
- We must remember that the paramount concern and question in determining child support, whether in the initial marital dissolution action or in proceedings for modification of a decree, is the best interests of the child.
- "A divorce decree does not freeze [an obligor] in his employment. One may in good faith make an occupational change even though that change may reduce his ability to meet his financial obligation to his children. [Obligee] ignores the fact that the judgment of what is fair includes not only a consideration of the circumstances of the children but of the [obligor] as well. Ordinarily, a man makes a change in his occupation with the hope of improving his prospects for the future. When parents are living together the standard of living of the children rises or falls with the changes in the [obligor's] fortunes. Should this readjustment be any different because divorce has separated them physically? We think not, unless the move is made to avoid responsibility or made in bad faith." *Quoting* **Fogel v. Fogel**, 184 Neb. At 427-28, 168 N.W.2d at 277.
- Although there is here no showing that the father's decision to return to college was not made in good faith, this is only one of the factors to be considered in determining whether there has been a material change in circumstances. Where, as in the situation before us, the needs of the children for whom support is paid will be seriously impaired if support diminishes below the ordered amount, it would be inequitable to reduce the child support in a circumstance where the father has the earning capacity required to continue to meet the present child support order. There is here no showing that the father was unable to obtain any other suitable employment within the limits of his physical abilities, nor does the record support a contention that he will be assured employment which will not aggravate his ailment upon completion of his degree. Although the father should be free to pursue further education, he may not, under the circumstances presented here, finance it at the expense of his children.
- As a result, we cannot say that the trial court abused its discretion in the denial of the father's request to modify child support.
- **Note:** the court seemed to stress that its ultimate decision was based more on the standard of review than anything else. That being that "modification of child support is an issue entrusted to the discretion of the trial court, and although reviewed *de novo* on the record, the decision of the trial court will be affirmed absent an abuse of discretion." Here, the trial court was affirmed. If the trial court had ruled the opposite the supreme court may well have affirmed that decision as well.

Schmitt v. Schmitt, 239 Neb. 632, 477 N.W.2d 563 (1991),
Rauch v. Rauch, 256 Neb. 257, 590 N.W.2d 170 (1999)

- Adoption/Modification of the Nebraska Child Support Guidelines does constitute a material change of circumstances sufficient to justify consideration of proposed modification of child support orders entered before that date.

Also along this same vein: **Gartner v. Hume,** 12 Neb. App. 741, 686 N.W.2d 58 (2004)

- Under certain circumstances, an amendment to the Nebraska Child Support Guidelines can itself be considered a material change in circumstances warranting modification of a parent's child support obligation.

Schulze v. Schulze, 238 Neb. 81, 469 N.W.2d 139 (1991)

- A party seeking to modify a marital dissolution decree concerning custody, support, or visitation of a child has the burden to show a material change of circumstances affecting the best interests of the child.
- The paramount concern and question in determining child support, whether in the initial marital dissolution action or in proceedings for modification of a decree, is the best interests of the child.
- Parental earning capacity is a factor to be considered with the best interests of a child in determining the amount of child support.

Sellers v. Sellers, 23 Neb. App. 219, 869 N.W.2d 703 (September 2015)

This case presents classic child support modification facts: an increase in income; a second family, with a step-child; the federal poverty guidelines; health insurance issues and a history of health problems for the obligated parent. The discussion and resolution of these issues is handled very well by the Court of Appeals. An understanding of this case will be crucial for attorneys who work with child support modification facts.

- Neb. Ct. R. § 4-203 (rev. 2011) provides in part:

  > The child support guidelines shall be applied as a rebuttable presumption. All orders for child support obligations shall be established in accordance with the provisions of the guidelines unless the court finds that one or both parties have produced sufficient evidence to rebut the presumption that the guidelines should be applied.

- [T]here is no provision in the guidelines that would allow a deduction for a child other than a biological or adopted child.
- No precise mathematical formula exists for calculating child support when subsequent children are involved, but the court must perform the calculation in a manner that does not benefit one family at the expense of the other. The party requesting a deduction for his or her obligation to support subsequent children bears the burden of providing evidence of the obligation, including the income of the other parent of the child. ***Schwarz v. Schwarz***, 289 Neb. 960, 857 N.W.2d 802 (2015) [T]he district court considered Jason's income alone and what his obligation would be for his four biological children and divided that total obligation by four to arrive at an amount per child. ... The State argues that this formula treats all of Jason's children fairly and does not provide a benefit to either his previous children or his subsequently born child. We agree.
- Because Jason did not present sufficient evidence to support a deviation for extraordinary medical expenses, the court did not abuse its discretion in declining to allow such a deviation.
- Following our decision in ***Lasu v. Issak,*** 23 Neb.App. 83, ___ N.W.2d ___ (2015), we agree with Jason that it is appropriate to consider the poverty guidelines as updated in the Federal Register that were in place at the time of this modification proceeding. ... In further applying the poverty guidelines as updated annually in the Federal Register, we are also faced with the

question of how to determine the household income and size. ... [W]e determine that for purposes of setting child support, the questions of how to define income and how to count a family or household under the poverty guidelines as updated annually in the Federal Register should be determined in a manner consistent with the Nebraska Child Support Guidelines.

- [I]n considering application of the poverty guidelines as a mechanism to limit Jason's child support obligation for his three prior children in this case, we also consider whether it is appropriate to impute income to Jason's current wife. ... [T]he Nebraska Child Support Guidelines recognize that earning capacity may be considered in lieu of a parent's actual, present income. Neb. Ct. R. § 4-204. In applying the child support guidelines, courts in Nebraska often attribute income to a nonworking parent in calculating child support. See, e.g., *Muller v. Muller*, 3 Neb. App. 159, 524 N.W.2d 78 (1994)
- In this case, both parties attributed earning capacity income to Stephanie as if she were working full time and earning minimum wage. Under the circumstances of this case, we conclude that it is appropriate, in applying the poverty guidelines, to likewise attribute earning capacity income to Jason's current wife. The only evidence in the record is that she is a stay-at-home mother; there is no evidence that she could not attain minimum-wage earning capacity by reasonable efforts. ... For the sake of completeness, we considered the household size as four to include Jason's stepson, since we imputed income to Jason's current wife.

Sneckenberg v. Sneckenberg, 9 Neb. App. 609, 616 N.W.2d 68 (2000)

- An upward revision of the Nebraska Child Support Guidelines constitutes a material change of circumstances that can warrant upward modification of a parent's child support obligation, independent of changes in that parent's income.

Snodgrass v. Snodgrass, 241 Neb. 43, 486 N.W.2d 215 (1992)

Facts: Dad fell thousands of dollars behind on his child support, despite having an ability to pay most if not all of what he had been court ordered to pay. After being found in contempt he then filed an application to modify, claiming inter alia that he should have custody of one of the children. The court turned him down, "as the [appellant] is seeking equity from the [appellee] when he is not in equity himself." *Held: affirmed.*

- [T]he doctrine of unclean hands in this case does not link the payment of child support to the rights of a parent to exercise visitation. The two are independent. It is strictly appellant's flagrant and continuing contempt of court which precludes him from obtaining relief.

State on behalf of Pathammavong v. Pathammavong, 268 Neb. 1, 679 N.W.2d 749 (2004)

- Generally, issues of child support and custody are treated as separate and distinct issues.
- We have also held that when a party owes past-due child support, the failure to pay must be found to be a willful failure to pay, in spite of an ability to pay, before an application to modify child support may be dismissed on the basis of unclean hands.

State o/b/o B. M. v. Brian F., 288 Neb. 106, 846 N.W.2d 257 (2014)

- A party seeking to modify a child support order must show a material change in circumstances which (1) occurred subsequent to the entry of the original decree or previous modification and (2) was not contemplated when the decree was entered.
- Among the factors to be considered in determining whether a material change of circumstances has occurred are changes in the financial position of the parent obligated to pay support, the

needs of the children for whom support is paid, good or bad faith motive of the obligated parent in sustaining a reduction in income, and whether the change is temporary or permanent.

- The paramount concern in child support cases, whether in the original proceeding or subsequent modification, remains the best interests of the child.
- The party seeking the modification of child support has the burden to produce sufficient proof that a material change of circumstances has occurred that warrants a modification and that the best interests of the child are served thereby.
- the district court erred when it converted the action to modify child support to a disestablishment action and terminated child support based solely on the results of genetic testing. We therefore reverse the order of October 29, 2012, and remand the cause for a determination of modification of child support.
- actions to determine paternity and parental support are governed by §§ 43-1401 through 43-1418. We have recognized that paternity proceedings are purely statutory and that because the statutes regarding paternity proceedings modify the common law, they must be strictly construed.
- To read a disestablishment action into a modification for child support application takes a lighthearted view of terminating a most important legal and social relationship.
- The standard for showing fraud or newly discovered evidence is high. *Alisha C. v. Jeremy C.*, 283 Neb. 340, 808 N.W.2d 875 (2012).
- We strictly construe paternity statutes, and we are not inclined to create a novel remedy by broadly reading an evidentiary paternity statute.
- nothing in our case law, the Nebraska statutes, or the Nebraska Child Support Guidelines indicates that genetic testing excluding a legal father as the biological father of a child is sufficient evidence standing alone to establish a material change in circumstances warranting the modification or termination of child support which has previously been ordered in an existing paternity and child support judgment.

State v. Yelli, 247 Neb. 785, 530 N.W.2d 250 (1995)

But don't expect to get the judgment into evidence in a criminal nonsupport case that easily!

- A judgment in a *civil* paternity adjudication is *res judicata* as between the same parties in a subsequent *civil* action such as a support modification proceeding.

Stekr v. Beecham, 291 Neb. 883, 869 N.W.2d 347 (September 2015)

Facts: Dad sought downward modification of his child support order after being laid off and suffering a large reduction in his income. However he owned three expensive homes, including two he did not live in (one had never ever been lived in by anyone). He continued to pay about $2,500 per month in mortgage payments from savings and other undisclosed sources on one home, and owed no mortgage on one other home purchased as an investment, worth at least $400k. Trial court deviated from guidelines support amount and denied modification because of father's extensive real estate holdings, even though they generated no income. Father's credibility became an issue. Dad appealed.

Holding: Affirmed

- Although our review is de novo, we may still give weight to the fact that the trial court observed the witnesses and accepted one version of the facts instead of another. This rule is particularly apt for issues of credibility.
- Courts have been reluctant to impute income from an obligor's home equity. For example, the American Law Institute suggests that courts should not impute income from a parent's

residence if the investment is "commensurate with the parent's economic resources." Similarly, we believe that obligors should not ordinarily have to mortgage their homes or live in their cars in order to pay child support that is above the guidelines.

- The guidelines do not incorporate the obligor's non-income-producing assets into the child support formula, and courts should not require obligors to liquidate such assets as a matter of course. But the best interests of the child are the paramount concern, and sometimes the preservation of assets must yield to the child's needs.

Theisen v. Theisen, 14 Neb. App. 441 (2006)

- Child support orders are always subject to review and modification. *See* ***Reinsch v. Reinsch***, 259 Neb. 564, 611 N.W.2d 86 (2000).

Voichoskie v. Voichoskie, 215 Neb. 775, 340 N.W.2d 442 (1983)

- "'Whenever a party, who, as actor, seeks to set the judicial machinery in motion and obtain some remedy, has violated conscience, or good faith, or other equitable principle, in his prior conduct, then the doors of the court will be shut against him *in limine*; the court will refuse to interfere on his behalf, to acknowledge his right, or to award him any remedy." *Citing* ***Brown v. Alron***, Inc., 223 Neb. 1, 7, 388 N.W.2d 67, 72 (1986).
- A court should not be automatically precluded from entertaining an application to modify a decree where the applicant is in arrears. A parent who is in arrears but is otherwise entitled to a modification of monthly support payments should not be denied relief under the 'clean hands' doctrine if the court is satisfied that he has a valid excuse for not meeting his required payments in full, e.g., financial inability to pay."
- However: where the evidence discloses that a party is in fact able to pay past due support, such that he could be or has been found in contempt for the failure to pay, he will be barred by the clean hands doctrine from requesting a modification of the decree

Wagner v. Wagner, 262 Neb. 924, 636 N.W.2d 879 (2001)

- A divorce decree does not require a parent to remain in the same employment, and child support may be calculated based on actual income when a career change is made in good faith.
- whether the decision to leave employment was made in good faith is only one factor to be considered, and an award of child support could be based on a parent's earning capacity even when the parent acted in good faith.
- ***However,*** while child support may be based on a parent's earning capacity when a parent voluntarily leaves a higher paying job for lower paying employment, and a reduction in the amount of that parent's support obligation would seriously impair the needs of the children, support may be based on a lower rate of income for the obligated parent when he changes jobs in good faith, and there is no evidence that the needs of the minor children will be adversely affected by the reduction in earnings.

Wilson v. Wilson, 19 Neb. App. 103, 803 N.W.2d 520 (2011)

Facts: Parties divorced Oct. 2009. Decree split marital property and required Wife to vacate marital residence by 10-31-11. No appeal taken. Wife failed to vacate and months later Husband filed action 'to determine amounts due under decree.' He claimed $30,000 in extra costs he incurred due to Wife not moving out. The DCt sustained his motion and in addition found Wife in contempt for failure to vacate. Wife appealed, claiming the court in effect modified the terms of the decree's property settlement agreement without having filed for a modification. Ct. of Appeals agreed, and reversed that portion of the order. It found that there was no ambiguity or lack of clarity concerning what was actually ordered in the

decree, and accordingly there was nothing for the court to clarify. ***Held:*** Husband must file complaint to modify if he doesn't like the terms of the decree. He cannot modify the decree by a back door approach.

- A trial court retains jurisdiction to determine the amounts due for alimony and child support and to enforce its prior judgment, and included in that power to enforce its judgment is power to determine any amounts due under the initial decree.
- A party seeking to modify a dissolution decree must show a material change of circumstances which occurred subsequent to the entry of the original decree or a previous modification which was not contemplated when the prior order was entered.
- Modifying the amounts awarded to a parent in the decree, without following the appropriate procedures for bringing and resolving an application to modify the decree, was not appropriate.

Multiple Families

Emery v. Moffett, 269 Neb. 867, 697 N.W.2d 249 (2005)

- There is no precise mathematical formula for calculation child support when subsequent children are involved; the calculation is left to the discretion of the court as long as the court considers the obligations to both families and the income of the other parent of the subsequent children.

Parenting Act of 2008

The Nebraska bar association has produced a PDF brochure addressing the issues of child custody and visitation. It is available at:

http://nebar.com/associations/8143/files/2012_CustodyVisitation.pdf

It is crucial for child support IV-D attorneys to be aware that this act does NOT normally affect the work we do. LB 554, which became the Parenting Act, states in section 5 (2) that "A county attorney or authorized attorney shall not participate in the development of or court review of a parenting plan under the Parenting Act."

However…

State ex rel. Amanda M. v. Justin T., 279 Neb. 273, 777 N.W.2d 565 (2010)

- The Parenting Act may be utilized in state initiated paternity cases when both parents are parties to the paternity or child support action. See Neb. Rev. Stat. § 43-2924 (2).
- When the issue of custody is raised in a state initiated paternity/child support case, the district court is required to develop a parenting plan which "shall serve the best interests of the child."
- Before awarding parents joint custody of a minor child, due process requires that the trial court hold a hearing on the issue.
- When a court has determined that joint physical custody is, or may be, in a child's best interests but neither party has requested joint custody, the court must give the parties an opportunity to present evidence on the issue before imposing joint custody.

Paternity & Related
(see also Disestablishment, Res Judicata & Paternity)

An excellent overview of the issues relating to the determination of paternity may be found at www.lawny.org/index.php/advocate-page-attorney-resources-119/38-public-advocate-information/171-paternity-for-advocates

Note: *Changes in federal regulations, effective in 2011, require UIFSA Responding state IV-D agencies to pay for all DNA genetic testing in paternity related cases. Formerly it was the initiating state that was responsible for shouldering these costs. The Responding state may still look to a parent for reimbursement of these costs.*
See: www.acf.hhs.gov/programs/cse/pol/AT/2010/at-10-06.htm *for further information.*

§ 25-403.01 Actions; venue; transfer; payment of expenses
Any action, other than the actions mentioned in sections 25-401 to 25-403 [relating to real estate], may be brought (1) in the county where any defendant resides, (2) in the county where the cause of action arose, (3) in the county where the transaction or some part of the transaction occurred out of which the cause of action arose, or (4) if all defendants are nonresidents of this state, in any county. When an action has been commenced in any other county, the court in which the action has been commenced shall have jurisdiction over the action, but upon timely motion by a defendant, the court shall transfer the action to the proper court in a county in which such action might have been properly commenced. …

§42-377 Legitimacy of children
Children born to the parties, or to the wife, in a marriage relationship which may be dissolved or annulled pursuant to sections 42-347 to 42-381, shall be legitimate unless otherwise decreed by the court, and in every case the legitimacy of all children conceived before the commencement of the suit shall be presumed until the contrary is shown.
Source: Laws 1972, LB 820, § 31; Laws 1997, LB 229, § 21.
See also §43-512.04

Cavanaugh v. deBaudiniere, 1 Neb. App. 204, 493 N.W.2d 197 (1992)

- This section [42-377] does not create an irrebuttable presumption of legitimacy in the case of children conceived before the commencement of the dissolution action.

§43-247. Juvenile court; jurisdiction.

…

The juvenile court shall have concurrent original jurisdiction with the district court and county court as to any juvenile defined in subdivision…(11) of this section.

…

(11) The paternity determination for a child over which the juvenile court already has jurisdiction.

§43-512. Application for assistance; procedure; maximum monthly allowance; payment; transitional benefits; terms, defined.

(1) Any dependent child as defined in section 43-504 or any relative or eligible caretaker of such a dependent child may file with the Department of Health and Human Services a written application for financial assistance for such child on forms furnished by the department.

(2)The department, through its agents and employees, shall make such investigation pursuant to the application as it deems necessary or as may be required by the county attorney or authorized attorney. **If the investigation or the application for financial assistance discloses that such child has a parent or stepparent who is able to contribute to the support of such child** and has failed to do so, a copy of the finding of such investigation and a copy of the application shall immediately be filed with the county attorney or authorized attorney.

. . .

Source: Laws 2000, LB 972, § 17

§43-512.02 (2) Child, spousal, and medical support collection; paternity determination; services available; application; fees; costs.

(1) Any child or any relative, lawful custodian, guardian, or next friend of a child may file with the county attorney, authorized attorney, or other office designated by the Department of Health and Human Services an application for the same child, spousal, and medical support collection or paternity determination services as are provided to dependent children and their relatives under sections 43-512 to 43-512.10 by the department, the county attorney, the authorized attorney, and the clerk of the district court.

(2) If an office other than the office of the county attorney or authorized attorney is authorized by the department to accept such applications **and if the application discloses that such child has a parent or stepparent who is able to contribute to the support of such child and has failed to do so**, a copy of the application shall immediately be filed with the county attorney or authorized attorney.

….

Source: Laws 1997, LB 307, § 59

§43-512.04 Child support or medical support; separate action allowed; procedure; presumption; decree; contempt.

(1) An action for child support or medical support may be brought separate and apart from any action for dissolution of marriage. The complaint initiating the action shall be filed with the clerk of the district court and may be heard by the county court or the district court as provided in section 25-2740. *Such action for support may be filed on behalf of a child:*

(a) Whose paternity has been established (i) by prior judicial order in this state, (ii) by a prior determination of paternity made by any other state as described in subsection (1) of section 43-1406, or (iii) by the marriage of his or her parents as described in section 42-377 or subsection (2) of section 43-1406; or

(b) Whose paternity is presumed as described in section 43-1409 or subsection (2) of section 43-1415.

(2) The father, not having entered into a judicially approved settlement or being in default in the performance of the same, may be made a respondent in such action. The mother of the child may also be made a respondent in such an action. Such action shall be commenced by a complaint of the mother of the child, the father of the child whose paternity has been established, the guardian or next friend of the child, the county attorney, or an authorized attorney.

(3) The complaint shall set forth the basis on which paternity was previously established or presumed, if the respondent is the father, and the fact of non-support and shall ask that the father, the mother, or both parents be ordered to provide for the support of the child. Summons shall issue against the father, the mother, or both parents and be served as in other civil proceedings, except that such summons may be directed to the sheriff of any county in the state and may be served in any county. The method of trial shall be the same as in actions formerly cognizable in equity, and jurisdiction to hear and determine such actions for support is hereby vested in the district court of the district or the county court of the county where the child is domiciled or found or, for cases under the Uniform Interstate Family Support Act if the child is not domiciled or found in Nebraska, where the parent of the child is domiciled.

(4) In such proceeding, if the defendant is the presumed father as described in subdivision (1)(b) of this section, the court shall make a finding whether or not the presumption of paternity has been rebutted. The presumption of paternity created by acknowledgment as described in section 43-1409 [*the notarized ack. of paternity statute*] may be rebutted as part of an equitable proceeding to establish support by genetic testing results which exclude the alleged father as being the biological father of the child. *A court in such a proceeding may order genetic testing as provided in sections 43-1414 to 43-1418.*

(5) If the court finds that the father, the mother, or both parents have failed adequately to support the child, the court shall issue a decree directing him, her, or them to do so, specifying the amount of such support, the manner in which it shall be furnished, and the amount, if any, of any court costs and attorney's fees to be paid by the father, the mother, or both parents. Income withholding shall be ordered pursuant to the Income Withholding for Child Support Act. The court may require the furnishing of bond to insure the performance of the decree in the same manner as is provided for in section 42-358.05 or 43-1405. *Failure on the part of the defendant to perform the terms of such decree shall constitute contempt of court and may be dealt with in*

the same manner as other contempts. The court may also order medical support and the payment of expenses as described in section 43-1407.
Source: Laws 2004, LB 1207, § 38

§43-512.05 Child, spousal, and medical support payments; district court clerks; furnish information; cooperative agreements; reimbursement for costs incurred.

….

2) The department and the governing board of the county, county attorney, or authorized attorney may enter into a written agreement regarding the determination of paternity and child, spousal, and medical support enforcement for the purpose of implementing such sections. **Paternity shall be established when it can be determined that the collection of child support is feasible.** (emphasis added)

§43-1401 Terms, defined

For purposes of sections 43-1401 to 43-1418:

(1) Child shall mean a child under the age of eighteen years born out of wedlock;

(2) Child born out of wedlock shall mean a child whose parents were not married to each other at the time of its birth, except that a child shall not be considered as born out of wedlock if its parents were married at the time of its conception but divorced at the time of its birth. The definition of legitimacy or illegitimacy for other purposes shall not be affected by the provisions of such sections; and

(3) Support shall include reasonable education.

Source: Laws 1994, LB 1224, § 55.

§43-1406 Determination of paternity by other state; full faith and credit; legitimacy of child

(1) A determination of paternity made by any other state, whether established through voluntary acknowledgment, genetic testing, or administrative or judicial processes, shall be given full faith and credit by this state.

A child whose parents marry is legitimate.

Source: Laws 1994, LB 1224, § 57

§ 43-1408.01 Notarized acknowledgment of paternity; execution by alleged father; form; filing with Department of Health and Human Services

(1) During the period immediately before or after the in-hospital birth of a child whose mother was not married at the time of either conception or birth of the child or at any time between conception and birth of the child, the person in charge of such hospital or his or her designated representative shall provide to the child's mother and alleged father, if the alleged father is readily identifiable and available, the documents and written instructions for such mother and father to complete a notarized acknowledgment of paternity. Such acknowledgment, if signed by both parties and notarized, shall be filed with the Department of Health and Human Services at the same time at which the certificate of live birth is filed.

. . .

(2) The acknowledgment shall be executed on a form prepared by the department. Such form shall be in essentially the same form provided by the department and used for obtaining signatures required by section 71-640.02. The acknowledgment shall include, but not be limited to, (a) a statement by the mother consenting to the acknowledgment of paternity and a statement that the alleged father is the biological father of the child, (b) a statement by the

alleged father that he is the biological father of the child, (c) written information regarding parental rights and responsibilities, and (d) the social security numbers of the parents.

(3) …

(4) The department shall accept completed acknowledgment forms and make available to county attorneys or authorized attorneys a record of acknowledgments it has received, as provided in subsection (1) of section 71-612. The department may prepare photographic, electronic, or other reproductions of acknowledgments. Such reproductions, when certified and approved by the department, shall be accepted as the original records, and the documents from which permanent reproductions have been made may be disposed of as provided by rules and regulations of the department.

Source: Laws 1994, LB 1224, § 56; Laws 1996, LB 1044, § 201; Laws 1997, LB 307, § 77; Laws 1997, LB 752, § 100; Laws 2007, LB296, § 128.

§ 43-1409 Notarized acknowledgment of paternity; rebuttable presumption; admissibility; rescission.

The signing of a notarized acknowledgment…by the alleged father shall create a rebuttable presumption of paternity as against the alleged father. The signed, notarized acknowledgment is subject to the right of the signatory to rescinding the acknowledgment within sixty days after signing or after the date of an administrative or judicial proceeding relating to the child, including a proceeding to establish a support order in which the signatory is a party, whichever occurs first. *After the rescission period a signed notarized acknowledgment is considered a legal finding which may be challenged only on the basis of fraud, duress, or material mistake of fact with the burden of proof upon the challenger*, and the legal responsibilities, including the child support obligation, of any signatory arising from the acknowledgment shall not be suspended during the challenge, except for good cause shown. *Such a signed and notarized acknowledgment shall be admissible in evidence in any proceeding to establish support*.

Source: Laws 1999, LB 594, § 21.

Putative Father Registry: Contact information:

Department of Health and Human Services
Department of Finance and Support
Vital Statistics Section, Paternity Registry
P.O. Box 95965
Lincoln, NE 68509-5065

To obtain a copy of a birth certificate, contact DHHS at:

220 Building
- 2nd floor
P.O. Box 95026
220 South 17th Street
Lincoln NE 68508-1811 (address valid as of August 2013)

The State of Nebraska has created a short video discussing the "How To's" of Acknowledging Paternity. The video may be viewed at:

http://dhhs.ne.gov/children_family_services/CSE/Pages/Testimonials.aspx

§43-1411 Paternity; action to establish; venue; limitation; summons.
A civil proceeding to establish the paternity of a child may be instituted, in the court of the district where the child is domiciled or found or, for cases under the Uniform Interstate Family Support Act, where the alleged father is domiciled, by (1) the mother or the alleged father of such child, either during pregnancy or *within four years* after the child's birth, unless consent or relinquishment has been made pursuant to sections 43-104.08 to 43-104.24 or section 43-105 for purposes of adoption or (2) the guardian or next friend of such child or the state, either during pregnancy or *within eighteen years after the child's birth*. Summons shall issue and be served as in other civil proceedings, except that such summons may be directed to the sheriff of any county in the state and may be served in any county. (emphasis added)
Source: Laws 1998, LB 1041, § 45.
Cross Reference: Uniform Interstate Family Support Act, see section 42-701.

State on Behalf of Hopkins v. Batt, 253 Neb. 852, 573 N.W.2d 425 (1998)

- We have construed § 43-1411 as a means by which the State, in its *parens patriae* role, may bring a paternity action on behalf of a minor child for future support. ...In contrast to § 43-512.03, the State's right to sue under this section is not conditioned upon the payment of public assistance benefits for the minor child.

Note: The Supreme Court case of **Sherman T. v. Karyn N.**, 286 Neb. 468, 837 N.W.2d 746 (2013) remanded a federal constitutional due process and equal protection attack on the 4 year statute of limitations contained in §43-1411 back to the state district court, finding that the "factual allegations raise a reasonable expectation that discovery will reveal evidence of these two constitutional claims." As of August 2016 the case has not made a reappearance on the appellate docket.

§43-1411.01. Paternity or parental support; jurisdiction; termination of parental rights; provisions applicable.
(1) An action for paternity or parental support under sections 43-1401 to 43-1418 may be initiated by filing a complaint with the clerk of the district court as provided in section 25-2740. Such proceeding may be heard by the **county court or the district court** as provided in section 25-2740. A paternity determination under sections 43-1411 to 43-1418 may also be decided in a county court or separate juvenile court if the county court or separate **juvenile court** already has jurisdiction over the child whose paternity is to be determined.
(2) Whenever termination of parental rights is placed in issue in any case arising under sections 43-1401 to 43-1418, subsection (5) of section 42-364 and the Parenting Act shall apply to such proceedings.
Source: Laws 1997, LB 229, § 38; Laws 1998, LB 1041, § 46; ; Laws 2004, LB 1207, § 40; ; Laws 2008, LB1014, § 46.; Operative date Operative date April 17, 2008

§43-1412 Paternity; action to establish; procedure; public hearings prohibited; evidence; default judgment; decree; payment of costs and fees.
(1) The method of trial shall be the same as that in other civil proceedings, except that the trial shall be by the court without a jury unless a jury is requested (a) by the alleged father, in a proceeding instituted by the mother or the guardian or next friend, or (b) by the mother, in a

proceeding instituted by the alleged father. It being contrary to public policy that such proceedings should be open to the general public, no one but the parties, their counsel, and others having a legitimate interest in the controversy shall be admitted to the courtroom during the trial of the case. The alleged father and the mother shall be competent to testify. *The uncorroborated testimony (i) of the mother, in a proceeding instituted by the mother or the guardian or next friend, or (ii) of the alleged father, in a proceeding instituted by the alleged father, shall not alone be sufficient to support a verdict or finding that the alleged father is actually the father. Refusal by the alleged father to comply with an order of the court for genetic testing shall be deemed corroboration of the allegation of paternity. A signed and notarized acknowledgment of paternity or a certified copy or certified reproduction thereof shall be admissible in evidence in any proceeding to establish paternity without the need for foundation testimony or other proof of authenticity or accuracy.*

If it is determined in this proceeding that the alleged father is actually the father of the child, a judgment shall be entered declaring the alleged father to be the father of the child.

(2) *A default judgment shall be entered upon a showing of service and failure of the defendant to answer or otherwise appear.*

(3) If a judgment is entered under this section declaring the alleged father to be the father of the child, the court shall retain jurisdiction of the cause and enter such order of support, including the amount, if any, of any court costs and attorney's fees which the court in its discretion deems appropriate to be paid by the father, as may be proper under the procedure and in the manner specified in section 43-512.04. If it is not determined in the proceeding that the alleged father is actually the father of the child, the court shall, if it finds that the action was frivolous, award court costs and attorney's fees incurred by the alleged father, with such costs and fees to be paid by the plaintiff.

(4) All judgments under this section declaring the alleged father to be the father of the child shall include the father's social security number. The social security number of the declared father of the child shall be furnished to the clerk of the district court *in a document accompanying the judgment.*

Source: Laws 2006, LB 1113, § 41.

§43-1414. Genetic testing; procedure; confidentiality; violation; penalty.

It's a floor cleaner…and a dessert topping. It contains civil AND criminal sanctions!

(1) In any proceeding to establish paternity, the court may, on its own motion, or shall, on a timely request of a party, after notice and hearing, require the child, the mother, and the alleged father to submit to genetic testing to be performed on blood or any other appropriate genetic testing material. *Failure to comply with such requirement for genetic testing shall constitute contempt* and may be dealt with in the same manner as other contempts.

…

(8) Any person convicted of violating this section shall be guilty of a Class IV misdemeanor for the first offense and a Class III misdemeanor for the second or subsequent offense.

Source: Laws 1984, LB 845, § 1; ; Laws 1994, LB 1224, § 61; ; Laws 1997, LB 752, § 103; ; Laws 2001, LB 432, § 9; ; Laws 2007, LB296, § 129.; Operative date July 1, 2007

§43-1415 Results of genetic tests; admissible evidence; rebuttable presumption.

(1) The results of the tests, including the statistical probability of paternity, shall be admissible evidence and, except as provided in subsection (2) of this section, shall be weighed along with other evidence of paternity.

(2) When the results of tests, whether or not such tests were ordered pursuant to section 43-1414, show a probability of paternity of **ninety-nine percent or more**, there shall exist a **rebuttable presumption** of paternity.
(3) Such evidence may be introduced by verified written report without the need for foundation testimony or other proof of authenticity or accuracy unless there is a timely written request for personal testimony of the expert at least thirty days prior to trial.
Source: Laws 1994, LB 1224, § 62.

§ 43-1417 Additional genetic testing; when.
If the result of genetic testing or the expert's analysis of inherited characteristics is disputed, the court, upon reasonable request of a party, shall order that additional testing be done by the same laboratory or an independent laboratory at the expense of the party requesting additional testing.
Source: Laws 1984, LB 845, § 4

Distinguish these paternity statutes, which are based upon equity, with inheritance statutes, such as...

§ 30-2309 For *purposes of intestate succession*…a person born out of wedlock is a child of the mother. That person is also a child of the father, if: .... the paternity is established by an adjudication before the death of the father or is established thereafter by strict, clear and convincing proof.

The burden of proof is different in inheritance law, but in effect paternity can be proven after the death of the father *under inheritance statutes*. This does not mean you can successfully file a paternity action against a deceased putative father. You may not! See *Carlson v. Bartels*, below.

Related:
§ 71-640.01. Birth certificates; identification of father.
The information pertaining to the identification of the father at the time of birth of an infant born in this state and reported on a birth certificate, filled out and filed pursuant to the Vital Statistics Act, shall comply with the following:
(1) If the mother was married at the time of either conception or birth or at any time between conception and birth, the name of the husband shall be entered on the certificate as the father of the child unless (a) paternity has been determined otherwise by a court of competent jurisdiction, (b) the mother and the mother's husband execute affidavits attesting that the husband is not the father of the child, in which case information about the father shall be omitted from the certificate, or (c) the mother executes an affidavit attesting that the husband is not the father and that the putative father is the father, the putative father executes an affidavit attesting that he is the father, and the husband executes an affidavit attesting that he is not the father. In such event, the putative father shall be shown as the father on the certificate. For affidavits executed under subdivision (b) or (c) of this subdivision, each signature shall be individually notarized;
(2) If the mother was not married at the time of either conception or birth or at any time between conception and birth, the name of the father shall not be entered on the certificate without the written consent of the mother and the person named as the father;
(3) In any case in which paternity of a child is determined by a court of competent jurisdiction, the name of the father shall be entered on the certificate in accordance with the finding of the court; and

(4) If the father is not named on the certificate, no other information about the father shall be entered thereon.
The identification of the father as provided in this section shall not be deemed to affect the legitimacy of the child or duty to support as set forth in sections 42-377 and 43-1401.
Source: Laws 1977, LB 72, § 1; Laws 1994, LB 886, § 9; Laws 2005, LB 301, § 27.

Additional Information – DHHS Legal Opinion – April 14, 2008: "Regarding the birth certificate statute: this statute and the three-way form don't preclude pursuing the husband for child support since the law recognizes the husband as the father (until a court says otherwise). DHHS Legal do not think either of these two statutes or the support/paternity statutes in 43-1401 *et seq* are affected by the birth certificate statute at 71-640.01 as far as seeking support from the husband. The birth certificate statute(s) are in their own statutory world that sets up a system for identifying a father on a birth certificate. DHHS Legal reads the last sentence of 71-640.01 as recognition that the birth certificate statutes are not intended to interfere with the support/paternity statutes. Therefore, if the wife, the husband, and the putative father all sign affidavits naming putative father as the biological father, that's fine for the birth certificate. But it doesn't preclude pursuing support from the husband since the child was born during the marriage and that's against whom a support action would commence."

Bryan M. v. Anne B., 292 Neb. 725, 874 N.W.2d 824 (February 2016)
Facts: The biological father of a child born into another man's marriage brought a paternity action on behalf of himself and as the "next friend" of the minor child. He sought a declaration of paternity and custody of the child, who was born 8 years before the action was filed. He claimed that the statute of limitations barring paternity actions after 4 years should be tolled by the doctrines of fraud and equitable estoppel based on misrepresentations of the mother that he was not the father.
Held: the 4 year statute of limitations does not violate the Due Process or Equal Protection Clauses of the U.S. and Nebraska Constitutions.

- An action to establish paternity is statutory in nature, and the authority for such action must be found in the statute and must be in accordance with the provisions thereof.
- § 43-1411 provides that a paternity action may be instituted by (1) the mother or the alleged father of a child either during pregnancy or within 4 years after the child's birth or (2) the guardian or next friend of such child, or the state, either during pregnancy or within 18 years after the child's birth. Thus, a parent's right to initiate paternity actions under § 43-1411 is barred after 4 years, but actions brought by a guardian or next friend on behalf of children born out of wedlock may be brought within 18 years after the child's birth. In the context of a paternity action, a next friend is one who, in the absence of a guardian, acts for the benefit of an infant or minor child.
- Actions brought by the next friend of the child are causes of action that seek to establish the child's rights rather than those of the parent.
- It is generally recognized that a next friend must have a significant relationship with the real party in interest, such that the next friend is an appropriate alter ego for the party who is not able to litigate in his or her own right.
- Bryan may not bring the paternity action as T.B.'s "next friend." He has no significant relationship with T.B., and there is no indication that T.B. is without financial support. Bringing this action as T.B.'s next friend is a thinly veiled attempt to bypass the 4-year limitations period in § 43-1411 for actions brought by parents.

- Equitable estoppel is not limited to circumstances of fraud but may also be applied to prevent an inequitable resort to a statute of limitations where the other elements of estoppel are present.
- Bryan could not have reasonably and in good faith relied on Anne's statements that he was not T.B.'s father. . . . Had Bryan used ordinary prudence, he would have been able to timely discover that he was T.B.'s biological father.
- A statute is presumed to be constitutional, and all reasonable doubts are resolved in favor of its constitutionality.
- The dissimilar treatment of dissimilarly situated persons does not violate equal protection rights. . . . On its face, § 43-1411 treats mothers and putative fathers identically by imposing a 4-year limitations period on paternity actions brought by parents asserting their own rights. Similarly, the statute does not discriminate based on gender in allowing a guardian or next friend to bring an action on behalf of the child. ... [W]e reject Bryan's argument that § 43-1411 impermissibly discriminates against men. ... We conclude that § 43-1411 does not violate Bryan's due process rights.
- See: ***Michael H. v. Gerald D.***, 491 U.S. 110, 109 S. Ct. 233, 105 L. Ed. 2d 91 (1989).
- Under § 43-1411, the biological parent need not be in loco parentis to the child to bring a paternity action. Instead, the sole requirement is that he or she must bring the action within the time period provided in that statute.
- We also reject Bryan's claims that "[o]ur society has changed such that protecting the 'legitimacy' of a child born during a marriage between a man and a woman is no longer a meaningful goal of the state."

Bullock v. J.B., 272 Neb. 738, 725 N.W.2d 401 (2006)

This case involves an attempt to establish a decree of paternity and order of support for the first time, *after* the death of the putative father. ***Held***: Ain't gonna happen.

- A paternity action is personal and does not survive the death of a putative father.
- The personal representative of a putative father's estate cannot be made the child's father. Nor can a support obligation be imposed upon the personal representative of a putative father's estate.
- Parties cannot by agreement seek to waive an abatement and revive an action for paternity, which was abated due to the death of the putative father. The death of the alleged father serves to terminate the court's jurisdiction over the lawsuit.

See also **Shermanv. Neth,** 283 Neb. 895, 813 N.W.2d 501 (2012)

- Where the sole party with an interest in a proceeding involving purely personal rights dies, not only are the issues in that proceeding moot but there is no longer a party to continue the litigation and there is no one with a justiciable interest who may take that party's place.

Carlson v. Bartels, 143 Neb. 680, 10 N.W.2d 671 (1943)

Held: children born out of wedlock cannot go after estate of putative father for child support absent existence of prior determination of paternity and order of support predating the death of the alleged father.

- paternity can be determined by an action for declaratory judgment
- In the absence of a statute, a cause of action for the support of a child born out of wedlock does not survive against the personal representative of the alleged father.

Cesar C. v. Alicia L., 281 Neb. 979, 800 N.W.2d 249 (2011)

NOTE: This case replaces previous case law as set forth in *State on behalf of J.R. v. Mendoza*, 240 Neb. 149, 163-64, 481 N.W.2d 165, 174 (1992)

Facts*:** Unmarried couple. "Dad" signs notarized hospital ack. of pat and is on birth cert. Later mom abandons child and later is sent to prison for drugs. Child lives with dad. Mom gets out of prison and wants custody of child. Dad objects. Mom suddenly claims Dad is not bio father. Mom gets court order for DNA and it excludes Dad. Mom files for and gets custody and c.s. under the "parental preference doctrine." Dad appeals. ***Held: Dad prevails. Mom estopped from raising DNA, as hospital Ack of Pat. creates a legal presumption of pat.

- See §§ 43-1402 and 43-1409
- Although an appellate court ordinarily considers only those errors assigned and discussed in the briefs, the appellate court may, at its option, notice plain error.
- We note plain error in the district court's failure to give proper legal effect to the notarized acknowledgment of paternity..., and we determine that to leave the error uncorrected would result in damage to the integrity, reputation, or fairness of the judicial process
- [T]he proper legal effect of a signed, unchallenged acknowledgment of paternity is a finding that the individual who signed as the father is in fact the legal father.
- Section 43-1402 ...contemplates that paternity may be established by acknowledgment and that establishment of paternity by acknowledgment is the equivalent of establishment of paternity by a judicial proceeding.
- [W]e interpret the provision in § 43-1409 that the acknowledgment is a "legal finding" to mean that it legally establishes paternity in the person named in the acknowledgment as the father.
- [A]n acknowledgment legally establishes paternity and grants the individual named as father the legal status of a parent to the child regardless of genetic factors.
- The current version of § 43-1409 recognizes **only a formal written and notarized acknowledgment**, and by designating such acknowledgment as a "legal finding" after the rescission period, the Legislature indicated that under the current version, as contrasted with the version at issue in *State on behalf of J.R. v. Mendoza, supra*, an acknowledgment has the conclusive effect of a judgment finding paternity.
- A judicial proceeding is not needed to establish paternity when a notarized acknowledgment of paternity exists, once the rescission time has run.
- before Alicia could challenge paternity and subject Cesar to genetic testing, she needed to overcome the acknowledgment that she and Cesar had both signed which established that Cesar was Jaime's legal father. Section 43-1409 provides that an acknowledgment that has become a legal finding of paternity "may be challenged only on the basis of fraud, duress, or material mistake of fact with the burden of proof upon the challenger."
- Because such legal status had been established and the acknowledgment was unchallenged, the results of genetic testing were not relevant to any issue properly raised in the case and the district court should not have ordered or considered genetic testing.

Cross v. Perreten, 257 Neb. 776, 600 N.W. 2d 780 (1999)

- Paternity proceedings "are purely statutory and the courts can try such issues and make such orders, in them, as the statute contemplates and none other."
- Relief in paternity actions is limited to that provided in the statutes
- The statutory framework allows either the mother, the father, a guardian or next friend, or the State to file suit for the determination of paternity

- In an action to establish paternity, issues of custody and visitation rights are incidental to the primary cause of action and fall within the general equity jurisdiction of the district court. However, nothing in the paternity statutes permits a trial court to consider issues unrelated to the question of paternity and the immediate incidents thereto.

DeVaux v. DeVaux II, 245 Neb. 611, 514 N.W.2d 640 (1994)

Facts: *Child born during marriage. Husband and wife then divorce, with wife awarded custody and husband ordered to pay child support. Later, Mother filed an application to modify her dissolution decree to reflect that her former husband was not the father of her minor child. Bio dad of child (Mother's new husband) intervened in the modification action filed by Mom. Former husband objected to modification, alleging res judicata and unclean, um, hands on the part of former wife. The district court granted the modification, and the former husband appealed.* ***Note****: This case predates the enactment of Nebraska's Disestablishment law. See also* ***Alicia C. v. Jeremy C.***, (2012)

- Paternity findings in a dissolution decree are a final judgment and are *res judicata*.
- We hold that under the doctrine of ***res judicata***, a finding of paternity in a dissolution decree precludes the parties to the decree from relitigating paternity.
- We express no opinion regarding [the biological father's] right or ability to maintain a paternity action. (See ***State on Behalf of Hopkins v. Batt***, 253 Neb. 852, 573 N.W.2d 425 (1998)
- A fundamental fact necessary to sustain an order of child support is paternity by the man judicially obligated to pay such support. (citation omitted)
- [P]aternity is not based on the best interests of the child. The fact that child custody may be modified does not permit paternity findings to be disturbed.
- Under §25-2001, a district court has the power to vacate or modify its own judgment after term for one of nine reasons enumerated in the statute. The only one of these reasons applicable to [the mother's] claim is a motion for new trial based on newly discovered evidence. [The mother] is not entitled to relief under §25-2001 because she is out of time; claims of newly discovered evidence must be filed within 1 year of the final judgment. See Neb. Rev. Stat. §25-1145 (Reissue 1989-*since repealed*). However... §25-2001 is not the exclusive remedy for vacating or modifying a judgment after term. Section 25-2001 is concurrent with the courts' independent equity jurisdiction. In order to make a sufficient showing for a new trial on the grounds of newly discovered evidence, the proof in support thereof must show that such evidence is now available which neither the litigant nor counsel could have discovered by the exercise of reasonable diligence... [The mother's] application fails to allege that the results of the blood tests could not have been discovered with the exercise of reasonable diligence. [The mother] was aware of her extramarital sexual relations. These sexual relations provided her with "some reason to awaken inquiry" as to the paternity of the minor child. Therefore, [the mother] is not entitled to a new trial on the basis of newly discovered evidence.

Farmer v. Farmer, 200 Neb. 308, 263 N.W.2d 664 (1978)

- Where parents of a child born out of wedlock subsequently marry, that child is legitimate.

☆ **Ford v. Ford**, 191 Neb. 548, 216 N.W.2d 176 (1974)

- Presumed legitimacy of children born in wedlock may not be rebutted by the testimony or declaration of a parent.

☆ **Helter v. Williamson**, 239 Neb. 741, 478 N.W.2d 6 (1991)

- The legitimacy of children born during wedlock is presumed, and this presumption may be

rebutted by clear and convincing evidence; ***the testimony or declaration of a husband or wife is not competent to bastardize a child***.

- Notice of paternity proceedings and an opportunity to appear must be served upon the **husband** of the mother of the child born during marriage

Henke v. Guerrero, 13 Neb. App. 337, 692 N.W.2d 762 (2005)

- An out-of-wedlock child has the statutory right to be supported to the same extent and in the same manner as a child born in lawful wedlock; the resulting duty of a parent to provide such support may, under appropriate circumstances, require the award of retroactive child support.
- **While a paternity action is one at law, the award of child support in such a case is equitable in nature.** When reviewing a question of law, an appellate court reaches a conclusion independent of the lower court's ruling.

In re Adoption of Corbin J., 278 Neb. 1057, 775 N.W.2d 404 (2009)

***Holding**: A **temporary order** for child support does not adjudicate paternity.*

- An adjudicated father is an individual determined to be the father by a court of competent jurisdiction.
- [A] temporary order [setting child support] was not a final court-ordered determination [as to paternity].

In Re Adoption of Jaelyn B., 293 Neb. 917, ___ N.W.2d ___ (June 2016)

Adoption court admitted evidence of DNA test finding one man was the child's bio father, over the objection of the man who had signed an acknowledgment of paternity several years earlier.

Man who signed ack of paternity assigns (1) that Nebraska's putative and unwed father statutes violate the Due Process and Equal Protection Clauses of the U.S. and Nebraska Constitutions and (2) that these constitutional guarantees require a trial court to appoint counsel for indigent parents who object to the involuntary termination of their parental rights through adoption proceedings.

Would-be adoptive mother contends that legal father's legal status cannot trump the desires of the child's natural mother and father to permit an adoption.

- [The County Court] failed to determine under § 43-1406 whether it must give full faith and credit to Ohio's determination that Jesse's consent was required. Because § 43-1406 requires Nebraska to recognize Ohio's paternity determination, the court lacked jurisdiction to decree an adoption without his consent.
- Section 43-1406(1) requires this state to give full faith and credit to another's state's paternity determination: "A determination of paternity made by any other state, whether established through voluntary acknowledgment, genetic testing, or administrative or judicial processes, shall be given full faith and credit by this state."
- "The Full Faith and Credit Clause of U.S. Const. art. IV, § 1, provides in part that 'Full Faith and Credit shall be given in each State to the Public Acts, Records, and judicial Proceedings of every other State.'" A "judgment rendered in a sister state court which had jurisdiction is to be given full faith and credit and has the same validity and effect in Nebraska as in the state rendering judgment."
- our common-law marriage cases illustrate that resolving the full faith and credit issue does not always turn on whether a judgment conferring a legal status exists.
- we have previously recognized a man's legal status as a child's father that rested on a statutory paternity determination, not a court's judgment.

- in ***Cesar C. v. Alicia L.***, we recognized that a paternity acknowledgment signed in Nebraska confers legal parental rights the same as a judgment of paternity.
- In Nebraska, as in Ohio, a paternity acknowledgment operates as a legal finding of paternity after the rescission period has expired. At that point, the acknowledged father is the child's legal father, not a presumed father. And under ***Cesar C.***, a father whose paternity is established by a final, voluntary acknowledgment has the same right to seek custody as the child's biological mother, even if genetic testing shows he is not the biological father.
- under § 43-1402, "establishment of paternity by acknowledgment is the equivalent of establishment of paternity by a judicial proceeding." We concluded that the genetic testing results were irrelevant
- We note that most states probably have some version of § 43-1406(1) because Congress has mandated that states adopt this provision to obtain grants to provide aid to needy families.
- In sum, under Ohio's statutes, Jesse is Jaelyn's father, not her presumed or putative father. And he has the right to give or refuse his consent to her adoption. Under § 43-1406(1), Nebraska courts must extend full faith and credit to Ohio's determination of Jesse's paternity and his accompanying rights to withhold his consent to Jaelyn's adoption. So, Nebraska is not a sanctuary state to avoid the law of the state where the child was born.

In Re Interest of Kodi L., 287 Neb. 35, 840 N.W.2d 539 (2013)

Facts: Mom and her boyfriend knew that the boyfriend was not the bio father of Mom's infant, but they signed an Ack. Of Paternity form attesting that he was. Later the child's GAL sought to exclude the boyfriend from a juvenile court hearing concerning placement of the child, alleging fraud on the Ack. of Pat form. A DNA test report which excluded the boyfriend was received into evidence, and The Juvi. court agreed to exclude the boyfriend, who appealed. The Supreme court did not reach the merits of the man's argument, because he failed to raise the issue in the trial court. But it seems he would have lost if he had preserved the issue for appeal.

- [A]n acknowledgment of paternity can be challenged "on the basis of fraud, duress, or material mistake of fact." § 43-1409.
- " [A]n issue not presented to or passed on by the trial court is not appropriate for consideration on appeal." Sherman T. v. Karyn N., 286 Neb. 468, 475, 837 N.W.2d 746, 753 (2013).

Jeffrey B. v. Amy L., 283 Neb. 940, 814 N.W.2d 737 (2012)

What. A. Mess.

Facts: Unmarried woman carries on sexual relationships with two men at the same time (she has 5 kids by 5 fathers). She becomes pregnant in 1999, tells one man he is the father, and he steps up to the plate for the child, obtaining a paternity judgment on his own, and then living with the child as the custodial parent for 7 out of the next 10 years. Mom made only half hearted attempts to tell the other man she is pregnant in 1999, but never actually connects with him. That second man hears rumors she is pregnant in 1999, but fails to act on them for ten years, until he sees a picture of the child in 2009 and thinks the child looks like him. His suspicions are confirmed by DNA testing. DNA Dad later succeeds in intervening in the settled 2001 paternity decree in 2010, and convinces trial court to set aside the decree of paternity in the legal father in favor of DNA dad in 2011. Mom and Legal Dad appeal. There are over a dozen assignments of error from all 3 parties.

Held: DNA dad sat on his rights and responsibilities too long. Equity will not let him intervene in a settled 10 year old paternity case. Case reversed.

- Whether a party has the right to intervene in a proceeding is a question of law. When reviewing questions of law, an appellate court has an obligation to resolve the questions independently of the conclusion reached by the trial court.
- The plain language of § 25-328 makes clear that intervention as a matter of right is allowed only before trial begins.
- Leave to intervene after the entry of a final decree is not allowable as a matter of right and should seldom be granted, but equity sometimes requires a departure from the general rule. In such a case, the burden of persuasion is a heavy one.
- § 25-2001 ...(4) A district court may vacate or modify its own judgments or orders after the term at which such judgments or orders were made (a) for mistake, neglect, or omission of the clerk, or irregularity in obtaining a judgment or order . . . (c) for newly discovered material evidence which could neither have been discovered with reasonable diligence before trial nor have been discovered with reasonable diligence in time to move for a new trial . . . (f) for unavoidable casualty or misfortune, preventing the party from prosecuting or defending . . . .
- Todd cannot invoke § 25-2001(4) because § 25-328 does not permit intervention after the paternity decree was entered in 2001. Todd has not shown that the 2001 paternity decree was obtained by mistake, neglect, or irregularity. Amy's pregnancy could have been discovered by reasonable diligence before trial or in time to move for a new trial, but Todd did not exercise reasonable diligence to discover that Amy was pregnant with his child. Todd has not shown there was unavoidable casualty or misfortune that prevented him from intervening before the 2001 decree.
- "A right to intervene should be asserted within a reasonable time. The applicant must be diligent and not guilty of unreasonable delay after knowledge of the suit."... We have held that laches, or unreasonable delay, is a proper reason to deny intervention even prior to trial or judgment.
- To be entitled to vacate a judgment after term by an action in equity, the litigant must show that, without fault or laches on his part, he was prevented from proceeding under § 25-2001.
- equitable remedies are generally not available where there exists an adequate remedy at law. ... Nebraska law provides specific statutory remedies to be utilized in establishing paternity and setting aside a paternity decree. Neb. Rev. Stat. § 43-1411(1) (Reissue 2008) authorizes the mother or "alleged father" of a child to bring a civil action to determine paternity "either during pregnancy or within four years after the child's birth," except in circumstances not applicable here. Neb. Rev. Stat. § 43-1412.01 (Reissue 2008) provides a remedy whereby "an individual" may ask a court to set aside a legal determination of paternity based upon the results of a scientifically reliable genetic test performed in accordance with certain statutes.
- To the extent there is conflict between two statutes on the same subject, the specific statute controls over the general statute. Under this well-established rule, the question of whether the paternity decree should be set aside must be determined under § 43-1412.01, applicable to setting aside a judgment of paternity, and not under the provisions of § 25-2001, applicable to vacating judgments in general.
- Fianna has resided with Jeffrey since 2004, and we can find no reason that would allow Todd to intervene and substitute himself as Fianna's father.
- the trial court abused its discretion in allowing Todd to intervene and in setting aside the paternity decree of 2001.

Jones v. Paulson, 261 Neb. 327, 622 N.W.2d 857 (2001)
What's in a name? Plenty of stuff to fight over, it seems…
Citing § 71-640.03:

> (1) In any case in which paternity of a child is determined by a court of competent jurisdiction, the surname of the child may be entered on the record the same as the surname of the father.
> (2) The surname of the child shall be the parents' prerogative, except that the Department of Health and Human Services Finance and Support shall not accept a birth certificate with a child's surname that implies any obscene or objectionable words or abbreviations.

- In a paternity action, a court, in deciding whether a child's surname should be changed to the father's surname under § 71-640.03(1), must consider the best interests of the child regarding a change of name.

Mooney v. Duer, 1 Neb. App. 84, 487 N.W.2d 575 (1992)
In this case the state filed the petition alleging paternity before the results of genetic testing (which was already in progress) came back. The Mom was inconsistent and vague in her assertions that the man named as the father actually was. One other man had apparently been excluded as the father before the state went after the defendant. The testing showed that the alleged father was not the biological father of the child. The state here was forced to pay the alleged father's attorney's fees.

- The State must first have evidence of corroboration of the mother's claim of paternity in order to file a complaint alleging paternity. An example of corroboration would be favorable genetic testing results, or a written acknowledgment of paternity. A failure of the State to have corroborating evidence before filing will constitute a frivolous lawsuit, entitling the alleged father to the payment of his attorney fees by the State.
- under § 43-1412, the term "frivolous" connotes a paternity suit brought for an improper motive or premised upon a legal position so wholly without merit as to be without rational argument in the law or evidence.
- [T]he fact that the mother can testify on the issue of who fathered her child does not resolve the issue of whether this is a frivolous lawsuit. However, § 43-1412 and pertinent case law require that the mother's testimony be corroborated. See *Gregory v. Davis,* 214 Neb. 408, 334 N.W.2d 1 (1983).
- We are affirming the award because the State's legal position in filing the paternity suit, which can only be characterized as an "errant shot in the dark," was wholly without merit and therefore frivolous.
- See **R.R.S. §43-1412**: [i]f it is not determined in the proceeding that the alleged father is actually the father of the child, the court shall, if it finds that the action was frivolous, award court costs and attorney's fees incurred by the alleged father, with such costs and fees to be paid by the plaintiff.
- In *Lutheran Medical Center v. City of Omaha,* 229 Neb. 802, 429 N.W.2d 347 (1988), the court had to define the term "frivolous" as a prerequisite for the assessment of fees under § 25-824. There, it was stated that the offending party had demonstrated a disdain for common law and common sense.
- [from the dissent:] The term "ex rel.", or ex relatione, is defined as "[l]egal proceedings which are instituted by the attorney general (or other proper person) in the name and behalf of the state, but on the information and at the instigation of an individual who has a private interest in the matter...." Black's Law Dictionary 582 (6th ed. 1990).

Note: In civil proceedings where paternity is an issue, most states provide that there must be corroboration to support the mother's testimony that the respondent is the father. Other cases addressing the need for ***corroboration*** *in the testimony as to paternity include:*

State ex rel. Klostermeier v. Klostermeier, 161 Neb. 247, 72 N.W.2d 848 (1955)
Lockman v. Fulton, 162 Neb. 439, 76 N.W.2d 452 (1956)
Wade v. Hicks, 191 Neb. 847, 218 N.W.2d 222 (1974)
State on behalf of Cooper v. Harmon, 2 Neb. App. 612, 512 N.W.2d 656 (1994)

Nebraska v. Storz, 235 Neb. 368, 455 N.W.2d 182 (1990)

- Child conceived after the divorce decree was signed but before the parents' divorce decree was final is a child of the marriage, and only the court which heard the divorce has the jurisdiction to address issues relating to the support of the child.

Perkins v. Perkins, 198 Neb. 401, 253 N.W.2d 42 (1977)

- The presumption favoring legitimacy of children may only be rebutted by clear and convincing evidence beyond the testimony of husband or wife denying child's legitimacy.

Snay v. Snarr, 195 Neb. 375, 238 N.W.2d 234 (1976)

- In a paternity proceeding, only a preponderance of evidence is necessary to sustain a verdict.

Snodgrass v. Snodgrass, 241 Neb. 43, 486 N.W.2d 215 (1992)

- When the trial court in the original decree determined paternity, and no appeal was taken, that determination is final.
- Appellant chose not to assert that the older child was not his at any time until after appellant had been determined to be in contempt. Paternity was determined by the court in the original decree herein. That determination was not appealed and is, therefore, final. Appellant raises no new facts or circumstances which require the district court to reopen the decree.

Stacy M. v. Jason M., 290 Neb. 141, 858 N.W.2d 852 (2015)

Facts: After his divorce was final H finds out he is not the bio father of the youngest child born into his marriage. He files a motion to terminate his child support, but wants to still be considered the legal father of the minor child. Mother objects.
Held: Father can't have it both ways.

- a finding that an individual is not a biological father is not the equivalent of a finding that an individual is not the legal father. See ***State on behalf of B.M. v. Brian F.***, 288 Neb. 106, 846 N.W.2d 257 (2014).
- Under Nebraska common law, later embodied in Neb. Rev. Stat. § 42-377 (Reissue 2008), legitimacy of children born during wedlock is presumed. This presumption may be rebutted only by clear, satisfactory, and convincing evidence. The testimony or declaration of a husband or wife is not competent to challenge the paternity of a child.
- The district court in a dissolution proceeding has jurisdiction to resolve a disputed issue of paternity. Even if paternity is not directly placed in issue or litigated by the parties to a dissolution proceeding, any dissolution decree which orders child support implicitly makes a final determination of paternity. When the parties fail to submit evidence at the dissolution proceeding rebutting the presumption of paternity, the dissolution court can find paternity based on the presumption alone.

- …a dissolution decree which orders child support is a legal determination of paternity. As a result, any dissolution decree that orders child support is res judicata on the issue of paternity
- However, in 2008, the Legislature enacted § 43-1412.01, which overrides res judicata principles and allows, in limited circumstances, an adjudicated father to disestablish a prior, final paternity determination based on genetic evidence that the adjudicated father is not the biological father. Section 43-1412.01 gives the court discretion to determine whether disestablishment of paternity is appropriate in light of both the adjudicated father's interests and the best interests of the child.
- …the language of the statute does not provide any support for the equitable relief which Jason seeks. Rather, it permits but does not require a court to set aside a child support obligation when paternity has been disestablished. It does not authorize any change in child support without such disestablishment.
- The public policy of this state provides that parents have a duty to support their minor children until they reach majority or are emancipated, and a parent is not relieved of this duty by virtue of divorce. The obligation of support is a duty of a legally determined parent.

State on behalf of Cooper v. Harmon, 2 Neb. App. 612, 512 N.W.2d 656 (1994)

- Relevant evidence of paternity includes evidence of sexual intercourse between the mother and alleged father at any possible time of conception and the results of blood testing. Corroboration means independent evidence which tends to strengthen or otherwise to confirm the testimony of the mother of the child whose paternity is in issue.

State on behalf of Dady v. Snelling, 10 Neb. App. 740, 637 N.W.2d 906 (2001)

- Under § 43-1415(3), evidence of genetic testing results can be introduced without foundational testimony or other proof of authenticity or accuracy in regard to the testing itself, unless there is a written request for personal testimony of the expert at least 30 days prior to trial.

State on Behalf of Hopkins v. Batt, 253 Neb. 852, 573 N.W.2d 425 (1998)

Note: Portions of this opinion are thrown into serious doubt by **Cesar C. v. Alicia L.,** 281 Neb. 979, ___ N.W.2d ____ (July 2011). This case may be limited to its own unusual set of facts.

- Th[e] statutory presumption [of paternity in the husband of the biological mother contained in §42-377] may be rebutted by clear, satisfactory, and convincing evidence. In a paternity action, the mother and the alleged father are competent to testify that a child's parentage is contrary to the presumption of legitimacy.
- In the absence of a biological relationship between a husband and his wife's child, the husband may acquire certain rights and responsibilities when he elects to stand *in loco parentis* to the child. See, ***Hickenbottom v. Hickenbottom***, 239 Neb. 579, 477 N.W.2d 8 (1991).
- 'A person standing ***in loco parentis*** to a child is one who has put himself in the situation of a lawful parent by assuming the obligations incident to the parental relation, without going through the formalities necessary to a legal adoption, and the rights, duties, and liabilities of such person are the same as those of the lawful parent. The assumption of the relation is a question of intention, which may be shown by the acts and declarations of the person alleged to stand in that relation.' See, ***Austin v. Austin***, 147 Neb. 109, 22 N.W.2d 560 (1946)
- A non-bio father may at one time have intended to stand *in loco parentis* to a child by naming the child after him *and paying child support pursuant to a dissolution decree,* but

that does not permanently forestall a court from finding another man to be the biological father of the child, and ordering child support

- An **acknowledgment of paternity** by another person **is not conclusive** in an action to establish paternity in the biological father.

State on Behalf of Joseph F. v. Rial, 251 Neb. 1, 554 N.W.2d 769 (1996)

- A district court **retains jurisdiction** for orders regarding child support notwithstanding the fact that a paternity determination is on **appeal.**

State ex rel. Storz v. Storz, 235 Neb. 368, 455 N.W.2d 182 (1990)

- If a father and mother were **still married*** when the child was conceived, the child is their legitimate offspring, and he or she is a product of their marriage, even if they later divorce before the child is born.

  * before the divorce becomes final

State v. Cummings, 2 Neb. App. 820, 515 N.W.2d 680 (1994)

- Where a defendant is in **default**, the allegations of the petition are to be taken as true against him, except allegations of value and amount of damage, and if the petition states a cause of action, the plaintiff is entitled to judgment without proof except as to the quantum of damages. (Paternity corroboration language in §43-1412 does not override basic default rule)

State v. Yelli, 247 Neb. 785, 530 N.W.2d 250 (1995)

- In a civil action, only a preponderance of the evidence is necessary to sustain the establishment of paternity.

Younkin v. Younkin, 221 Neb. 134, 375 N.W.2d 894 (1985)

- A fundamental fact necessary to sustain an order of child support is paternity by the man judicially obligated to pay such support.

Priority of Payments

§ 42-358.02. Delinquent child support payments, spousal support payments, and medical support payments; interest; rate; report; Title IV-D Division; duties.

(1) . . .

. . .

(4) Support order payments shall be credited in the following manner:

(a) First, to the payments due for the current month in the following order: Child support payments, then spousal support payments, and lastly medical support payments;

(b) Second, toward any payment arrearage owing, in the following order: Child support payment arrearage, then spousal support payment arrearage, and lastly medical support payment arrearage; and

(c) Third, toward the interest on any payment arrearage, in the following order: Child support payment arrearage interest, then spousal support payment arrearage interest, and lastly medical support payment arrearage interest.

(5) Interest which may have accrued prior to September 6, 1991, shall not be affected or altered by changes to this section which take effect on such date. All delinquent support order payments and all decrees entered prior to such date shall draw interest at the effective rate as prescribed by this section commencing as of such date.

Quirks, Oddities and other Practice Tips

Did You Know…

Kansas *law automatically presumes that child support in multiple children orders will reduce on a pro rata basis as older children emancipate out, but Kansas support orders rarely if ever include the reduced child support amounts in the text of the order. Check with the Kansas support office when registering a Kansas support order through UIFSA to find out how your order is to reduce when the oldest child emancipates.*

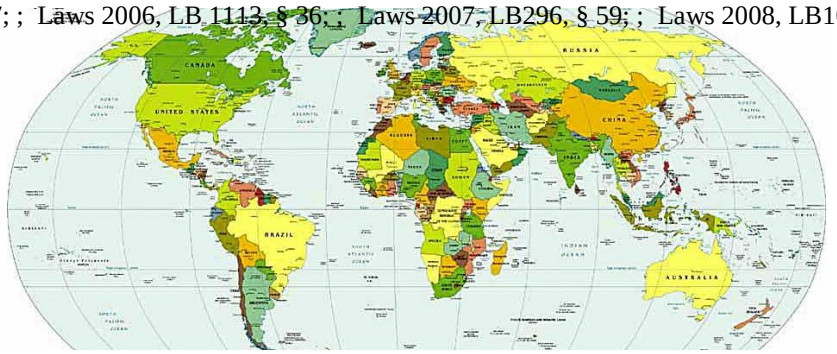
- Congress amended the tax code to give the federal dependent **income tax deductions** automatically to the custodial parent, unless the custodial parent signs a written waiver. *See* Schmitt v. Schmitt, 239 Neb. 632, 635-36, 477 N.W.2d 563, 565 (1991)
- *Submit your little known facts or tips to billm @ sarpy.com*

42-364.13. Support order; requirements.

(1) Any order for support entered by the court shall specifically provide that any person ordered to pay a judgment shall be required to furnish to the clerk of the district court his or her address, telephone number, and social security number, the name of his or her employer, whether or not such person has access to employer-related health insurance coverage and, if so, the health insurance policy information, and any other information the court deems relevant until such judgment is paid in full. The person shall also be required to advise the clerk of any changes in such information between the time of entry of the decree and the payment of the judgment in full. If both parents are parties to the action, such order shall provide that each be required to

furnish to the clerk of the district court all of the information required by this subsection. Failure to comply with this section shall be punishable by contempt.
(2) All support orders entered by the court shall include the year of birth of any child for whom the order requires the provision of support.
. . .
(4) . . . (a) If any case contains an order or judgment for child, medical, or spousal support, the order shall include the following statements:
In the event that the (plaintiff or defendant) fails to pay any child, medical, or spousal support payment, as such failure is certified each month by the State Disbursement Unit in cases in which court-ordered support is delinquent in an amount equal to the support due and payable for a one-month period of time, he or she shall be subject to income withholding and may be required to appear in court on a date to be determined by the court and show cause why such payment was not made. In the event that the (plaintiff or defendant) fails to pay and appear as ordered, a warrant shall be issued for his or her arrest.
(b) If the court orders income withholding regardless of whether or not payments are in arrears pursuant to section 43-1718.01 or 43-1718.02,the statement in this subsection may be altered to read as follows:
In the event that the (plaintiff or defendant) fails to pay any child, medical, or spousal support payment, as such failure is certified each month by the State Disbursement Unit in cases in which court-ordered support is delinquent in an amount equal to the support due and payable for a one-month period of time, he or she may be required to appear in court on a date to be determined by the court and show cause why such payment was not made. In the event that the (plaintiff or defendant) fails to pay and appear as ordered, a warrant shall be issued for his or her arrest.

Source: Laws 1983, LB 371, § 9; ; Laws 1984, LB 845, § 30; ; Laws 1985, Second Spec. Sess., LB 7, § 17; ; Laws 1993, LB 523, § 1; ; Laws 1994, LB 1224, § 45; ; Laws 2000, LB 972, § 13; ; Laws 2004, LB 1207, § 27; ; Laws 2006, LB 1113, § 36; ; Laws 2007, LB296, § 59; ; Laws 2008, LB1014, § 34.



Reciprocity/ International Law & Related

I. Overview

42-721 Attorney General; powers.
. . .
(b) The Attorney General may determine that a foreign country or political subdivision has established a reciprocal arrangement for child support with this state and take appropriate action for notification of the determination.
Source: Laws 1993, LB 500, § 21; Laws 2003, LB 148, § 61.

If you work child support long enough you will encounter cases with parents and minor children living in and being citizens of foreign countries. When the NCP resides in your jurisdiction it may fall to your court to either establish an order of paternity and/or order for support, or to register a foreign support order for purposes of enforcement or modification. The general methods of doing so remain the same when dealing with foreign parties, but you will encounter all sorts of additional "issues", including document interpretation, language barriers, time zone issues (email does wonders in that regard), differing methods of obtaining service of process, currency conversion issues and generalized issues relating to differing levels of social services found in other countries. For example, in much of Europe single parents automatically qualify for government cash benefits, which allows a single parent not to have to work. Free universal health insurance is also the norm in many other nations (lucky them!).

Nebraska has signed reciprocity agreements for the establishment and enforcement of child support orders with the following nations: Australia, Canada (the provinces of Alberta, British Columbia, Manitoba, New Brunswick, Northwest Territories, Newfoundland/Labrador, Northwest Territories, Nova Scotia, Nunavut, Ontario, Saskatchewan and Yukon), the Czech Republic, El Salvador, France, Germany, Hungary, Ireland, portions of Mexico (27 individual states), The Netherlands, Norway, Poland, Portugal, the Slovak Republic, Sweden, Scotland, Switzerland , The United Kingdom (England, Northern Ireland, Wales) and Yap. (Also see this State Dept. Link; note that it admits it may be out-of-date.) Working international support cases with countries not on this list is also possible if no one objects and you obtain the cooperation of the other nation's child support system.

An extremely useful 77 page guide for workers/attorneys who share cases with Canada may be found at www.acf.hhs.gov/programs/cse/pol/IM/2011/im-11-01a.pdf In addition, the Canadian Department of Justice has a useful link describing their child support laws, written in layman's terminology: www.justice.gc.ca/eng/pi/fcy-fea/sup-pen/index.html

Note: Additional resources relating to International Child Support (Maintenance), including a treatise on currency conversion, and a PowerPoint presentation on International Child Support, may be obtained by emailing William MacKenzie at Billm @sarpy.com.

Readers may also find of assistance an online resource of the U.S. State Department's Bureau of Consular Affairs, relating to family law and other legal issues with foreign jurisdictions. See: http://travel.state.gov/law/law_1734.html

II. Full Faith & Credit issues

Many European nations (plus Canada, Argentina and parts of Mexico) apply their marriage laws without regard to gender (the number of nations stands at 14, with recent additions of Brazil, New Zealand, France and Uruguay in 2013). Same sex divorces and parents have already found their way into the mix of cases we are asked to enforce. See the **Same Sex Marriage** subheading for more information in this regard.

III. The Hague Convention on the International Recovery of Child Support & Other Forms of Family Maintenance

In 2007 an International Protocol affecting maintenance for children was concluded by the **Hague Conference on Private International Law**. The organization is described as being "*The World Organisation for Cross-border Co-operation in Civil and Commercial Matters*." You can read a helpful overview of the organization here as well as their FAQ page.

Of particular interest to the child support community would be the following agreements/documents, concluded in November 2007, and effective January 1, 2013:

- CONVENTION ON THE INTERNATIONAL RECOVERY OF CHILD SUPPORT AND OTHER FORMS OF FAMILY MAINTENANCE, (PDF Version);
- An Outline of the above document; and the
- PROTOCOL ON THE LAW APPLICABLE TO MAINTENANCE OBLIGATIONS (PDF version)

The United States sent a delegation to The Hague to work on drafting the Convention, and is a signatory to the Protocol and Convention. The US government plans to utilize the convention to assist local CSE offices in working international cases with other signatory nations (40 in total as of 2013).

On September 30, 2014, following Congressional approval. President Obama signed legislation formally adopting the provisions of the Hague Convention. Additional details on the legislation can be found here:
http://waysandmeans.house.gov/news/documentsingle.aspx?DocumentID=397310

The individual states are now in the process of updating their UIFSA laws to dovetail with the provisions contained in the Convention, before it will be enacted nationwide. Nebraska did this in 2016.

A list of signatory nations to this convention includes the following states (as of March 2013):

Argentina	Cyprus	Hungary	New Zealand
Australia	Czech Republic	Ireland	Norway
Belgium	Denmark	Israel	Paraguay
Bulgaria	Dominican Republic	Japan	Poland
Canada + Quebec	Estonia	Latvia	Portugal
Chile	European Community	Lithuania	Romania
People's Republic of China, (Hong Kong and Macao)	Finland	Malaysia	Slovak Republic
	France	Mexico	Slovenia
	Germany	Monaco	South Africa
Croatia	Greece	Netherlands	Sweden

Switzerland United Kingdom
United States

As of September 30, 2014, 32 countries, including the USA, have ratified to Convention. The Hague Convention terms are included in UIFSA version 2008, which will still need to be ratified by each of the several United States before it becomes effective throughout the USA. This is supposed to be completed by the end of 2015 in most states, including Nebraska.

IV. Currency Conversion issues

Federal court rulings have long held that all judgments set by courts in the United States should to be paid in dollars, and not in foreign currency. This solves some potential problems, but can lead to other issues. When we register foreign child support orders for enforcement, for example, we are forced to convert the original judgment stated in euros, pound sterling or zlotys to dollars. Many resources on the Internet offer currency exchange information, including historical data. My favorite for ease of use is the Bank of Canada site at www.bankofcanada.ca/en/rates/exchform.html

One problem you may encounter (this author did) is when the foreign jurisdiction requires periodic updating of the currency exchange rates in their order. Germany requires annual adjustments, for example, and this may be the preferred way to go (some jurisdictions require monthly recalculation of conversion rates, and this can be extremely cumbersome). In a UIFSA registration case you should take care to address this issue in the original order confirming registration or risk having your order locked in at a set dollar ($) amount for the entire term of the order. Of course, sometimes periodic adjustments will work to the benefit of the person paying support. No one can tell at the time the order is registered which way the exchange rate will trend in coming years. (If you could you would be doing that for a living, rather than enforcing child support orders!)

There should be no need to "modify" a support order each time an adjustment in the conversion rate is necessary. Just spell out in the original order in your court that there will be periodic currency conversion adjustments (spell out when those will occur), and the manner in which those adjustments will occur. You may need to submit to the clerk of court for filing a statement of the changed currency conversion ratio each time a conversion is to take place.

V. International Service of Process

For a discussion of service of process when one party lives outside the United States, see the following treatise, which warns about the failure to use the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters,
http://apps.americanbar.org/family/military/saysavanh_turner.pdf
See http://en.wikipedia.org/wiki/Hague_Service_Convention for information about the Convention.

Remarriage

Insanity: doing the same thing over and over again and expecting a different result.

- Albert Einstein

§ 42-358.04. Delinquent permanent child support payments; remarriage; effect.
Remarriage of the person entitled to collect under a permanent child support decree shall not work to cut off delinquent payments due under such decree.
Source: Laws 1975, LB 212, § 6

Hildebrand v. Hildebrand, 239 Neb. 605, 477 N.W.2d 1 (1991)
In case this point wasn't self evident….

- Citing ***In re Marriage of Root***, 774 S.W.2d 521 (Mo. App. 1989):
  It would be absurd to hold that once parents remarry each other and the family is again intact and residing in the same household, the former noncustodial parent must pay future installments of child support to the other parent per the past divorce decree. That is to say, the remarriage should terminate the former noncustodial parent's duty to pay any child support that would have become due after the remarriage.
- [O]nce parties remarry, the former child support order is moot, while any deficiencies prior to the marriage are collectible.

Removal of minor child from Nebraska

From this author's many years of experience, it seems that a great many custodial parents simply don't understand that once a Nebraska court takes jurisdiction over their minor child(ren) and sets an order of custody, visitation and/or child support, the minor child may **not** be removed from Nebraska (other than for short vacations and the like) without first securing the permission of the court. Permission is not an automatic thing, either…. See below. Courts take a very dim view of parents who secrete their children out of Nebraska without first receiving court permission. Child support may be judicially halted when such incidents are brought to the attention of the court. It is imperative for child support attorneys to convey this information to custodial parents. As an officer of the court, a IV-D attorney should consider whether to participate in a request to modify support when it is discovered that a child has been removed from the court's jurisdiction without authorization.

Note, this set of rules only applies to "custodial" parents. Parents who have possession of their child but not legal custody are not governed accordingly.

Farnsworth v. Farnsworth, 257 Neb. 242, 597 N.W.2d 592 (1999)

- Of all the disputes that courts are called upon to resolve, parental relocation cases such as this one are among the most complicated and troubling. That is because the interests of the custodial parent, who often has legitimate, sound reasons for wanting to move to a distant state, are mutually exclusive to the interests of the noncustodial parent, who commonly has a compelling desire to continue frequent, regular contact with the child. Complicating matters

further, courts must ultimately perform the difficult task of weighing the best interests of the child, which may or may not be consistent with the personal interests of either or both parents.

- To prevail on a motion to remove a minor child, the custodial parent must first satisfy the court that he or she has a legitimate reason for leaving the state. . . . After clearing that threshold, the custodial parent must next demonstrate that it is in the child's best interests to continue living with him or her. . . . Of course, whether a proposed move is in the best interests of the child is the paramount consideration.
- In determining whether removal to another jurisdiction is in the child's best interests, the trial court considers (1) each parent's motives for seeking or opposing the move; (2) the potential that the move holds for enhancing the quality of life for the child and the custodial parent; and (3) the impact such a move will have on contact between the child and the noncustodial parent, when viewed in the light of reasonable visitation. See ***McLaughlin v. McLaughlin***, 264 Neb. 232, 647 N.W.2d 577 (2002).

Gartner v. Hume, 12 Neb. App. 741, 686 N.W.2d 58 (2004)

- To prevail on a motion to remove a minor child to another jurisdiction, the custodial parent must first satisfy the court that he or she has a legitimate reason for leaving the state. After clearing that threshold, the custodial parent must next demonstrate that it is in the child's best interests to continue living with him or her.

Hibbard v. Hibbard, 230 Neb. 364, 366, 431 N.W.2d 637, 639 (1988).

- Children have the right to be treated as interested and affected persons and not as pawns or chattel of either or both parents.

Shaffer v. Shaffer, 231 Neb. 910, 438 N.W.2d 507 (1989)

- Generally, siblings should not be separated.

Res Judicata/ Claim Preclusion, & Paternity

(a/k/a "My two dads")
(see also *Collateral Estoppel*)

DeVaux v. DeVaux, 245 Neb. 611, 621-22, 514 N.W.2d 640, 647 (1994)

Facts: *Wife gave birth during marriage to child fathered by a boyfriend. She did not inform her husband. Parties later divorced and husband was ordered to pay child support, and was given rights of visitation. Later mother came clean with ex-husband, because she married boyfriend. She wanted child support stopped, as well as visitation. Ex-husband refused to go along, citing his bond with child. Genetic tests showed 2nd husband was bio dad.*

- Under the doctrine of *res judicata*, does a finding of paternity in a dissolution decree prevent the parties to the decree from relitigating paternity? We answer this question: Yes.
- Res judicata bars relitigation of any right, fact, or matter directly addressed or necessarily included in a former adjudication if (1) the former judgment was rendered by a court of competent jurisdiction, (2) the former judgment was a final judgment, (3) the former judgment was on the merits, and (4) the same parties or their privies were involved in both actions. [see also **Hara v. Reichert**, 287 Neb. 577, 843 N.W.2d 812 (2014)]
- A fundamental fact necessary to sustain an order of child support is paternity by the man judicially obligated to pay such support.

Hara v. Reichert, 287 Neb. 577, 843 N.W.2d 812 (2014)

New terminology is adopted, for those of us who didn't take Latin in High School

- In the past, we have referred to claim preclusion and issue preclusion as res judicata and collateral estoppel. Courts and commentators have moved away from that terminology and now use the terms claim preclusion and issue preclusion. Put simply, they are more clear and descriptive.

Kiplinger v. Nebraska Dept. of Nat. Resources, 282 Neb. 237, 803 N.W.2d 28 (2011)

- Under the doctrine of collateral estoppel, also known as issue preclusion, an issue of ultimate fact that was determined by a valid and final judgment cannot be litigated again between the same parties or their privities in any future litigation.
- Collateral estoppel is applicable where (1) an identical issue was decided in a prior action, (2) the prior action resulted in a judgment on the merits which was final, (3) the party against whom the doctrine is to be applied was a party or was in privity with a party to the prior action, and (4) there was an opportunity to fully and fairly litigate the issue in the prior action.

McCarson v. McCarson, 263 Neb. 534, 641 N.W.2d 62 (2002)

Facts: *Wife got pregnant during her marriage by a paramour. Later she filed for divorce while husband was overseas with the US Military. He filed an appearance and 61 days later the court issued the divorce and ordered him to pay child support for the child. Later wife admitted he was not the bio father, and he filed to modify the decree and terminate the support order. Mother, who's uncleanliness extended also to her hands, opposed the termination of support on grounds of res judicatta. But ex-husband was not without fault of his own…*

- [U]nder the traditional rule of res judicata, any rights, facts, or matter in issue directly adjudicated or necessarily involved in the determination of an action before a competent court in which a judgment or decree is rendered upon the merits is conclusively settled by the judgment therein and cannot again be litigated by the parties and privies. ***Gruber v. Gruber***, 261 Neb. 914, 626 N.W.2d 582 (2001).
- [T]he paternity findings in a dissolution decree constitute a final judgment.
- § 25-2001 states that "[a] district court shall have power to vacate or modify its own judgments or orders after the term at which such judgments or orders were made. . . (4) for fraud practiced by the successful party in obtaining the judgment or order."
- [I]n order to set aside a judgment after term on the ground of fraud practiced by the successful party, as provided for in § 25-2001(4), the petitioning party must prove that due diligence was exercised by him or her at the former trial and that the failure to secure a just decision was not attributable to his or her fault or negligence.

Young v. Govier & Milone, 286 Neb. 224, 835 N.W.2d 684 (2013)

- The doctrine of *res judicata*, or claim preclusion, bars the relitigation of a matter that has been directly addressed or necessarily included in a former adjudication if (1) the former judgment was rendered by a court of competent jurisdiction, (2) the former judgment was a final judgment, (3) the former judgment was on the merits, and (4) the same parties or their privies were involved in both actions. Res judicata will not preclude a second suit between the same parties if the forum in which the first action was brought did not have jurisdiction to adjudicate the action; stated another way, judgments entered by a court without jurisdiction are void and subject to collateral attack.

- ...summary judgments, judgments on a directed verdict, judgments after trial, default judgments, and consent judgments are all generally considered to be on the merits for purposes of res judicata.

Retro Support

Bowers v. Lens, 264 Neb. 465, 648 N.W.2d 294 (2002)

- A judgment for retroactive alimony, i.e., alimony that should have vested and accrued in prior months, is one which is immediately due and collectible by the judgment creditor. This situation is distinguishable from an order in which a court may allow a contemnor to purge his or her contempt for past-due support on an installment basis.

(I would submit that alimony and child support are analogous under this holding) Interest on a retroactive judgment begins to accrue on the date the district court entered its judgment)

Cooper v. Cooper, 8 Neb. App. 532, 538, 598 N.W.2d 474, 478 (1999)

- In the absence of a showing of bad faith, it is an abuse of discretion for a court to award retroactive child support when the evidence shows the obligated parent does not have the ability to pay the retroactive support and still meet current obligations. *Cited with approval in* ***Wilkins v. Wilkins***, 269 Neb. 937 (2005); ***Emery v. Moffett***, 269 Neb. 867 (2005); and ***Henke v. Guerrero***, 13 Neb. App. 337 (2005) "The ability to pay is a paramount factor."

Emery v. Moffett, 269 Neb. 867, 697 N.W.2d 249 (2005)

- It is *improper* for a court, in determining whether to order retro child support, to find that a non custodial parent cannot afford to pay retro support now, but nonetheless order him to pay retro support, but defer the time he has to begin paying it until after the child emancipates.

Freeman v. Groskopf, 286 Neb. 713, 838 N.W.2d 300 (2013)

- Whether a child support order should be retroactive is entrusted to the discretion of the trial court, and an appellate court will affirm its decision absent an abuse of discretion.

Henke v. Guerrero, 13 Neb. App. 337, 692 N.W.2d 762 (2005)

What happens when "there is not enough money" to go around?

- In the absence of a showing of bad faith, it is an abuse of discretion for a court to award retroactive child support when the evidence shows the obligated parent does not have the ability to pay the retroactive support and still meet current obligations.
- The paramount concern and question in determining child support is the best interests of the child
  - Accordingly, the inability to pay retroactive support in a paternity case does not obviate the obligation, but, rather, the consequences of such inability are to be handled in the context of the Nebraska Child Support Guidelines, which are applicable to paternity actions. *(i.e. minimum support should be set)*
- The father's inability to pay retroactive support means that after assessing the equities of the case, the court can deviate from the child support guidelines in setting retroactive support, and because it is an equity matter, the court can also order a payment plan for the retroactive support.

Lucero v. Lucero, 16 Neb. App. 706, 750 N.W.2d 377 (2008)

- Absent equities to the contrary, the modification of child support orders should be applied retroactively to the first day of the month following the filing date of the application for modification.
- In the absence of a showing of bad faith, it is an abuse of discretion for a court to award retroactive child support when the evidence shows the obligated parent does not have the ability to pay the retroactive support and still meet current obligations.

Matchett v. Dunkle, 244 Neb. 639, 508 N.W.2d 580 (1993)

- Opens the door to retroactive child support in paternity cases.

Sylvis v. Walling, 248 Neb. 168, 532 N.W.2d 312 (1995)

- [A] cause of action for the retroactive support of a child born out of wedlock belongs not to the mother, but to the child.
- [A]n obligation for retroactive child support is not a debt.

Willers v. Willers, 255 Neb. 769, 587 N.W.2d 390 (1998)

Not a classic retro support case. Mother took minor child to Washington State, then filed for divorce. Washington State entered the divorce, but no support was ordered because the court lacked jurisdiction over the husband/father. Now father has been brought to court in Nebraska and custodial parent sought support retroactive to the date of the divorce.

- A child born out of wedlock is entitled to child support retroactively to the date of birth, because it is upon the child's birth that the parental duty of support commences.
- [T]he parental duty to support minor children can be enforced retroactively to the date of the divorce decree where a child is born in wedlock, the parents are subsequently divorced, but the divorce decree is silent on the issue of child support.

67A C.J.S. Parent and Child 75 at 390 (1978)
"While the right to child support may be barred by laches, an unreasonable delay in seeking support cannot waive the right of the child to support, or remove the obligation of the father to support the child"

Review & Modification

See Modification Issues.

Same Sex Marriage/ Civil Union Related Issues

§42-117. Marriage contracted out of state; when valid.
All marriages contracted without this state, which would be valid by the laws of the country in which the same were contracted, shall be valid in all courts and places in this state.
Source: R.S.1866, c. 34, § 17, p. 257; R.S.1913, § 1556; C.S.1922, § 1505; C.S.1929, § 42-117; R.S.1943, § 42-117.

While many attorneys have long scoffed at child support law as being static and "boring", we who practice in the area know that nothing could be further from the truth. In the world of Family Law, this issue, more than any other, has seen profound change in the past decade, with no doubt more changes to come. Perhaps the greatest area of change is in the filed of Same Sex marriage. Beginning in Hawaii and Massachusetts, this issue was fought in both the state as well as federal court systems for over a decade. Finally, the U.S. Supreme Court ruled in June 2015 in *Obergefell v. Hodges* that all states must honor same sex marriages performed in their sister states, as well as in foreign jurisdictions. The Court further ruled that marriage is a fundamental right which must be extended to all applicants, regardless of their sexual identity or orientation.

An interesting report of the Congressional Research Service of the Library of Congress on this general issue may be viewed at
http://www.au.af.mil/au/awc/awcgate/crs/rl31994.pdf

Massachusetts was the first state to approve same sex marriage, in 2005. Our neighbor state of Iowa began issuing same sex marriage licenses in April 2009 (some 13,000 couples were married in the first year).

Internationally, more than a dozen of foreign nations recognize either same sex civil unions or marriages, or both (this number seemingly increases by the month). Outside of Europe, this includes Argentina, Brasil, Canada, New Zealand, South Africa, Uruguay and Mexico. A report on the status of Marriage Equality in Europe may be read here (updated as of April 2016). To summarize from that report:

> As of December 2015, thirteen out of the nineteen countries that have now legalised same-sex marriage across the globe are in Europe. In fact, almost all states in Western Europe now recognise same-sex unions in the same way as heterosexual ones, but notably, two of the largest - Germany and Italy - are not among them. All Central and Eastern European countries continue to ban gay marriage. On the face of it, the two halves of Europe have to some extent been travelling in opposite directions.

A list of nations that Nebraska maintains reciprocity with can be found under the "**Reciprocit**y" subject heading.

Hills v. State, 61 Neb. 589, 85 N.W. 836 (1901)
This old, old case may yet have life in it.

- If marriage is valid where celebrated, it is valid in this state.

Second Families/Step-parents

Brooks v. Brooks, 261 Neb. 289, 622 N.W.2d 670 (2001)

- We conclude that there is no precise mathematical formula applicable to situations where a court deviates from the guidelines when children from subsequent relationships are involved. Subsequent familial relationships vary widely from case to case. When a deviation from the guidelines is appropriate, the trial court should consider both parents' support obligations to all children involved in the relationships. In considering the obligation to those subsequent children, the trial court should take into consideration the income of the other parent of these children as well as any other equitable considerations.
- We hold that the specific formula for making such calculations is left to the discretion of the trial court, as long as the basic principle that both families are treated as fairly as possible is adhered to. We again emphasize that the trial court shall include the appropriate worksheets with its order and provide in its order the amount of support that would have been required under the guidelines absent a deviation. We further emphasize the importance of providing the methods used when calculating a deviation by showing this either on the worksheets or in the order.

Henke v. Guerrero, 13 Neb. App. 337, 692 N.W.2d 762 (2005)

This case is a great example of how courts struggle to sort through issues relating to children of second families. In this case, the child for whom support was ordered is one of the custodial parent's children. The child was born during the marriage of the CP, but is not the husband's child. Likewise, the obligated parent was married to someone else, and has other children, born both before and after the child at issue.

- Although this is not a multiple-family case based on a remarriage, it is about as complex a multifamily situation as we can imagine.

Lasu v. Issak, 23 Neb. App. 83, 868 N.W.2d 79 (2015)

- All orders for child support obligations shall be established in accordance with the provisions of the Nebraska Child Support Guidelines unless the court finds that one or both parties have produced sufficient evidence to rebut the presumption that the guidelines should be applied.
- If the district court fails to indicate that a deviation from Neb. Ct. R. § 4-218 (rev. 2014) is warranted, it abuses its discretion if its child support order drives the obligor's income below the poverty line set forth in § 4-218.
- There is no precise mathematical formula for calculating child support when subsequent children are involved.
- Calculation of child support when subsequent children are involved is left to the discretion of the court as long as the court considered the obligations to both families and the income of the other parent of the subsequent children.

- When a deviation from the Nebraska Child Support Guidelines is appropriate, the trial court should consider both parents' support obligations to all children involved in the relationships.
- In considering the obligation to subsequent children, the trial court should take into consideration the income of the other parent of these children as well as any other equitable considerations.
- The specific formula for making calculations for the obligation to subsequent children is left to the discretion of the trial court, as long as the basic principle that both families are treated as fairly as possible is adhered to.
- In ordering child support, a trial court has discretion to choose if and how to calculate the deviation, but must do so in a manner that does not benefit one family at the expense of the other.
- A parent's support, childcare, and health care obligation shall not reduce his or her net income below the minimum net monthly obligation for one person, or the poverty guidelines updated annually in the Federal Register by the U.S. Department of Health and Human Services under authority of 42 U.S.C. § 9902(2), except minimum support may be ordered as defined in Neb. Ct. R. § 4-209.
- When an obligor's combined household income is below the poverty guidelines as updated annually in the Federal Register, the district court should order minimum support pursuant to Neb. Ct. R. § 4-209 or otherwise set forth specific reasons for deviating from the basic subsistence requirement.
- When determining child support in a complex multifamily situation, trial courts should be careful not to order a disproportionate amount of a child support obligor's net income to go to the children at issue and the goal must be for fairness for all the children for whom a parent must provide support.

Moore v. Bauer, 11 Neb. App. 572, 657 N.W.2d 25 (2003)

- Under certain circumstances, it may be appropriate for a trial court to consider subsequently born children of a party when determining child support. This determination is entrusted to the discretion of the trial court. The party requesting a deviation from the Nebraska Child Support Guidelines based upon an obligation to support offspring of a subsequent relationship bears the burden of providing evidence regarding the obligation, including the income of the other parent of the child or children of the subsequent relationship.
- The party requesting a deviation from the Nebraska Child Support Guidelines based upon an obligation to support offspring of a subsequent relationship bears the burden of providing evidence regarding the obligation, including the income of the other parent of the child or children of the subsequent relationship.

Prochaska v. Prochaska, 6 Neb. App. 302, 573 N.W.2d 777 (1998)

- In *Lodden v. Lodden*, 243 Neb. 14, 497 N.W.2d 59 (1993), the Supreme Court found no abuse of discretion in the trial court's failure to consider a father's obligation to support his present family and in the increase of the father's support obligation to his previous family. The court stated that the guidelines "do not provide for an automatic deduction for the support of children of subsequent marriages." (But see dissent in *Lodden*)

State on Behalf of J. R. v. Mendoza, 240 Neb. 149, 481 N.W.2d 165 (1992)
(Discussed in more detail elsewhere in this outline)

- Step parent must legally support minor child living in his/her home. Obligation ends when child emancipates, or when stepparent becomes divorced from parent of child. *See Neb. Rev. Stat. §28-705(1)*

Weinand v. Weinand, 260 Neb. 146, 616 N.W.2d 1 (2000)
Question Presented: *Must an ex-stepparent who is awarded rights of reasonable visitation in a divorce decree pay child support as a consequence of such an award?*

- [P]arties in a proceeding to dissolve a marriage cannot control the disposition of matters pertaining to minor children by agreement.
- The Nebraska divorce statutes do **not** impose a duty upon any individual other than a parent to pay for the support of minor children.
- We...hold that in circumstances where a minor child is living with, and being supported by, both of his or her natural parents, the statutory responsibility for the child's support is solely that of the natural parents. § 42-364(6).
- In order to stand in loco parentis, one must assume all obligations incident to the parental relationship. ...No matter how well intentioned, an ex-stepfather who visits his former stepdaughter on Tuesday and Thursday afternoons and on every other Sunday, cannot, by definition, be deemed as standing in loco parentis.

Service of Process & Related

For a discussion of service of process when one party lives outside the United States, see the following treatise, which warns about the failure to use the ***Hague Convention*** on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, Nov. 15, 1965, 20 U.S.T. 361, T.I.A.S. No. 6638.
http://apps.americanbar.org/family/military/saysavanh_turner.pdf
See http://en.wikipedia.org/wiki/Hague_Service_Convention for information about the Convention.

25-217. Action; commencement; defendant not served; effect.
An action is commenced on the date the complaint is filed with the court. The **action shall stand dismissed** without prejudice as to any defendant not served within **six months** from the date the complaint was filed.
Source: Laws 2002, LB 876, § 5.

§ 25-505.01 Service of summons; methods; State Court Administrator; maintain list.
(1) Unless otherwise limited by statute or by the court, a plaintiff may elect to have service made by any of the following methods:
(a) Personal service which shall be made by leaving the summons with the individual to be served; with some person of suitable age and discretion residing therein;
(b) Residence service which shall be made by leaving the summons at the usual place of residence of the individual to be served, with some person of suitable age and discretion residing therein;
(c) Certified mail service which shall be made by
(i) within ten days of issuance, sending the summons to the defendant by certified mail with a return receipt requested showing to whom and where delivered and the date of delivery, and

(ii) filing with the court proof of service with the signed receipt attached; or

(d) Designated delivery service which shall be made by (i) within ten days of issuance, sending the summons by a designated delivery service to the defendant, (ii) obtaining a signed delivery receipt showing to whom and where delivered and the date of delivery, and (iii) filing with the court proof of service with a copy of the signed delivery receipt attached. As used in this subdivision, a designated delivery service means a delivery service designated as such pursuant to 26 U.S.C. 7502(f) and a signed delivery receipt includes an electronic or facsimile receipt with an image of the recipient's signature.

(2) Failure to make service by the method elected by the plaintiff does not affect the validity of the service.

(3) The State Court Administrator shall maintain on the web site of the Supreme Court a list of designated delivery services.

Source: Laws 1983, LB 447, § 22; Laws 1984, LB 845, § 21; Laws 2009, LB35, § 6; Laws 2011, LB669, § 7. Operative Date: May 27, 2011

See www.irs.gov/publications/p80/ar01.html (www.supremecourt.ne.gov/community/index.shtml)

- DHL Express (DHL): DHL Same Day Service.
- Federal Express (FedEx): FedEx Priority Overnight, FedEx Standard Overnight, FedEx 2Day, FedEx International Priority, and FedEx International First.
- United Parcel Service (UPS): UPS Next Day Air, UPS Next Day Air Saver, UPS 2nd Day Air, UPS 2nd Day Air A.M., UPS Worldwide Express Plus, and UPS Worldwide Express.
- Your private delivery service can tell you how to get written proof of the mailing date. Private delivery services cannot deliver items to P.O. boxes. You must use the U.S. Postal Service to mail any item to an IRS P.O. box address.

§ 25-517.02. Substitute and constructive service.

Upon motion and showing by affidavit that service cannot be made with reasonable diligence by any other method provided by statute, the court may permit service to be made (1) by leaving the process at the defendant's usual place of residence and mailing a copy by first-class mail to the defendant's last-known address, (2) by publication, *or* (3) by any manner reasonably calculated under the circumstances to provide the party with actual notice of the proceedings and an opportunity to be heard.

Source: Laws 1983, LB 447, §33.

§ 42-364. Action involving child support, child custody, parenting time, visitation, or other access; parenting plan; legal custody and physical custody determination; rights of parents; child support; termination of parental rights; court; duties; modification proceedings; use of school records as evidence.

(1) . . .

. . .

(6) Modification proceedings relating to support, custody, parenting time, visitation, other access, or removal of children from the jurisdiction of the court shall be commenced by filing a complaint to modify. . . . Service of process and other procedure shall comply with the requirements for a dissolution action.

(7) . . .

Source: Laws 1983, LB 138, § 1; Laws 1985, LB 612, § 1; Laws 1985, Second Spec. Sess., LB 7, § 16; Laws 1991, LB 457, § 3; Laws 1991, LB 715, § 1; Laws 1993, LB 629, § 21; Laws 1994, LB 490, § 1;

Laws 1996, LB 1296, § 15; Laws 1997, LB 752, § 96; Laws 2004, LB 1207, § 25; Laws 2006, LB 1113, § 35; Laws 2007, LB554, § 32; Laws 2008, LB1014, § 32; Laws 2009, LB288, § 5; Laws 2010, LB901, § 1. Operative Date: July 1, 2010

Conaty v. Boelhower, 218 Neb. 193, 352 N.W.2d 619 (1984)

- a personal money judgment could not be supported on the basis of substituted service.

Johnson v. Johnson, 282 Neb., 42, 803 N.W.2d 420 (2011)

- a voluntary appearance signed the day before the petition is filed waives service of process if filed simultaneously with or after the petition.

Kovar v. Habrock, 261 Neb. 337, 622 N.W.2d 688 (2001)

- The language of Neb. Rev. Stat. §25-217 providing for dismissal of unserved petitions is self-executing and mandatory.
- Service of process on a party must be perfected within 6 months of the filing date of the action, or the action is deemed dismissed by operation of law.
- If orders are made following a dismissal by operation of law under Neb. Rev. Stat. §25-217, they are a nullity, as are subsequent pleadings.

Servicemembers Civil Relief Act of 2003 (SCRA)

See http://usmilitary.about.com/od/sscra/l/blscramenu.htm and www.bankersonline.com/regs/201/sscra.html

Of particular interest is the requirement to ALWAYS allege in court pleadings whether a party is or is not a member of the Armed Forces within the meaning of the SCRA. If they are, they have the right to counsel, via court appointment, in many circumstances, and no default judgment may be entered against an unrepresented service member. See Section 201:

(a) APPLICABILITY OF SECTION- This section applies to any civil action or proceeding in which the defendant does not make an appearance.

(b) AFFIDAVIT REQUIREMENT-

(1) PLAINTIFF TO FILE AFFIDAVIT- In any action or proceeding covered by this section, the court, before entering judgment for the plaintiff, shall require the plaintiff to file with the court an affidavit—

(A) stating whether or not the defendant is in military service and showing necessary facts to support the affidavit; or

(B) if the plaintiff is unable to determine whether or not the defendant is in military service, stating that the plaintiff is unable to determine whether or not the defendant is in military service.

(2) APPOINTMENT OF ATTORNEY TO REPRESENT DEFENDANT IN MILITARY SERVICE- If in an action covered by this section it appears that the defendant is in military service, the court may not enter a judgment until after the court appoints an attorney to represent the defendant. If an attorney appointed under this section to represent a servicemember cannot

locate the servicemember, actions by the attorney in the case shall not waive any defense of the servicemember or otherwise bind the servicemember.

(3) DEFENDANT'S MILITARY STATUS NOT ASCERTAINED BY AFFIDAVIT- If based upon the affidavits filed in such an action, the court is unable to determine whether the defendant is in military service, the court, before entering judgment, may require the plaintiff to file a bond in an amount approved by the court. If the defendant is later found to be in military service, the bond shall be available to indemnify the defendant against any loss or damage the defendant may suffer by reason of any judgment for the plaintiff against the defendant, should the judgment be set aside in whole or in part. The bond shall remain in effect until expiration of the time for appeal and setting aside of a judgment under applicable Federal or State law or regulation or under any applicable ordinance of a political subdivision of a State. The court may issue such orders or enter such judgments as the court determines necessary to protect the rights of the defendant under this Act.

(4) SATISFACTION OF REQUIREMENT FOR AFFIDAVIT- The requirement for an affidavit under paragraph (1) may be satisfied by a statement, declaration, verification, or certificate, in writing, subscribed and certified or declared to be true under penalty of perjury.

(c) PENALTY FOR MAKING OR USING FALSE AFFIDAVIT- A person who makes or uses an affidavit permitted under subsection (b) (or a statement, declaration, verification, or certificate as authorized under subsection (b)(4)) knowing it to be false, shall be fined as provided in title 18, United States Code, or imprisoned for not more than one year, or both.

(d) STAY OF PROCEEDINGS- In an action covered by this section in which the defendant is in military service, the court shall grant a stay of proceedings for a minimum period of 90 days under this subsection upon application of counsel, or on the court's own motion, if the court determines that—

(1) there may be a defense to the action and a defense cannot be presented without the presence of the defendant; or

(2) after due diligence, counsel has been unable to contact the defendant or otherwise determine if a meritorious defense exists.

(e) INAPPLICABILITY OF SECTION 202 PROCEDURES- A stay of proceedings under subsection (d) shall not be controlled by procedures or requirements under section 202.

(f) SECTION 202 PROTECTION- If a servicemember who is a defendant in an action covered by this section receives actual notice of the action, the servicemember may request a stay of proceeding under section 202.

(g) VACATION OR SETTING ASIDE OF DEFAULT JUDGMENTS-

(1) AUTHORITY FOR COURT TO VACATE OR SET ASIDE JUDGMENT- If a default judgment is entered in an action covered by this section against a servicemember during the servicemember's period of military service (or within 60 days after termination of or release from such military service), the court entering the judgment shall, upon application by or on behalf of the servicemember, reopen the judgment for the purpose of allowing the servicemember to defend the action if it appears that—

(A) the servicemember was materially affected by reason of that military service in making a defense to the action; and

(B) the servicemember has a meritorious or legal defense to the action or some part of it.

(2) TIME FOR FILING APPLICATION- An application under this subsection must be filed not later than 90 days after the date of the termination of or release from military service.
Source: http://usmilitary.about.com/od/sscra/l/blscra201.htm

Carmicheal v. Rollins, 280 Neb. 59, 783 N.W. 2d 763 (2010)
This case sets forth exactly what a servicemember must demonstrate - and how they must go about demonstrating – that they are entitled to a stay of court proceedings.

- One of the articulated purposes of the Servicemembers Civil Relief Act, 50 U.S.C. app. § 501et seq. (2006), is to provide for the temporary suspension of judicial and administrative proceedings and transactions that may adversely affect the civil rights of servicemembers during their military service.
- The Servicemembers Civil Relief Act, 50 U.S.C. app. § 501et seq. (2006), is intended to strengthen and expedite the national defense by enabling persons in the military service to devote their entire energy to the defense needs of the nation.
- The protections afforded by the Servicemembers Civil Relief Act, 50 U.S.C. app. § 501et seq. (2006), are intended to be far ranging, applying to any judicial or administrative proceeding commenced in any court or agency in any jurisdiction subject to this act.
- A request for a stay, or the grant of a stay, does not affect whether a court has jurisdiction.
- We have held that a proceeding regarding custody determinations is a special proceeding. However, we have not previously addressed whether the denial of a stay under the SCRA is an order affecting a substantial right. We find that it is.
- The grant of temporary custody and child support ...is not a final order.

Social Security
(Also see Equity, Equitable Estoppel)

Often times the court runs into situations where a parent is disabled and either seeking social security disability benefits or has qualified for the benefits. Sometimes the fact that a dependent child is receiving (or is eligible to receive) benefits through SSA becomes relevant. Below is a thumbnail primmer on the topic, as well as some relevant appellate case law.

There are two types of social security benefits: Social Security Disability Insurance, SSDI and Supplemental Security Income, SSI. SSI is a needs based disability program.
See generally www.ssa.gov/disability/professionals/bluebook/general-info.htm

Under the **SSDI** program (title II of the Act), there are three basic categories of individuals who can qualify for benefits on the basis of disability:

- A disabled insured worker under full retirement age.
- An individual disabled since childhood (before age 22) who is a dependent of a parent entitled to title II disability or retirement benefits or was a dependent of a deceased insured parent.
- A disabled widow or widower, age 50-60 if the deceased spouse was insured under Social Security.

Under title XVI, or **SSI (Supplemental Security Income)**, there are two basic categories under which a financially needy person can get payments based on disability:

- An adult age 18 or over who is disabled.
- A child (under age 18) who is disabled.

SSI benefits are available to low income and low resource individuals, including children under age 18, who do not qualify for Social Security Disability (SSDI) benefits. The medical disability rules are the same as those for Social Security disability. **Note: SSI benefits are NOT subject to income withholding/garnishment under federal law.** See 5 CFR §581.104(j).

Regardless of the type, social security benefits may be taxable. Tax obligations ensue when the recipient has other sources of income besides the disability benefits, or if their spouse earns a substantial income.

If recipients file a federal tax return as an "individual" and report a combined income between $25,000 and $34,000, they may have to pay income tax on 50 percent of their Social Security benefits. For combined incomes above $34,000, up to 85 percent of the Social Security benefits are subject to income tax.

Recipients who are married and file a joint return may have to pay taxes on 50 percent of their benefits if the recipient and his/her spouse has a combined income between $32,000 and $44,000. If the combined income is more than $44,000, up to 85 percent of your Social Security benefits are subject to income tax.

Disabled children under age 18 can be eligible for a special type of Supplemental Security Income benefits. Social Security has special rules for evaluating the medical basis for finding a child disabled.

Child SSI benefits are only payable if the child meets the medical requirements for disability published by Social Security and if that child's household falls below an income threshold. Often disabled children from families where one or both parents work will not qualify because the parents' income and resources will offset the child's eligibility for benefits.

See www.4socialsecuritydisability.com/index.html for additional information.

Dinges v. Dinges, 16 Neb. App. 275, 743 N.W.2d 662 (2008)

- The anti-assignment section of the Social Security Act, 42 U.S.C. § 407(a) (2000), states:

  > The right of any person to any future payment under this subchapter shall not be transferable or assignable, at law or in equity, and none of the moneys paid or payable or rights existing under this subchapter shall be subject to execution, levy, attachment, garnishment, or other legal process, or to the operation of any bankruptcy or insolvency law.

- In ***Philpott v. Essex County Welfare Board***, 409 U.S. 413, 417, 93 S.Ct. 590, 34 L.Ed.2d 608 (1973), the U.S. Supreme Court described § 407(a) as "imposing] a broad bar against the use of any legal process to reach all social security benefits." *However*, in 1975, Congress declared that Social Security benefits were subject to legal process "to enforce the legal obligation of the individual to provide child support or alimony." 42 U.S.C. § 659(a) (2000).

Gress v. Gress, 257 Neb. 112, 596 N.W.2d 8 (1999)

- "We have clearly established that a noncustodial parent is entitled to credit against a monthly child support obligation for Social Security benefits paid to his or her minor child as a result of the noncustodial parent's disability."

Hartman v. Hartman, 261 Neb. 359, 622 N.W.2d 871 (2001)

- Social Security benefits made to a child on account of the custodial parent's disability should be included in calculating that parent's income. In reaching this conclusion, the court determined that dependency benefits are based upon a parent's disability and her prior earnings; therefore, they are in lieu of a party's income. Relying upon *Riggs v. Riggs*, 261 Neb. 344, 622 N.W.2d 861 (2001), the *Hartman* court reasoned that Social Security benefits made to a child on account of a parent's disability are not a "means-tested public assistance benefit" which are excluded under § 4-204 of the guidelines and therefore should be included as income when calculating child support.

Johnson v. Johnson, 290 Neb. 838, 862 N.W.2d 740 (2015)

Facts: Children were receiving social security benefits on account of their father's retired status, however the trial court was never advised of that fact at time of trial. Years later the father wanted a credit for those payments. The trial court, and the court of appeals, and the Supreme Court ruled that the father waived that right by not advising the trial court of that at time of the original decree. He cannot later ask for the credit to apply, even prospectively, in a later modification hearing.

- We have considered the issue of applying Social Security benefits to meet a parent's child support obligation on several occasions. E.g., *Gress v. Gress*, 257 Neb. 112, 596 N.W.2d 8 (1999); *Hanthorn v. Hanthorn*, 236 Neb. 225, 460 N.W.2d 650 (1990); *Lainson v. Lainson*, 219 Neb. 170, 362 N.W.2d 53 (1985); *Schulze v. Jensen*, 191 Neb. 253, 214 N.W.2d 591

(1974). The cases often involve disability benefits or child support arrearages, but we find guidance in their reasoning. We have explained that Social Security benefits are not a mere gratuity from the federal government but have been earned through an employee's payment of Social Security taxes. See *Brewer v. Brewer*, 244 Neb. 731, 509 N.W.2d 10 (1993).

- A request to apply Social Security benefits to a child support obligation is merely a request to identify the source of payment. See *Gress v. Gress, supra*. A Social Security benefit can serve as a substitute source for income.
- It nevertheless remains at the court's discretion, depending on the overall situation of both the parties and children, to order child support in addition to the amounts received from Social Security.

Lainson v. Lainson, 219 Neb. 170, 362 N.W.2d 53 (1985)

- when the court is cognizant of the amount of Social Security benefits being paid for the benefit of the minor child, and awards an amount of child support in addition thereto, an appellate court will not reverse the award absent an abuse of discretion.

The following case seems to take a different view of how to treat dependent SS benefits, compared with **Hartman v. Hartman,** *above.*

Ward v. Ward, 7 Neb. App. 821, 585 N.W.2d 551 (1998)

Holding: Trial court may deduct value of child's social security benefits adoptive Dad received for the benefit of the adopted child (on behalf of the child's deceased mother) when calculating the noncustodial parent's child support obligation, ***if it is done correctly****. Ruling is limited to its facts by* ***Gress v. Gress****, 274 Neb. 686, 743 N.W.2d 67 (2007),which dealt with a handicapped child. (Child in* ***Ward*** *had no special needs requiring an upward deviation in child support)*

- A representative payee has a responsibility to use Social Security payments he or she receives for a child only for the use and benefit of the beneficiary in a manner and for the purposes he or she determines, under the federal guidelines.
- For the purposes of determining child support, Social Security payments to a representative payee for a child are for the use and benefit of the beneficiary if used for the beneficiary's current maintenance, which includes the cost of food, shelter, clothing, medical care, and personal comfort items.
- A judge may not satisfy his or her duty to act equitably toward all concerned, i.e., the parties and the children, by blindly following suggested child support guidelines. (citing **Brandt v. Brandt**, 227 Neb. 325, 417 N.W.2d 339 (1988))
- A court may deviate from the Nebraska Child Support Guidelines whenever the application of the guidelines in an individual case would be unjust or inappropriate.
- It is simply not fair or reasonable to give the custodial parent the benefit of 100% of the Social Security payments and thus shift most of the burden of supplying the unprovided support to the noncustodial parent. The guidelines can still be used as a reliable guide in setting support if the Social Security benefits are considered as family income but not attributed to either parent, and if they are applied to the support computed under the guidelines for that income, with the balance prorated to the parties on the basis of their real incomes. In this way, the total support is increased in recognition that the family income is greater than the net monthly earnings of the parents, and the parent who has the legal obligation to support the child receives the benefit of the government program intended to pay for the support of the child.

Calculate support this way:

1. Mom's gross income + Dad's Gross income = Parental gross income
2. Add value of social security benefits. Sum = New family gross income
3. Calculate family child support amount based on line 2.
4. Deduct social security benefit amount from figure derived from step 3.
5. Arrive at new family support amount.
6. Prorate child support amount from step 5 between the parents based upon their "real" incomes.

Spousal Support/Alimony

(See also *Modification)*

Notice to IV-D Child Support Attorneys:

DHHS CSE Memos of Feb. 5 and March 1, 2013 reiterate that "CSE is prohibited from using Federal enforcement tools to enforce spousal support judgments once the child support judgment ends. In addition, CSE is prohibited from using the following state enforcement tools to enforce spousal support judgments: income withholding, license suspension, administrative attachment and state income tax offset. If a payment is received using one of the ineligible enforcement tools, the payment will not be applied to a spousal support judgment when the spousal support judgment has ended."

This means that even when child support arrears are owed, if the child no longer qualifies to receive ongoing "current" child support, the child support judgment has terminated, and no future collections of spousal support will occur, even if child support arrears continue to be owed.

Questions may be directed to Lisa Maddock in Lincoln at 1-402-471-1400.

§ 43-1715. Spousal support, defined

Spousal support shall mean alimony or maintenance support for a spouse or former spouse if the provision for support is a part of an order, decree, or judgment which provides for child support and the child and spouse or former spouse are living in the same household.
Source: Laws 1985, Second Spec. Sess., LB 7, § 35

Note: The terms "alimony" and "spousal support" are used interchangeably throughout Nebraska case law, and there is no meaningful difference. Technically, all spousal support is alimony, but all alimony is not spousal support, as reflected in the statute cited above.

Finney v. Finney, 273 Neb. 436, 730 N.W.2d 351 (2007)
Metcalf v. Metcalf, 278 Neb. 258, 269 N.W.2d 386 (2009) – *also see below*

- Modification of a dissolution decree is a matter entrusted to the discretion of the trial court, whose order is reviewed de novo on the record, and which will be affirmed absent an abuse of discretion by the trial court.
- Alimony orders may be modified or revoked for good cause shown. Good cause means a material and substantial change in circumstances and depends upon the circumstances of each case. The moving party has the burden of demonstrating a material and substantial change in circumstances which would justify the modification of an alimony award. Changes in circumstances which were within the contemplation of the parties at the time of the decree, or that were accomplished by the mere passage of time, do not justify a change or modification of an alimony award.

Grahovac vs. Grahovac, 12 Neb. App. 585, 680 N.W.2d 616 (2004)

- An award of alimony may be modified or revoked if the moving party can show good cause. See ***Pope v. Pope,*** 251 Neb. 773, 559 N.W.2d 192 (1997). In an action for modification of alimony, good cause is demonstrated by a material change in circumstances, but any changes in circumstances which were within the contemplation of the parties at the time of the decree, or that were accomplished by the mere passage of time, do not justify a change or modification of an alimony order.
- A modification *of child support* is only warranted when a change of circumstances is of a material and substantial nature and was not contemplated at the time of the decree.
- A petition for the modification or termination of alimony will be denied if the change in financial condition is due to fault or voluntary wastage or dissipation of one's talents and assets.
- A "practicing alcoholic" who lost high paying job due to alcoholism and refusal to seek treatment cannot seek reduction in alimony.

Gress v. Gress, 274 Neb. 686, 743 N.W.2d 67 (2007)

- Although paragraph R of the NCSG speaks only to child support, we are persuaded that the basic subsistence limitation in that paragraph should apply with equal force in the alimony context. As a purely logical matter, this conclusion is buttressed by the structure of the NCGS itself. ...[P]aragraph M [now § 4-213] of the NCSG mandates that alimony be drawn from whatever income is left *after* child support obligations have been determined. Prioritizing child support over alimony indicates that of the two, child support is the more important support interest. So if child support cannot drive an obligor's income below the poverty line unless specifically warranted, then *a fortiori*, alimony should also not be allowed to drive an obligor's income below the poverty line unless specifically warranted.
- [A]n alimony award which drives the obligor's income below the basic subsistence limitation set forth in paragraph R [now § 4-218] of the Nebraska Child Support Guidelines is presumptively an abuse of judicial discretion unless the court specifically finds that conformity with paragraph R would work an unjust or inappropriate result in that particular case.
- [A]n obligor's "income" available for alimony purposes is not necessarily synonymous with taxable income. ... In sum, if the combination of child support and alimony obligations would reduce an obligor's *net* income below the basic subsistence limitation in paragraph R [now § 4-218], the trial court must make specific findings of fact that the obligor is capable of paying that

amount despite his reported income on tax returns. If such findings are made, the court may award alimony in excess of what would otherwise be allowed under the limit in [§ 4-218].

- Alimony. The primary purpose of alimony is to assist an ex-spouse for a period of time necessary for that individual to secure his or her own means of support.
- Above all else, the duration of an alimony award must be reasonable.

Hall vs. Hall (not designated for permanent publication) (2003)

According to Neb. Rev. Stat. §42-365 (Reissue 1998), factors which should be considered by a court in determining alimony include (1) the circumstances of the parties; (2) the duration of the marriage; (3) the history of contributions to the marriage, including contributions to the care and education of the children, and interruption of personal careers or educational opportunities; and (4) the ability of the supported party to engage in gainful employment without interfering with the interests of any minor children in the custody of each party. *Schaefer v. Schaefer*, 263 Neb. 785, 642 N.W.2d 792 (2002); *Hill v. Hill, supra*. In awarding alimony, a court should consider, in addition to specific statutory criteria, the income and earning capacity of each party as well as the general equities of each situation. Kropf v. Kropf, 248 Neb. 614, 538 N.W.2d 496 (1995)

- County attorney has no legal authority to intervene on behalf of a parent to collect alimony in cases where child support was not also ordered. It does not matter that the trial court referred to alimony as "spousal support."
- Section 42-347 (Reissue 1993) states, in pertinent part:

> As used in sections 42-347 to 42-380, unless the context otherwise requires:
>
> . . . .
>
> Spousal support, when used in the context of income withholding or any provisions of law which might lead to income withholding, shall mean alimony or maintenance support for a spouse or former spouse when ordered as a part of an order, decree, or judgment which provides for child support and the child and spouse or former spouse are living in the same household.

Lambert v. Lambert, 9 Neb. App. 661, 617 N.W.2d 645 (2000)

- A petition for modification of child support or alimony will be denied if a change in financial condition is due to fault or voluntary wastage or dissipation of one's talents and assets. In this case, parent was fired for choosing to smoke marijuana.
- Material change in circumstances in reference to modification of child support is analogous to modification of alimony for good cause.

Mastrocesare vs. Mastrocesare, 2 Neb. App. 231, 507 N.W.2d 683 (1993)

…Citing Section 42-347(4), which states:

> Spousal support, when used in the context of income withholding or any provisions of law which might lead to income withholding, shall mean alimony or maintenance support for a spouse or former spouse *when ordered as a part of an order, decree, or judgment which provides for child support* and the child and spouse or former spouse are living in the same household.

§43-1715 defines spousal support almost identically.

- Despite the statutory definition of spousal support, it is evident that the term "spousal support" and the term "alimony" are commonly used interchangeably.

Metcalf v. Metcalf, 278 Neb. 258, 769 N.W.2d 386 (2009)

The Metcalf decision essentially means that once a party tries and fails to modify their support order, they will have a more difficult time trying a second time to obtain a modification.

- We determine that in cases where there has been a previous attempt to modify support, the court must first consider whether circumstances have changed since the **most recent [albeit failed] request** for modification. But when considering whether there has been a *material and substantial* change in circumstances justifying modification, the court will consider the change in circumstances since the date of the last order establishing or modifying alimony. In other words, **a judgment for alimony may be modified only upon a showing of facts or circumstances that have changed since the last order granting or denying modification was entered. But once some change has been established since the last request, the analysis focuses on the change in circumstances since alimony was originally awarded or last modified.** We adopt this rule because it recognizes the force of *res judicata*; modification will be considered only when there has been a change in circumstances since the last request for modification. But if there has been no change, modification is not justified, because the request is essentially the same as the last request.
- If there has been no change between the most recent modification request and the current request, the **current modification is barred by res judicata.**

Millatmal v. Millatmal, 272 Neb. 452, 723 N.W.2d 79 (2006)

- We will affirm a trial court's award of alimony unless it is so untenable as to deprive a party of a substantial right or just result.

Pope v. Pope, 251 Neb. 773, 559 N.W.2d 192 (1997)

- Parent terminated from employment for sleeping on the job not entitled to reduction in alimony. Reduction in earnings does not rise to the "good cause" threshold.

Simpson v. Simpson, 275 Neb. 152, 744 N.W.2d 710 (2008)

- [A]n increase in income is a circumstance that may be considered in determining whether alimony should be modified. ... [A] party's increase in income is considered in conjunction with changes in the other party's situation.
- Although an increase in the income of the spouse paying maintenance is a relevant factor for the trial court to consider, it alone does not require the court to modify the amount of maintenance previously ordered.
- Alimony should not be used to equalize the incomes of the parties or to punish one of the parties.
- [A] petition to modify alimony will be denied if the change in financial condition is due to the fault or **voluntary wastage** or dissipation of one's talents or assets.
- We do not consider ... (personal differences with her employer, which precipitated the CP quitting her job).... To be a material and substantial change of circumstances.
- [E]vidence of [the NCPs] increased income does not constitute, in and of itself, a material and substantial change in circumstances, without a proven increase in [the CPs] living expenses.

Spady v. Spady, 284 Neb. 885, 824 N.W.2d 366 (2012)

- The word "support" in § 42-351(2) is not by its terms limited to child support. Further, we look to the immediately preceding provision, § 42-351(1), which refers to "support of minor children [and] the support of either party." Section 42-351(1) shows that the word "support" is used statutorily in § 42-351 to refer to child support and spousal support, i.e., alimony.
- Our analysis and the district court's continuation of "temporary alimony" during the appeal are also consistent with the historical jurisprudence surrounding the manner by which an alimony award can be accepted pending appeal without losing the potential to challenge the adequacy of the amount on appeal. See *Larabee v. Larabee*, 128 Neb. 560, 259 N.W. 520 (1935) (stating that one who voluntarily accepts payment of part of judgment in his or her favor loses right to prosecute appeal). But see *Reynek v. Reynek*, 193 Neb. 404, 227 N.W.2d 578 (1975) (concluding that acceptance of property settlement did not forfeit right to appeal child custody).
- By making the alimony award "temporary" pending appeal, the recipient is not at risk of losing the opportunity to challenge the award.
- The district court's order...followed the practice of awarding "temporary alimony" pending appeal and was both authorized statutorily and consistent with our jurisprudence. The district court had jurisdiction to issue the...order, and it is not void. Paul's failure to pay temporary alimony to Carolyn in violation of the...order was subject to contempt....

Zoubenko v. Zoubenko, 19 Neb. App. 582, 813 N.W.2d 506 (2012)

- [T]he primary purpose of alimony is to assist an ex-spouse for a period of time necessary for that individual to secure his or her own means of support, and the duration of an alimony award must be reasonable in light of this purpose.
- Factors which should be considered by a court in determining alimony include: (1) the circumstances of the parties; (2) the duration of the marriage; (3) the history of contributions to the marriage, including contributions to the care and education of the children, and interruption of personal careers or educational opportunities; and (4) the ability of the supported party to engage in gainful employment without interfering with the interests of any minor children in the custody of each party. *Kalkowski v. Kalkowski, supra*. See Neb. Rev. Stat. § 42-365 (Reissue 2008).
- [A]limony should not be used to equalize the incomes of the parties or to punish one of the parties. *Kalkowski v. Kalkowski*, 258 Neb. 1035, 607 N.W.2d 517 (2000). See also *Patton v. Patton*, 20 Neb. App. 51, 818 N.W.2d 624 (2012).

Standing & Related

In Re Guardianship & Conservatorship of Herrick, 21 Neb. App. 971, 846 N.W.2d 301 (2014)

An instructive discussion of the difference between "standing to sue" and "capacity to sue."

- Under Nebraska's pleading rules, a party wishing to raise the issue of whether another party has the necessary capacity must specifically deny that the opposing party has capacity. *Carlos H. v. Lindsay M.*, 283 Neb. 1004, 815 N.W.2d 168 (2012); Neb. Ct. R. Pldg. § 6-1109(a) (rev. 2008). Thus, unlike standing, a party's capacity to sue or be sued is not jurisdictional.
- [B]ecause a party's capacity to sue or be sued is not jurisdictional, a challenge to a party's capacity must be brought at the earliest opportunity or it is waived.
- [S]tanding is determined at the commencement of the litigation

Statute of Limitations

Criminal Prosecution for Sexual Assault of a Minor/ Incompetent:

§ **29-110. Prosecutions; complaint, indictment, or information; filing; time limitations; exceptions.**

…

(7) There shall not be any time limitations for prosecution or punishment for treason, murder, arson, forgery, sexual assault in the first or second degree under section 28-319 or 28-320, sexual assault of a child in the second or third degree under section 28-320.01, incest under section 28-703, or sexual assault of a child in the first degree under section 28-319.01; nor shall there be any time limitations for prosecution or punishment for sexual assault in the third degree under section 28-320 when the victim is under sixteen years of age at the time of the offense.

§ **28-319.01**. **Sexual assault of a child; first degree; penalty**

§ 28-320. Sexual assault; second or third degree; penalty.

§ **28-320.01 Sexual assault of a child; second or third degree; penalties.**

~ ~ ~

Finnern v. Bruner, 167 Neb. 281, 92 N.W.2d 785 (1958)

- A decree awarding alimony and child support in an action for divorce does not become dormant by lapse of time and the defense of the statute of limitations is not available to defeat recovery of delinquent payments.

Don't confuse with the issue of child support liens, as set forth in Section §42-371 (R.R.S. 1998)

….

(2) Child support and spousal support judgments shall cease to be liens on real or registered personal property ten years from the date (a) the youngest child becomes of age or dies or (b) the most recent execution was issued to collect the judgment, whichever is later, and such lien shall not be reinstated;

(3) Alimony and property settlement award judgments, if not covered by subdivision (2) of this section, shall cease to be a lien on real or registered personal property ten years from the date (a) the judgment was entered, (b) the most recent payment was made, or (c) the most recent execution was issued to collect the judgment, whichever is latest, and such lien shall not be reinstated;

Freis v. Harvey, 5 Neb. App. 679, 563 N.W.2d 363 (1997)

- The language of §42-371(2) and its predecessors is plain and unambiguous. ....it in no way altered the rule that child support judgments are not judgments under §25-1515 and thereby are not rendered dormant. Such judgments are likewise not rendered dormant by §42-371(2).

But see: **§43-290**

…

The **juvenile court** shall retain jurisdiction over a parent ordered to pay support for the purpose of enforcing such support order for so long as such support remains unpaid but **not to exceed ten years from the nineteenth birthday of the youngest child for whom support was ordered.**

Statutory Construction/ Interpretation

Groseth v. Groseth, 257 Neb. 525, 600 N.W.2d 159 (1999)

- Courts engaged in an exercise of statutory construction must presume that the Legislature intended a sensible, rather than an absurd, result.
- Courts must look to a statute's purpose and give to the statute a reasonable construction which best achieves that purpose, rather than a construction that would defeat it.

Hendrix v. Sivick, 19 Neb. App. 140 (2011)

Facts: Two Omaha attorneys in government practice can't seem to follow the wording of their divorce decree. The Court reinterprets "shall" as meaning "it would be a good idea if you did, but it is really not necessary."

- As a general rule, in the construction of statutes, the word "shall" is considered mandatory and inconsistent with the idea of discretion. *Forgey v. Nebraska Dept. of Motor Vehicles*, 15 Neb. App. 191, 724 N.W.2d 828 (2006). Nonetheless, while the word "shall" may render a particular statutory provision mandatory in character, when the spirit and purpose of the legislation require that the word "shall" be construed as permissive rather than mandatory, such will be done.

  > "'If the prescribed duty is essential to the main objective of the statute, the statute ordinarily is mandatory and a violation will invalidate subsequent proceedings under it. If the duty is not essential to accomplishing the principal purpose of the statute but is designed to assure order and promptness in the proceeding, the statute ordinarily is directory and a violation will not invalidate subsequent proceedings unless prejudice is shown.'"

  State v. $1,947, 255 Neb. 290, 297, 583 N.W.2d 611, 616-17 (1998).
- The time limitation contained in the decree for Hendrix to submit documentation of expenses to Sivick is not essential to the purpose of the decree. The main principle behind the child support guidelines is to recognize the equal duty of both parents to contribute to the support of their children in proportion to their respective net incomes. Neb. Ct. R. § 4-201. ...[T]he decree does not state that Hendrix forfeits her right to reimbursement for failing to send a request and supporting documentation on a monthly basis.
- Obviously, the parties should abide by the terms of the decree, but it is the obligations of support and not the procedures for documentation which are critical to the child's best interests.

- Hendrix's failure to timely provide such documentation may be relevant to a court's determination of whether Sivick's subsequent failure to timely pay is willful and contumacious, but it provides no reason to entirely discharge Sivick's reimbursement obligation.

Spady v. Spady, 284 Neb. 885, 824 N.W.2d 366 (2012)

- The word "support" in § 42-351(2) is not by its terms limited to child support. Further, we look to the immediately preceding provision, § 42-351(1), which refers to "support of minor children [and] the support of either party." Section 42-351(1) shows that the word "support" is used statutorily in § 42-351 to refer to child support and spousal support, i.e., alimony.
- Components of a series or collection of statutes pertaining to a certain subject matter are in *pari materia* and should be conjunctively considered and construed to determine the intent of the Legislature, so that different provisions are consistent, harmonious, and sensible. *Travelers Indem. Co. v. Gridiron Mgmt. Group*, 281 Neb. 113, 794 N.W.2d 143 (2011).

State v. Casterline, 290 Neb. 985, 863 N.W.2d 148 (2015)

- When an appellate court judicially construes a statute and that construction fails to evoke an amendment, it is presumed that the Legislature has acquiesced in the court's determination of the Legislature's intent.

Supreme Court Rules

https://supremecourt.nebraska.gov/rules

These rules are all the codified Nebraska Supreme Court Rules.

- **CHAPTER 1: ADMINISTRATIVE OPERATIONS**
- **CHAPTER 2: APPEALS**
- **CHAPTER 3: ATTORNEYS AND THE PRACTICE OF LAW**
- **CHAPTER 4: CHILDREN AND FAMILIES**
- **CHAPTER 5: JUDGES**
- **CHAPTER 6: TRIAL COURTS**

Surrogate Parentage

§25-21,200. Contract; void and unenforceable; definition

(1) A surrogate parenthood contract entered into shall be void and unenforceable. The biological father of a child born pursuant to such a contract shall have all the rights and obligations imposed by law with respect to such child.
(2) For purposes of this section, unless the context otherwise requires, a surrogate parenthood contract shall mean a contract by which a woman is to be compensated for bearing a child of a man who is not her husband.

Judge Michael Offner at 2007 adoption day hearing — Hastings celebration.

Tax Exemptions

The IRS is very protective of how it operates. It will not let state courts usurp its rules relating to dependent tax exemptions. Also note that under IRS regulations the parent who actually provides dependent health care coverage (either through their employer, through a policy purchased in the Marketplace, or coverage through Medicaid, CHIP or other government based health care coverage is by default the parent who will be authorized to claim the dependent tax credit on their federal tax return. See
www.irs.gov/uac/Questions-and-Answers-on-the-Individual-Shared-Responsibility-Provision
IRS **Form 8332** allows noncustodial parents to claim a dependent tax credit. See:
http://www.irs.gov/pub/irs-pdf/f8332.pdf

*

Anderson v. Anderson, 290 Neb. 530, 861 N.W.2d 113 (2015)

- A tax dependency exemption is an economic benefit nearly identical to an award of child support or alimony.
- In general, the custodial parent is presumptively entitled to the federal tax exemption for a dependent child.
- A court may exercise its equitable powers and order the custodial parent to execute a waiver of his or her right to claim the tax exemption for a dependent child if the situation of the parties so requires.
- The primary purpose for permitting a trial court to reallocate the exemption is to allow the party paying support to have more disposable income from which to make such payment.
- Allocation of the dependency exemption to the noncustodial parent is not warranted if the parent pays a relatively small amount of child support.

Emery v. Moffett, 269 Neb. 867, 697 N.W.2d 249 (2005)
Foster v. Foster, 266 Neb. 32, 662 NW2d 191 (2003), and…
Hall v. Hall, 238 Neb. 686, 472 N.W.2d 217 (1991)

- We hold that a tax dependency exemption is nearly identical in nature to an award of child support or alimony and is thus capable of being modified as an order of support.

Hall v. Hall, 238 Neb. 686, 472 N.W.2d 217 (1991)

- [T]he fact that [the custodial parent] did not respond to [the non custodial parent]'s motion for modification of their divorce decree is not determinative of the status of the **tax exemptions**. [The noncustodial parent] may not be granted the exemptions simply on [the custodial parent's] failure to respond or appear. Rather, this court, under its equity powers, balances the interests of the parties and then determines where the equities lie.
- The trial court in this case did not specifically allocate the tax exemptions. However, since federal tax laws determine the placement of the exemptions absent reallocation by the state court, the custodial parent is presumed to retain the tax exemptions.

State o/b/o Pathammavong v. Pathammavong, 268 Neb. 1, 679 N.W.2d 749 (2004)

- The general rule that a custodial parent is presumptively entitled to the federal tax exemption for a dependent child. See, I.R.C. § 152(e) (2000); ***Hall v. Hall***, 238 Neb. 686, 472 N.W.2d 217 (1991).
- however....We have held that a Nebraska court having jurisdiction in a divorce action shall have the power to allocate tax dependency exemptions as part of the divorce decree and may order the custodial parent to execute a waiver of his or her right to declare the tax exemptions if the situation of the parties so requires.

Sarpy County Courthouse, Papillion

Temporary Support

Temporary child support – see § 42-357.

Dartmann v. Dartmann, 14 Neb. App. 864, 717 N.W.2d 519 (2006)

"Temporary support" *does not mean the support expires when temporary order expires and is replaced by final decree, which is silent on issue of temporary support.*

- Neb. Rev. Stat. § 42-369(4) (Reissue 2004) provides, in part, that "[o]rders, decrees, and judgments for temporary or permanent support or alimony . . . have the force and effect of judgments when entered." Child support payments become a vested right of the payee in a dissolution action as they accrue. *Gress, supra.* See ***Berg v. Hayworth***, 238 Neb. 527, 471 N.W.2d 435 (1991). A court may not forgive or modify past-due child support.
- [T]he district court may, on motion and satisfactory proof that a judgment has been paid or satisfied in whole or in part by the act of the parties thereto, order it discharged and canceled of record, to the extent of the payment or satisfaction.
- The case law is clear that the district court's ability to discharge an arrearage of child support hinges on satisfactory proof that a judgment has been fully paid or satisfied by the act of both parties.

Huskey v. Huskey, 289 Neb. 439, 855 N.W.2d 377 (2014)

Note: This case focuses more on custody than child support, but is instructive in its discussion of what constitutes a temporary order. It also involves a discussion of Neb. Rev. Stat. § 43-2929.01, which relates to custodial parents who experience military deployments away from Nebraska.

- the Legislature did not intend for appellate review of truly temporary orders entered pursuant to § 43-2929.01(4)(a). That subsection is limited to temporary relief, and orders which do not finally determine the rights of the parties or affect a substantial right are not final orders as defined by § 25-1902.
- we acknowledge the danger that a court might enter a final order disguised as a temporary order under § 43-2929.01(4)(a), that successive temporary orders could be employed in an attempt to evade appellate review, or that a temporary order might persist for such a duration that it would affect a substantial right and constitute a final order despite its label as "temporary." We are not suggesting that under any of those circumstances, a purportedly temporary order would evade appellate review.

Jessen v. Line, 16 Neb. App. 197, 742 N.W.2d 30 (2007)

Facts: Apparently wealthy businessman father plays "hide the ball" with his financial records, preventing mother from ever seeing them, despite 3 court orders. The court of appeals scolds both sides for not resolving that issue using the "persuasive powers" of the trial court.

- [A temporary child] support order was merely an interlocutory order from which no appeal could be taken.
- The fact that the initial [temporary] child support order was interlocutory militates in favor of making the final order retroactive

Rickus v. Rickus, 183 Neb. 140, 158 N. W. 2d 540 (1969)

- [T]emporary orders in the district court allowing alimony, child support, etc., terminate with the rendition of a final decree of divorce or the overruling of a motion for new trial if one be filed. ***Hall v. Hall***, 176 Neb. 555, 126 N. W. 2d 839

Note: All temporary orders are subject to vacation/termination by court order if the parties do not timely follow up with a final, permanent order of support. If a temporary order ends up on the dismissal docket, and dismissed under the case progression standards, the parties will have to start over again. When paternity is involved, the termination of the case terminates the finding of paternity, forcing the child support interests to "start from scratch" with a new complaint for paternity and support.

Termination/ Relinquishment of Parental Rights

This treatise does not attempt to provide an exhaustive treatment on the issue of termination of parental rights. However, often times families affected by child support orders we are charged with enforcing end up in juvenile court with allegations of abuse, neglect, or abandonment. Particularly with the issue of child abandonment our appellate courts seem to be taking a harder line as to what constitutes grounds for termination of parental rights. I will list below a few appellate cases that address these issues and set guidelines for when a parent should have their parental rights and child support responsibilities terminated.

In re Interest of Angelica L. & Daniel L., 277 Neb. 984, 767 N.W.2d 74 (2009)

- The jurisdiction of the State in juvenile adjudication cases arises out of the power every sovereignty possesses as *parens patriae* to every child within its borders to determine the status and custody that will best meet the child's needs and wants.
- a court may not properly deprive a parent of the custody of his or her minor child unless the State affirmatively establishes that such parent is unfit to perform the duties imposed by the relationship, or has forfeited that right.
- The fact that a child has been placed outside the home for 15 or more of the most recent 22 months does not demonstrate parental unfitness. The placement of a child outside the home for 15 or more of the most recent 22 months under Neb. Rev. Stat. § 43-292(7) (Reissue 2008) merely provides a guideline for what would be a reasonable time for parents to rehabilitate themselves to a minimum level of fitness.
- Regardless of the length of time a child is placed outside the home, it is always the State's burden to prove by clear and convincing evidence that the parent is unfit and that the child's best interests are served by his or her continued removal from parental custody.
- The "best interests" standard is subject to the overriding presumption that the relationship between parent and child is constitutionally protected and that the best interests of a child are served by reuniting the child with his or her parent. This presumption is overcome only when the parent has been proved unfit.

See also **In Re Interest Of Nicole M.**, 287 Neb. 685, 844 N.W.2d 65 (2014)

In re Interest of Angelina G. Et Al., 20 Neb. App. 646, 830 N.W.2d 512 (2013)

- Parental rights can be terminated only when the court finds that termination is in the child's best interests.
- A termination of parental rights is a final and complete severance of the child from the parent and removes the entire bundle of parental rights. With such severe and final consequences, parental rights should be terminated only in the absence of any reasonable alternative and as the last resort.
- Where a parent is unable or unwilling to rehabilitate himself or herself within a reasonable time, the best interests of the child require termination of the parental rights. Children cannot, and should not, be suspended in foster care or be made to await uncertain parental maturity.

In re Interest of Mya C. Et Al., 23 Neb. App. 383, 872 N.W.2d 56 (November 2015)

- There is a rebuttable presumption that the best interests of a child are served by having a relationship with his or her parent. *In re Interest of Nicole M.*, 287 Neb. 685, 844 N.W.2d 65 (2014). Based on the idea that fit parents act in the best interests of their children, this presumption is overcome only when the State has proved that a parent is unfit.
- Although we find that statutory grounds for termination exist, parental rights may only be terminated if the court finds that termination is in the child's best interests. § 43-292. A termination of parental rights is a final and complete severance of the child from the parent. *In re Interest of Crystal C.*, 12 Neb. App. 458, 676 N.W.2d 378 (2004). Therefore, with such severe and final consequences, parental rights should be terminated only in the absence of any reasonable alternative and as the last resort.
- A determination of unfitness is distinct from the determination of whether statutory grounds for termination exist. While it may be relevant, the evidence supporting the statutory grounds for termination is not always sufficient to demonstrate parental unfitness. For instance, adjudication under subsection (7), which looks only at the amount of time in which a child has been in an out-of-home placement, does not provide evidence of unfitness. *In re Interest of Aaron D.*, 269 Neb. 249, 691 N.W.2d 164 (2005). While the burden remains with the parent to rehabilitate himself within a reasonable time, the guideline of 15 or more months of the most recent 22 months is merely a guideline of a reasonable time for parental rehabilitation and the passage of time itself does not demonstrate parental unfitness. *In re Interest of Kendra M. et al.*, 283 Neb. 1014, 814 N.W.2d 747 (2012).
- the law does not require perfection of a parent. *In re Interest of Aaron D.*, 269 Neb. 249, 691 N.W.2d 164 (2005). Instead, we should look for the parent's continued improvement in parenting skills and a beneficial relationship between parent and child.
- While we agree with the juvenile court that David is not currently in a position to regain custody, we disagree to the extent that the trial court determined that David could not, within a reasonable time, be in a position to have custody of his children returned to him.

In Re Interest Of Nicole M., 287 Neb. 685, 844 N.W.2d 65 (2014)

- "Children cannot, and should not, be suspended in foster care or be made to await uncertain parental maturity." Citing *In re Interest of Walter W.*, 274 Neb. 859, 872, 744 N.W.2d 55, 65 (2008).

State v. McMillion, 23 Neb. App. 687, 875 N.W.2d 877 (March 2016)

- A natural parent who relinquishes his or her rights to a child by a valid written instrument gives up all rights to the child at the time of the relinquishment. *Monty S. & Theresa S. v. Jason W. & Rebecca W.*, 290 Neb. 1048, 863 N.W.2d 484 (2015). After a decree of adoption has been entered, the natural parents of an adopted child shall be relieved of all parental duties and responsibilities for the child and shall have no rights over the child. Neb. Rev. Stat. § 43-111 (Reissue 2008).

Wayne G. v. Jacqueline W., 21 Neb. App. 551, 842 N.W.2d 125 (2013)
See also **In Re Interest Of Nicole M.**, 287 Neb. 685, 844 N.W.2d 65 (2014)

- For a juvenile court to terminate parental rights under Neb. Rev. Stat. § 43-292 (Cum. Supp. 2012), it must find that one or more of the statutory grounds listed in that section have been satisfied and that termination is in the child's best interests.
- The State must prove these facts by clear and convincing evidence.
- There is a rebuttable presumption that the best interests of a child are served by having a relationship with his or her parent.
- the Nebraska Supreme Court has stated, ""Parental unfitness means a personal deficiency or incapacity which has prevented, or will probably prevent, performance of a reasonable parental obligation in child rearing and which has caused, or probably will result in, detriment to a child's well-being."" *Id.* at 1033-34, 814 N.W.2d at 761, quoting *Uhing v. Uhing*, 241 Neb. 368, 488 N.W.2d 366 (1992).
- The *best interests* analysis and the *parental fitness* analysis are fact-intensive inquiries, and although they are separate inquiries, each examines essentially the same underlying facts as the other.

Arguably the most complex, confusing and frustrating, part of the work of a child support attorney comes in the area of UIFSA – The Uniform Interstate Family Support Act. Think of the saying "Fools rush in where angels fear to tread" and you will get the idea. But you are no angel.... Familiarizing yourself with the statutes will help you a lot. Beware however, thousands of other child support offices across America may still not understand UIFSA, and that will be a constant source of frustration for those who do.

See Generally §42-701 et seq
Selected statutes follow:

§ 42-705 Basis for jurisdiction over nonresident.

(a) In a proceeding to establish or enforce a support order or to determine parentage, a tribunal of this state may exercise personal jurisdiction over a nonresident individual or the individual's guardian or conservator if:

(1) The individual is personally served with notice within this state;

(2) The individual submits to the jurisdiction of this state by consent, by entering a general appearance, or by filing a responsive document having the effect of waiving any contest to personal jurisdiction;

(3) The individual resided with the child in this state;

(4) The individual resided in this state and provided prenatal expenses or support for the child;

(5) The child resides in this state as a result of the acts or directives of the individual;

(6) The individual engaged in sexual intercourse in this state and the child may have been conceived by that act of intercourse;

(7) The individual asserted parentage in this state pursuant to section 43-104.02, 71-628, 71-640.01, or 71-640.02 with the Department of Health and Human Services; or

(8) There is any other basis consistent with the constitutions of this state and the United States for the exercise of personal jurisdiction.

(b) The basis of personal jurisdiction set forth in subsection (a) of this section or in any other law of this state shall not be used to acquire personal jurisdiction for a tribunal of this state to modify a child support order of another state unless the requirements of section 42-746 or 42-747.03 are met.

Source: Laws 1993, LB 500, § 5; Laws 1996, LB 1044, § 101; Laws 2003, LB 148, § 46; Laws 2007, LB296, § 60.

§ 42-709 Continuing, exclusive jurisdiction. .

(a) A tribunal of this state that has issued a child support order consistent with the law of this state has and shall exercise continuing, exclusive jurisdiction to modify its child support order if the order is the controlling order and:

(1) at the time of the filing of a request for modification this state is the residence of the obligor, the individual obligee, or the child for whose benefit the support order is issued; or

(2) even if this state is not the residence of the obligor, the individual obligee, or the child for whose benefit the support order is issued, the parties consent in a record or in open court that the tribunal of this state may continue to exercise jurisdiction to modify its order.

(b) A tribunal of this state that has issued a child support order consistent with the law of this state shall not exercise continuing, exclusive jurisdiction to modify the order if:

(1) all of the parties who are individuals file consent in a record with the tribunal of this state that a tribunal of another state that has jurisdiction over at least one of the parties who is an individual or that is located in the state of residence of the child may modify the order and assume continuing, exclusive jurisdiction; or

(2) its order is not the controlling order.

(c) If a tribunal of another state has issued a child support order pursuant to the Uniform Interstate Family Support Act or a law substantially similar to the act which modifies a child support order of a tribunal of this state, tribunals of this state shall recognize the continuing, exclusive jurisdiction of the tribunal of the other state.

(d) A tribunal of this state that lacks continuing, exclusive jurisdiction to modify a child support order may serve as an initiating tribunal to request a tribunal of another state to modify a support order issued in that state.
(e) A temporary support order issued ex parte or pending resolution of a jurisdictional conflict does not create continuing, exclusive jurisdiction in the issuing tribunal.
Source: Laws 1993, LB 500, § 9; Laws 1997, LB 727, § 3; Laws 2003, LB 148, § 48

§ 42-716. Application of law of this state.
Except as otherwise provided in the Uniform Interstate Family Support Act, a responding tribunal of this state:
(1) shall apply the procedural and substantive law generally applicable to similar proceedings originating in this state and may exercise all powers and provide all remedies available in those proceedings; and
(2) shall determine the duty of support and the amount payable in accordance with the support guidelines established under section 42-364.16.
Source: Laws 1993, LB 500, § 16; ; Laws 2003, LB 148, § 56.

§ 42-718 Duties and powers of responding tribunal
….
(e) If a responding tribunal of this state issues an order under the act, the tribunal shall send a copy of the order to the petitioner and the respondent and to the initiating tribunal, if any.
(f) If requested to enforce a support order, arrearages, or judgment or modify a support order stated in a foreign currency, a responding tribunal of this state shall convert the amount stated in the foreign currency to the equivalent amount in dollars under the applicable official or market exchange rate as publicly reported.
Source: Laws 1993, LB 500, § 18; Laws 1997, LB 727, § 7; Laws 2003, LB 148, § 58

§42-722. Private counsel.
An individual may employ private counsel to represent the individual in proceedings authorized by the Uniform Interstate Family Support Act.
Source: Laws 1993: LB 500, § 22.

§42-728. Nonparentage as defense.
A party whose parentage of a child has been previously determined by or pursuant to law may not plead nonparentage as a defense to a proceeding under the Uniform Interstate Family Support Act.
Source: Laws 1993, LB 500, § 28.

§42-729. Special rules of evidence and procedure
(a) The physical presence of a nonresident party who is an individual in a tribunal of this state is not required for the establishment, enforcement, or modification of a support order or the rendition of a judgment determining parentage.
(b) An affidavit, a document substantially complying with federally mandated forms, or a document incorporated by reference in any of them, which would not be excluded under the hearsay rule if given in person, is admissible in evidence if given under penalty of perjury by a party or witness residing in another state.

I A copy of the record of child support payments certified as a true copy of the original by the custodian of the record may be forwarded to a responding tribunal. The copy is evidence of facts asserted in it, and is admissible to show whether payments were made.
(d) Copies of bills for testing for parentage, and for prenatal and postnatal health care of the mother and child, furnished to the adverse party at least ten days before trial, are admissible in evidence to prove the amount of the charges billed and that the charges were reasonable, necessary, and customary.
(e) Documentary evidence transmitted from another state to a tribunal of this state by telephone, telecopier, or other means that do not provide an original record shall not be excluded from evidence on an objection based on the means of transmission.
(f) In a proceeding under the Uniform Interstate Family Support Act, a tribunal of this state shall permit a party or witness residing in another state to be deposed or to testify under penalty of perjury by telephone, audiovisual means, or other electronic means at a designated tribunal or other location in that state. A tribunal of this state shall cooperate with tribunals of other states in designating an appropriate location for the deposition or testimony.
(g) If a party called to testify at a civil hearing refuses to answer on the ground that the testimony may be self-incriminating, the trier of fact may draw an adverse inference from the refusal.
(h) A privilege against disclosure of communications between spouses does not apply in a proceeding under the act.
(i) The defense of immunity based on the relationship of husband and wife or parent and child does not apply in a proceeding under the act.
(j) A voluntary acknowledgment of paternity, certified as a true copy, is admissible to establish parentage of the child.
Source: Laws 1993, LB 500, § 29; Laws 2003, LB 148, § 67.

§ 42-732 Receipt and disbursement of payments.
…
(b) If neither the obligor, nor the individual obligee, nor the child resides in this state, upon request from the support enforcement agency of this state or another state, the support enforcement agency of this state or a tribunal of this state shall:
(1) direct that the support payment be made to the support enforcement agency in the state in which the obligee is receiving services;

§ 42-735 Administrative enforcement of orders.
(a) A party or support enforcement agency seeking to enforce a support order or an income withholding order, or both, issued by a tribunal of another state may send the documents required for registering the order to a support enforcement agency of this state.
(b) Upon receipt of the documents, the support enforcement agency, without initially seeking to register the order, shall consider and, if appropriate, use any administrative procedure authorized by the law of this state to enforce a support order or an income withholding order, or both. If the obligor does not contest administrative enforcement, the order need not be registered. If the obligor contests the validity or administrative enforcement of the order, the support enforcement agency shall register the order pursuant to the Uniform Interstate Family Support Act.
Source: Laws 1993, LB 500, § 35; Laws 2003, LB 148, § 75

42-740. **Notice of registration of order**.

(a) When a support order or income withholding order issued in another state is registered, the registering tribunal shall notify the nonregistering party. The notice shall be accompanied by a copy of the registered order and the documents and relevant information accompanying the order.

(b) A notice shall inform the nonregistering party:

(1) that a registered order is enforceable as of the date of registration in the same manner as an order issued by a tribunal of this state;

(2) that a hearing to contest the validity or enforcement of the registered order shall be requested within twenty days after notice;

(3) that failure to contest the validity or enforcement of the registered order in a timely manner will result in confirmation of the order and enforcement of the order and the alleged arrearages and precludes further contest of that order with respect to any matter that could have been asserted; and

(4) of the amount of any alleged arrearages.

. . .

Source: Laws 1993, LB 500, § 40; Laws 1997, LB 727, § 16; Laws 2003, LB 148, § 79

§ 42-746 Modification of child support order of another state.

(a) If section 42-747.01 does not apply, except as otherwise provided in section 42-747.03, upon petition a tribunal of this state may modify a child support order issued in another state which is registered in this state, if after notice and hearing the tribunal finds that:

(1) the following requirements are met:

(i) neither the child, nor the individual obligee, nor the obligor resides in the issuing state;

(ii) a petitioner who is a nonresident of this state seeks modification; and

(iii) the respondent is subject to the personal jurisdiction of the tribunal of this state; or

(2) this state is the state of residence of the child, or a party who is an individual is subject to the personal jurisdiction of the tribunal of this state, and all of the parties who are individuals have filed consents in a record in the issuing tribunal for a tribunal of this state to modify the support order and assume continuing, exclusive jurisdiction.

(b) Modification of a registered child support order is subject to the same requirements, procedures, and defenses that apply to the modification of an order issued by a tribunal of this state and the order may be enforced and satisfied in the same manner.

(c) Except as otherwise provided in section 42-747.03, a tribunal of this state shall not modify any aspect of a child support order that cannot be modified under the law of the issuing state, including the duration of the obligation of support. If two or more tribunals have issued child support orders for the same obligor and the same child, the order that controls under section 42-711 establishes the aspects of the support order which are nonmodifiable.

(d) In a proceeding to modify a child support order, the law of the state that is determined to have issued the initial controlling order governs the duration of the obligation of support. The obligor's fulfillment of the duty of support established by that order precludes imposition of a further obligation of support by a tribunal of this state.

(e) On issuance of an order by a tribunal of this state modifying a child support order issued in another state, the tribunal of this state becomes the tribunal having continuing, exclusive jurisdiction.

Source: Laws 1993, LB 500, § 46; Laws 1997, LB 727, § 18; Laws 2003, LB 148, § 82.

Annotations

Under this section and section 42-739, a responding state becomes an issuing state when it assumes continuing, exclusive jurisdiction to modify a foreign child support order and must apply its own substantive law to the modification. Under this section, a responding state acquires jurisdiction to modify the child support provisions of a foreign divorce decree once the following three conditions are met: (1) Both the parents and the children have moved away from the issuing state; (2) one of the parents, who is a nonresident of the responding state, seeks modification in the responding state, and (3) the other parent becomes subject to the personal jurisdiction of the responding state. **Groseth v. Groseth**, 257 Neb. 525, 600 N.W.2d 159 (1999).

UIFSA Registration/ Order Confirmation Process

Practice tip: While a close reading of the relevant statutes shown below indicates that only in cases where an objection to the registration of an out of state order is made must a formal "Order Confirming Registration" be prepared if registration of the order is ultimately confirmed, the better practice for child support practitioners is to always prepare a formal order for the judge's signature, and to have the order specify the amounts of child support owed, any arrears that are owed, any spousal support owed, etc., and also to spell out the effective date that Nebraska will assume collection responsibilities. Include the address of the payment center. A copy should be sent to the obligated parent, and by the clerk of district court to the Nebraska Child Support Payment Center, so that the NCSPC can set the case up on their system. Unless someone sends the NCSPC the notice of confirmation, the case will never be set up. Also, a copy of the confirmation order should be sent to the court that formerly was responsible for enforcement of the order, in order to avoid the obligated parent being "double billed" for support in two states. This is typically done by the party seeking the registration.

42-738 Effect of registration for enforcement.
(a) A support order or income withholding order issued in another state is registered when the order is filed in the registering tribunal of this state.
(b) A registered order issued in another state is enforceable in the same manner and is subject to the same procedures as an order issued by a tribunal of this state.
(c) Except as otherwise provided in sections 42-736 to 42-747.03, a tribunal of this state shall recognize and enforce, but shall not modify, a registered order if the issuing tribunal had jurisdiction.
Source: Laws 1993, LB 500, § 38; Laws 2003, LB 148, § 77.

§ 42-740 Notice of registration of order.
(a) When a support order or income withholding order issued in another state is registered, the registering tribunal shall notify the nonregistering party. The notice shall be accompanied by a copy of the registered order and the documents and relevant information accompanying the order.
(b) A notice shall inform the nonregistering party:
(1) that a registered order is enforceable as of the date of registration in the same manner as an order issued by a tribunal of this state;

(2) that a hearing to contest the validity or enforcement of the registered order shall be requested within twenty days after notice;

(3) that failure to contest the validity or enforcement of the registered order in a timely manner will result in confirmation of the order and enforcement of the order and the alleged arrearages and precludes further contest of that order with respect to any matter that could have been asserted; and

(4) of the amount of any alleged arrearages.

(c) If the registering party asserts that two or more orders are in effect, a notice shall also:

(1) identify the two or more orders and the order alleged by the registering person to be the controlling order and the consolidated arrearages, if any;

(2) notify the nonregistering party of the right to a determination of which is the controlling order;

(3) state that the procedures provided in subsection (b) of this section apply to the determination of which is the controlling order; and

(4) state that failure to contest the validity or enforcement of the order alleged to be the controlling order in a timely manner may result in confirmation that the order is the controlling order.

(d) Upon registration of an income withholding order for enforcement, the registering tribunal shall notify the obligor's employer pursuant to the Income Withholding for Child Support Act or sections 42-347 to 42-381.

Source: Laws 1993, LB 500, § 40; Laws 1997, LB 727, § 16; Laws 2003, LB 148, § 79.

§ 42-741 Procedure to contest validity or enforcement of registered order.

(a) A nonregistering party seeking to contest the validity or enforcement of a registered order in this state shall request a hearing within twenty days after notice of the registration. The nonregistering party may seek to vacate the registration, to assert any defense to an allegation of noncompliance with the registered order, or to contest the remedies being sought or the amount of any alleged arrearages pursuant to section 42-742.

(b) If the nonregistering party fails to contest the validity or enforcement of the registered order in a timely manner, the order is confirmed by operation of law.

If a nonregistering party requests a hearing to contest the validity or enforcement of the registered order, the registering tribunal shall schedule the matter for hearing and give notice to the parties of the date, time, and place of the hearing.

Source: Laws 1993, LB 500, § 41

§ 42-742 Contest of registration or enforcement.

(a) A party contesting the validity or enforcement of a registered order or seeking to vacate the registration has the burden of proving one or more of the following defenses:

(1) the issuing tribunal lacked personal jurisdiction over the contesting party;

(2) the order was obtained by fraud;

(3) the order has been vacated, suspended, or modified by a later order;

(4) the issuing tribunal has stayed the order pending appeal;

(5) there is a defense under the law of this state to the remedy sought;

(6) full or partial payment has been made;

(7) the statute of limitation under section 42-739 precludes enforcement of some or all of the alleged arrearages; or

(8) the alleged controlling order is not the controlling order.

(b) If a party presents evidence establishing a full or partial defense under subsection (a) of this section, a tribunal shall stay enforcement of the registered order, continue the proceeding to permit production of additional relevant evidence, and issue other appropriate orders. An uncontested portion of the registered order may be enforced by all remedies available under the law of this state.

(c) If the contesting party does not establish a defense under such subsection to the validity or enforcement of the order, the registering tribunal shall issue an order confirming the order.

Source: Laws 1993, LB 500, § 42; Laws 2003, LB 148, § 80

§ 42-743 Confirmed order.

Confirmation of a registered order, whether by operation of law or after notice and hearing, precludes further contest of the order with respect to any matter that could have been asserted at the time of registration.

Source: Laws 1993, LB 500, § 43

§ 42-745 Effect of registration for modification.

A tribunal of this state may enforce a child support order of another state registered for purposes of modification, in the same manner as if the order had been issued by a tribunal of this state, but the registered order shall be modified only if the requirements of section 42-746, 42-747.01, or 42-747.03 have been met.

Source: Laws 1993, LB 500, § 45; Laws 2003, LB 148, § 81.

Groseth v. Groseth, 257 Neb. 525, 600 N.W.2d 159 (1999)

- Under the Uniform Interstate Family Support Act, Neb. Rev. Stat. §42-709(a), an issuing state loses continuing, exclusive jurisdiction to modify child support provisions of a divorce decree once both parents and all their children move away from that state.
- a responding state acquires jurisdiction to modify the child support provisions of a foreign decree once the following three conditions are met: (1) Both the parents and the children moved away from the issuing state; (2) one of the parents, who is a nonresident of the responding state, seeks modification in the responding state; and (3) the other parent becomes subject to the personal jurisdiction of the responding state.

Hamilton v. Foster, 260 Neb. 887, 620 N.W.2d 103 (2000)

- UIFSA's provisions may only be used to enforce an existing support order, establish a support order where no order has previously been established, or modify an existing support order. See § § 42-714 and 42-733.

Lamb v. Lamb, 14 Neb. App. 337, 707 N.W.2d 423 (2005)

The silence of the Lambs when this case was decided must have been deafening...

- UCCJEA ≠ UIFSA
- The Nebraska Child Custody Jurisdiction Act does not confer subject matter jurisdiction upon a Nebraska court to modify a child support order issued by another state.
- The **modification of another state's child support order** must be addressed under the Uniform Interstate Family Support Act, Neb. Rev. Stat. §§42-701 to 42-751 (Reissue 2004).
- The Uniform Interstate Family Support Act provides a system where only one child support order may be in effect at any one time.

- Upon petition, a tribunal of this state may modify a child support order issued in another state which is registered in this state if, after notice and hearing, the tribunal finds that (1) neither the child nor the individual obligee nor the obligor resides in the issuing state, a petitioner who is a nonresident of Nebraska seeks modification, and the respondent is subject to the personal jurisdiction of the Nebraska district court or (2) Nebraska is the state of residence of the child, or a party who is an individual is subject to the personal jurisdiction of the Nebraska district court, and all of the parties who are individuals have filed consents in a record in the issuing tribunal for the Nebraska district court to modify the support order and assume continuing exclusive jurisdiction.
- A party seeking to modify a child support order issued in another state shall register that order in Nebraska in accordance with Neb. Rev. Stat. 42-736 to 42-739 (Reissue 2004) if the order has not been previously registered.
- Failure to register an order as required under the Uniform Interstate Family Support Act precludes a Nebraska court from modifying the issuing state's child support order.
- Registering a child support order issued by another state under the Nebraska Uniform Enforcement of Foreign Judgments Act does not confer subject matter jurisdiction on a Nebraska court to modify the foreign order with respect to payments to be made in the future.
- A district court may modify a registered child support order issued in another state when, among other requirements, the petitioner seeking modification is a nonresident of Nebraska.

Trogdon v. Trogdon, 18 Neb. App. 313, 780 N.W.2d 45 (2010)

Facts: Parties divorced in California. Mom and child later move to Nebraska and Dad moves to Washington State. Years later Mom registers the California divorce in her home state of Nebraska, and seeks to enforce against Dad in Washington. Dad is mailed a copy of the registration by the clerk of district court, and files a written objection on his own with the court, disputing the amount of alleged arrears, but not the court's lack of personal jurisdiction over him. Two months later, in preparation for the evidentiary hearing on his objection, he hires an attorney, who files an objection, claiming the Nebraska court lacks personal jurisdiction over him. The district court rules that it did have jurisdiction. He later appeals.

Held: when the father filed his objection to the registration, he asked the court to address the merits of the cause of action. This simple fact gave the Nebraska court jurisdiction over him.

- Personal jurisdiction is the power of a tribunal to subject and bind a particular entity to its decisions. *Hunt v. Trackwell*, 262 Neb. 688, 635 N.W.2d 106 (2001). Lack of personal jurisdiction may be waived and such jurisdiction conferred by the conduct of the parties. *Id.* For example, a party that files an answer generally denying the allegations of a petition invokes the court's power on an issue other than personal jurisdiction and confers on the court personal jurisdiction.
- Similarly, a party who does more than call a court's attention to the lack of personal jurisdiction by asking for affirmative relief will not later be heard to claim that the court lacked jurisdiction over that party. *Glass v. Nebraska Dept. of Motor Vehicles*, 248 Neb. 501, 536 N.W.2d 344 (1995).
- a confirmed support order cannot be contested with respect to any matter that could have been asserted at the confirmation hearing.
- [UIFSA] Section 42-742 goes on to enumerate the specific defenses which can be raised when contesting the validity or enforcement of a registered order and the effect of a validly raised defense. Section 42-742 provides:

(a) A party contesting the validity or enforcement of a registered order or seeking to vacate the registration has the burden of proving one or more of the following defenses:

(1) the issuing tribunal lacked personal jurisdiction over the contesting party;
(2) the order was obtained by fraud;
(3) the order has been vacated, suspended, or modified by a later order;
(4) the issuing tribunal has stayed the order pending appeal;
(5) there is a defense under the law of this state to the remedy sought;
(6) full or partial payment has been made;
(7) the statute of limitation under section 42-739 precludes enforcement of some or all of the alleged arrearages; or
(8) the alleged controlling order is not the controlling order.

(b) If a party presents evidence establishing a full or partial defense under subsection (a) of this section, a tribunal shall stay enforcement of the registered order, continue the proceeding to permit production of additional relevant evidence, and issue other appropriate orders. An uncontested portion of the registered order may be enforced by all remedies available under the law of this state.

(c) If the contesting party does not establish a defense under such subsection to the validity or enforcement of the order, the registering tribunal shall issue an order confirming the order.

- [UIFSA] Section 42-742(a)(5) clearly provides that if "there is a defense under the law of this state to the remedy sought," such defense can be raised prior to confirmation of a foreign support order. The Nebraska Supreme Court has previously held that the doctrine of equitable estoppel is a possible defense in proceedings concerning the enforcement or modification of support orders... *Truman v. Truman*, 256 Neb. 628, 633-34, 591 N.W.2d 81, 85 (1999)

Wills v. Wills, 16 Neb. App. 559, 745 N.W.2d 924 (2008)

***Facts*:** 1992 New Mexico divorce. Dad to pay child support until children emancipate under NM law (age 18). Later both parents and the children move to NE, and Mom has NE district court modify, and court resets emancipation age to 19. **Held**: No can do!

- Section 42-746 states, in pertinent part:

  (c) Except as otherwise provided in section 42-747.03, a tribunal of this state shall not modify any aspect of a child support order that cannot be modified under the law of the issuing state, including the duration of the obligation of support. . . .

  (d) In a proceeding to modify a child support order, the law of the state that is determined to have issued the initial controlling order governs the duration of the obligation of support. The obligor's fulfillment of the duty of support established by that order precludes imposition of a further obligation of support by a tribunal of this state.

- Despite a basic difference in the nature of the case, we rely upon the decision in ***Groseth v. Groseth***, 257 Neb. 525, 600 N .W.2d 159 (1999), for guiding principles. ... First, we properly look to the official comments contained in a model act on which a Nebraska statute or series of statutes was patterned for some guidance in an effort to ascertain the intent of the legislation. *Id.* Second, dicta in *Groseth* supports our interpretation. Third, a court must look to a statute's purpose and give to the statute a reasonable construction which best achieves that purpose, rather than a construction which would defeat it.

- A comment to the 2001 UIFSA amendments...(states): The fact that the State of the new controlling order has a different duration of for [sic] child support is specifically declared to be irrelevant by UIFSA. ... This comment refers to the 2001 amendment to UIFSA § 611 adding a new section (d), which was, in turn, adopted essentially verbatim by the Nebraska Legislature as the current § 42-746(d). Section 42-476(c) was also amended to expressly refer to the duration of the obligation of support as an aspect that cannot be modified under the law of the issuing state.
- [T]he duration of the support obligation remains fixed despite the subsequent residence of all parties in a new state with a different duration of child support.

Freeman v. Groskopf, 286 Neb. 713, 838 N.W.2d. 300 (2013)

The issue on appeal was whether the district court's upward modification of support was correct, and whether the increased level of support ordered should have applied retroactively, after the trial court found the obligated parent had acted in "bad faith".

- although we have concluded that in the absence of bad faith, it is an abuse of discretion to retroactively apply the modification when the obligated parent does not have the ability to pay, we have never held the converse. In other words, we have never held that where there is bad faith and an inability to pay, the trial court *must* make the modification retroactive.

Marr v. Marr, Jr., 245 Neb. 655, 515 N.W.2d 118 (1994)

Facts: Obligated parent/self employed paving contractor tried to get his child support modified and reduced, but evidence showed he owed $14,000 in past due support and had made no real effort to pay support despite earning a modest income. Held: Unclean hands prevents the court from modifying his support order.

- "He who seeks equity must do equity" and ... a party seeking equitable relief must come into court with "clean hands
- Had appellant presented a record where he consistently attempted to discharge his duty to support his child, in an amount reflecting a bona fide effort to perform his parental (and court-ordered) duty of support, a different case might be presented

Snodgrass v. Snodgrass, 241 Neb. 43, 486 N.W.2d 215 (1992)

Facts: Noncustodial father, after having been found to be in willful contempt of court for failure to make child support payments for his two minor children, filed an application to modify the divorce decree. In the application, he alleged that he was not the father of the older child and sought a paternity determination as well as custody of the younger child. The mother of the children successfully contended that the application should be dismissed on the ground that the petitioner had failed to come to the court with clean hands by virtue of the contempt order and child support arrearage.

- In affirming the district court's dismissal of the application, we determined that it was supported by a record which showed that the "[father's] conduct since the dissolution of the marriage has been to pay no child support unless compelled by the court" and that it was his "flagrant and continuing contempt of court" which precluded him from obtaining relief.

State o/b/o Pathammavong v. Pathammavong, 268 Neb. 1, 679 N.W.2d 749 (2004)

- When a party owes past-due child support, the failure to pay must be found to be a willful failure to pay, in spite of an ability to pay, before an application to modify child support may be dismissed on the basis of unclean hands.

Voichoskie v. Voichoskie, 215 Neb. 775, 340 N.W.2d 442 (1983)

- Conduct which forms a basis for a finding that a party has "unclean hands" must be willful in nature.
- *Citing* 1 Pomeroy, Equity Jurisprudence (3d ed.) sec. 397: 'Whenever a party, who, as actor, seeks to set the judicial machinery in motion and obtain some remedy, has violated conscience, or good faith, or other equitable principle, in his prior conduct, then the doors of the court will be shut against him *in limine*; the court will refuse to interfere on his behalf, to acknowledge his right, or to award him any remedy.'

Visitation Credits

§ 4-210 of the guidelines provides in part:

Visitation or parenting time adjustments or direct cost sharing should be specified in the support order. *An adjustment in child support may be made at the discretion of the court when visitation or parenting time substantially exceeds alternating weekends and holidays and 28 days or more in any 90-day period.* During visitation or parenting time periods of 28 days or more in any 90-day period, support payments may be reduced by up to 80 percent. The amount of any reduction for extended parenting time shall be specified in the court's order and shall be presumed to apply to the months designated in the order.

CASS COUNTY COURTROOM FIREPLACE

An online Visitation Credit form is available at: www.sarpy.com/childsupport/documents/AffidavitforSummerVisitationCredit07.pdf

Miscellaneous

Part I: Cases addressing Miscellaneous Civil, Technical & "Housekeeping" Related rules and issues

Andersen v. American Family Mut. Ins. Co., 249 Neb. 169, 542 N.W.2d 703 (1996),

- Unless otherwise provided by order of the district court, a **term of court** begins on January 1 of a given year and ends on December 31 of that same year.

Berg v. Hayworth, 238 Neb 527, 471 N.W.2d 435 (1991)

- Child support payments are a vested right of the payee in a dissolution action as they accrue, and such payments may be changed only by modification of the decree.

Bevard v. Kelly, 15 Neb. App. 960, 739 N.W.2d 243 (2007)

- A *nunc pro tunc* order operates to correct a clerical error or scrivener's error, not to change or revise a judgment or order, or to set aside a judgment actually rendered, or to render an order different from the one actually rendered, even if such order was not the order intended.
- The true function of an order nunc pro tunc is to correct the record which has been made, so that it will truly record the action really had, but which through some inadvertence or mistake has not been truly recorded. ***Andrews v. Nebraska State Railway Commission***, 175 Neb. 222, 121 N.W.2d 32 (1963).
- § 25-2001(3) expressly provides that the court may correct clerical errors *at any time* either on the court's initiative or on the motion of any party.

Conrad v. Conrad, 208 Neb. 588, 304 N.W.2d 674 (1981)
Eliker v. Eliker, 206 Neb. 764, 295 N.W.2d 268 (1980)

- Neither of the parties is authorized to interfere with the court's orders and only the court can determine what, if any, adjustments should be made.

Continental Oil Co. v. Harris, 214 Neb. 422, 333 N.W.2d 921 (1983).

- [T]he office of an **order** ***nunc pro tunc*** is to correct a record which has been made so that it will truly record the action had, which through inadvertence or mistake was not truly recorded. It is not the function of an order *nunc pro tunc* to change or revise a judgment or order, or to set aside a judgment actually rendered, or to render an order different from the one actually rendered, even though such order was not the order intended.
  See also **State v. Sims**, 277 Neb. 192, 761 N.W.2d 527 (2009)
- [T]he general rule that a judgment is no longer open to amendment, revision, modification, or correction after the term at which it was rendered does not apply where the purpose is to correct or amend clerical or formal errors so as to make the record entry speak the truth and show the judgment which was actually rendered by the court.
- Given the discrepancy between the orally pronounced sentence ... and the written entry relating thereto, we conclude that the orally pronounced sentence is controlling
- **Neb. Rev. Stat. §25-2001(3)** (Reissue 2008) states that "[c]lerical mistakes in judgments, orders, or other parts of the record and errors therein arising from oversight or omission may be corrected by the court by an order *nunc pro tunc* at any time on the court's initiative or on the motion of any party . . . ."

Dartmann v. Dartmann, 14 Neb. App. 864, 717 N.W.2d 519 (2006)

- [T]he district court's ability to discharge an arrearage of child support hinges on satisfactory proof that a judgment has been fully paid or satisfied by the act of both parties. Neb. Rev. Stat. §42-369(4) (Reissue 2004) provides, in part, that "[o]rders, decrees, and judgments for

temporary or permanent support or alimony . . . have the force and effect of judgments when entered." A court may not forgive or modify past-due child support.

- Child support payments become a vested right of the payee in a dissolution action as they accrue.
- Where the final decree is silent with respect to accrued, unpaid **temporary child support**, it remains a judgment against the obligated parent. *However*, the district court may, on motion and satisfactory proof that a judgment has been paid or satisfied in whole or in part by the act of the parties thereto, order it discharged and canceled of record, to the extent of the payment or satisfaction.

Eliker v. Eliker, 206 Neb. 764, 295 N.W.2d 268 (1980)

- **Requests for admissions** (made upon the county attorney) were irrelevant, not only to the proceedings under § 42-358, but to the action brought pursuant to § 42-364.01 as well.
- When a court orders the payment of child support, it means to have such order followed. We cannot be more emphatic in that regard.

Evans v. Frakes, 293 Neb. 253, 876 N.W.2d 626 (April 2016)

- A court that has jurisdiction to make a decision also has the power to enforce it by making such orders as are necessary to carry its judgment or decree into effect.

Gase v. Gase, 266 Neb. 975, 671 N.W.2d 223 (2003)

- The Nebraska Supreme Court will take **judicial notice** of general rules and regulations established and published by Nebraska state agencies under authority of law. Likewise, the court will take judicial notice of rules and regulations established and published by federal agencies under authority of law.

Golden Five Inc. v. Dept. of Social Services, 229 Neb. 148, 425 N.W.2d 865 (1988)
In Re Applications A-16027 Et Al., 242 Neb. 315, 495 N.W.2d 23 (1993)

- [T]he Department (of Health and Human Services) has no power to declare a **statute** unconstitutional.
- The power to declare an act of the Legislature unconstitutional is a judicial power reserved solely to the courts under the division of powers between the legislative, executive, and judicial branches of government set forth in the Nebraska Constitution.

Harvey v. Harvey, 6 Neb. App. 524, 575 N.W. 2d 167 (1998)

- Part and parcel of the notion that a foreign divorce decree, or as in this case an order of support, may be collaterally attacked in this state is the doctrine of the **divisibility of foreign divorce decrees**. "The **'divisibility doctrine'** holds that while a state court may have jurisdiction over the marriage to cause its termination, that same court may lack personal jurisdiction to adjudicate 'personal matters' such as support or alimony." ***Tiedeman v. Tiedeman***, 195 Neb. 15, 17, 236 N.W.2d 807, 809 (1975).
- Although a court may have jurisdiction so that the termination of the marital status is entitled to full faith and credit, this recognition may be withheld from an accompanying money judgment when personal jurisdiction is lacking.

Hicklin v. Hicklin, 244 Neb. 895, 509 N.W.2d 627 (1994)

- An action to **annul a marriage** sounds in equity. As such, an appellate court reviews annulment cases de novo on the record.
- we now hold that in an action for dissolution or annulment, a parent may accept child support and yet appeal other issues in the decree.
- An innocent party is one who "entered into the contract of marriage in good faith supposing the other to be capable of contracting."
- In order to determine the proper meaning of good faith, we look to the putative marriage doctrine [see § 42-378]. ... The putative marriage doctrine provides that, when a marriage is declared a nullity, the civil effects of a legal marriage will continue to flow to the parties who contracted the marriage in good faith.... In other words, a putative spouse will have many of the rights of an actual spouse. ... Good faith, in the context of a putative marriage, means an honest and reasonable belief that the marriage was valid at the time of the ceremony.
- We hold that § 42-378 applies when one or both of the parties are innocent.
- See also *Randall v. Randall*, 216 Neb. 541, 345 N.W.2d 319 (1984).

In re Interest of Brittany C. et al., 13 Neb. App. 411, 693 N.W.2d 592 (2005)

- For purposes of appeal, papers requested to be **judicially noticed** must be marked, identified, and made part of record

Mace v. Mace, 13 Neb. App. 896, 703 N.W.2d 624 (2005)

- Under the "**law of the case**" doctrine, holdings of an appellate court on questions presented to it in reviewing proceedings of the trial court conclusively settle, for the purpose of that litigation, all matters ruled upon, either expressly or by necessary implication.

Medlock v. Medlock, 263 Neb. 666, 642 N.W.2d 113 (2002)

- A party cannot complain of error which that party has invited the court to commit.
- A party cannot ask a court to use income averaging for a certain number of years in modifying support, then object to the court when it averages income for a different set of years. See ***Willcock v. Willcock***, 12 Neb. App. 422 (2004)

Murray v. Stine, 291 Neb., 125, 864 N.W.2d 386 (June 2015)

- Attorney fees, where recoverable, are generally treated as an element of court costs. And an award of costs in a judgment is considered a part of the judgment.
- silence of a judgment on the issue of attorney fees must be construed as a denial of the request.
- when a motion for attorney fees under § 25-824 is made prior to the judgment of the court in which the attorney's services were rendered, the judgment will not become final and appealable until the court has ruled upon that motion.

Schroeder v. Schroeder, 223 Neb. 684, 392 N.W.2d 787 (1986)

- A plaintiff may enter a **dismissal** as a matter of right at any time before final submission of a case.
- Temporary orders perish at the moment the Plaintiff's suit ceases to exist.

Smith v. Smith, 201 Neb. 21, 265 N.W.2d 855 (1978)

1. Courts: Divorce: Infants: Child Support. Where a divorce decree provides for the payment of stipulated sums monthly for the support of a minor child or children, contingent only upon a subsequent order of the court, such **payments become vested in the payee** as they accrue. The courts are without authority to reduce the amounts of such accrued payments.
2. Equity: Time. Where the obligation is clear and its essential character has not been changed by lapse of time, equity will enforce a claim of long standing as readily as one of recent origin, especially between the immediate parties to the litigation.
3. Equity: **Laches**. The defense of laches prevails only when it has become inequitable to enforce the claimant's right, and it is not available to one who has caused or contributed to the cause of delay or to one who has had it within his power to terminate the action.
4. Courts: Child Support: **Estoppel**. This court does not have authority to reduce past-due installments of child support. This is not to say, however, that it may not find in a proper case that a party has equitably estopped herself from collecting installments accruing after some affirmative action which would ordinarily terminate future installments.

5. Estoppel: Equity: Public Policy. Equitable estoppel is based upon grounds of public policy and good faith and is interposed to prevent injustice and inequitable consequences. Ordinarily, there must be a reliance in good faith upon statements or conduct of the party to be estopped and a change of position by the party claiming the estoppel to his injury, detriment, or prejudice.

Thomas & Thomas Court Reporters v. Switzer, 283 Neb. 19, 810 N.W.2d 677 (2012)

- *Pro se* litigants are not entitled to recover attorney fees, even if the pro se litigant is a licensed attorney.

Thornton v. Thornton, 13 Neb. App. 912, 704 N.W.2d 243 (2005)

- **Service of Process: Notice.** Pursuant to Neb. Rev. Stat. §25-517.02 (Reissue 1995), upon motion and showing by affidavit that service cannot be made with reasonable diligence by any other method provided by statute, the court may permit service to be made (1) by leaving the process at the defendant's usual place of residence and mailing a copy by first-class mail to the defendant's last-known address, (2) by publication, or (3) by any manner reasonably calculated under the circumstances to provide the party with actual notice of the proceedings and an opportunity to be heard.
- Statutes prescribing the manner of service of summons are mandatory and must be strictly complied with. Service by certified mail is not sufficient when statute required notice to be sent by first-class mail.

White v. Mertens, 225 Neb. 241, 404 N.W.2d 410 (1987)

- Absent other statutory remedy, unwed father has recourse to **declaratory judgment** statutes to establish parental rights. See §25-21,149 et seq.

Part II: Other Miscellaneous Cases:

Boyle v. Boyle, 12 Neb. App. 681, 684 N.W.2d 49 (2004)

- When a document is ambiguous, the meaning of the document is a question of fact and the trier of fact determines the intent of the parties from all the facts and circumstances. The trier of fact's determination in this regard will be upheld on appeal unless clearly erroneous.

Brockman v. Brockman, 264 Neb. 106, 646 N.W.2d 594 (2002)

- Reasonable **security** for payment of child support under Neb. Rev. Stat. § 42-371(6) should be invoked only when extraordinary circumstances require it.

Gordon v. Gordon, 231 Neb. 857, 438 N.W.2d 762 (1989)

- It is axiomatic that under Nebraska law the right to receive **child support** payments pursuant to a decree of dissolution is a **property right** of the custodial parent. Neb. Rev. Stat. §42-364(4) *(note: this statute has since been amended, see §42-364(6)).* The custodial parent becomes a judgment creditor who may collect or enforce the child support judgment by execution and the means authorized for collection of money judgments.

Gress v. Gress, 274 Neb. 686, 743 N.W.2d 67 (2007)

- Requiring a parent to pay a share of their child's **daycare** obligation is also subject to paragraph R's basic subsistence limitation. It is an abuse of discretion for a trial court to order a parent to pay a share of their child's day care expenses if those costs will drive the parent below the poverty guidelines as set forth in Paragraph R. of the child support guidelines.
- increased financial obligations, like decreased income, also qualify as a change in one's financial position. As a result, if (the NCP) is ever forced to pay for daycare and his income is reduced below the poverty line as a result, Patrick may seek a **modification** of the court's child support order.

In re Interest of Chance J., 279 Neb. 81, 776 N.W.2d 519 (2009)

***Note**: This opinion reverses a horrible opinion authored by the Nebraska Court of Appeals at* 17 Neb. App. 645, 768 N.W.2d 472.

- Children born to the parties in a marriage are presumed legitimate until proved otherwise or decreed otherwise by the court.
- A court may not properly deprive a parent of the custody of his or her minor child unless the State affirmatively establishes that such parent is unfit to perform the duties imposed by the relationship, or has forfeited that right. It is always the State's burden to prove by clear and convincing evidence that the parent is unfit and that the child's best interests are served by his or her continued removal from parental custody.
- In determining whether parental rights should be terminated based on abandonment, paternal uncertainty based on physical appearance of a child or suspicions of infidelity is not just cause or excuse for abandoning a child born into wedlock, especially when there are ample means to verify one's paternity.
- For purposes of § 43-292(1), " abandonment" is a parent's intentionally withholding from a child, without just cause or excuse, the parent's presence, care, love, protection, maintenance, and the opportunity for the display of parental affection for the child.

Jorn v. Pigs Unlimited, Inc., 255 Neb. 876, 587 N.W.2d 558 (1998)

- The term "impairment" is a medical assessment, while the term "**disability**" is a legal issue.

Moore v. Bauer, 11 Neb. App. 572, 657 N.W.2d 25 (2003)

- It is not unusual for a parent or parents to have continuing financial obligations regarding their children beyond the age of majority. There is no authority, statutory or otherwise, that requires a court to consider these types of expenses in determining the child support obligation for the remaining minor child or children.

Phillips v. Industrial Machine, 257 Neb. 256, 278, 597 N.W.2d 377, 392 (1999)

- **Permanent medical impairment** is related directly to the health status of the individual, whereas **disability** can be determined only within the context of the personal, social, or occupational demands, or statutory or regulatory requirements that the individual is unable to meet as a result of the impairment. (Gerrard, J., concurring).

Reed v. Reed, 277 Neb. 391, 763 N.W.2d 686 (2009)

- [A] child support creditor may use the Uniform Fraudulent Transfer Act (UFTA) to pursue transferred assets that are needed to satisfy a child support award. (*see also* ***Parker v. Parker***, 268 Neb. 187, 681 N.W.2d 735 (2004))
- An action under the UFTA is equitable in nature, and all persons whose rights will be directly affected by a decree in equity must be joined as parties in order that complete justice may be done and that there may be a final determination of the rights of all parties interested in the subject matter of the controversy
- It has been held that if an action is brought for wrongful transfer and it is possible to fashion relief which does not adversely affect the transferee's interest, then the transferee may not need to be joined in an action for judgment of damages against a defendant.
- "[d]issipation of marital assets" is defined as one spouse's use of marital property for a selfish purpose unrelated to the marriage at the time when the marriage is undergoing an irretrievable breakdown.

Ropken v. Ropken, 169 Neb. 352, 99 N.W.2d 480 (1959)

Nebraska will recognize common law marriages entered into consistent with the law of the state the parties resided in when such marriage is deemed to have begun.

- The validity of a marriage is determined by the law of the place where it was contracted; if valid there it will be valid everywhere.
- **Common-law marriages** are not recognized in Nebraska by legislative enactment.
- Cohabitation in Nebraska without a ceremonial marriage is meretricious. It is not evidence of a marital status in this state. It is presumed that a meretricious relationship having its origin in this state continues to be such. Necessarily, the presumption follows even when the parties subsequently live in a state recognizing common-law marriages.

State v. Kudlacz, 288 Neb. 656, 850 N.W.2d 755 (2014)

- A case is not authority for any point not necessary to be passed on to decide the case or not specifically raised as an issue addressed by the court.

- We therefore hold that confinement in the county jail as a condition of probation does not bar a person from seeking to have a conviction set aside pursuant to § 29-2264.

Additional Information & Resources

Nebraska Child Support Enforcement Association – www.ncsea.info/

National Child Support Enforcement Association (NCSEA) – www.ncsea.org/

Nebraska Attorney General/ A.G. Opinions – www.ago.state.ne.us/

Nebraska Crime Commission/CLE – www.ncc.ne.gov/calendar/calendar_cle.htm

Western Interstate Child Support Enforcement Council (WICSEC) - www.wicsec.org/

Amended and expanded rules for use of interpreters in Courts:

There are now 9 pages of court rules regarding the use of interpreters in the court system of Nebraska. See http://www.supremecourt.ne.gov/rules/pdf/Ch6Art7.pdf for full details.

Interpreter costs are eligible for federal/state reimbursement

The Nebraska Supreme Court amended rules for use of interpreters, effective 7-01-2007. With interpreter costs rising, it is important to note that these costs are eligible for reimbursement by your office or by the court. See generally www.supremecourt.ne.gov/rules/amendments/feescheduleamdmt.pdf and www.supremecourt.ne.gov/rules/amendments/interpreteramdmts.pdf

A portion of the updated court rule is reprinted below:

The Nebraska Supreme Court establishes the following interpreter fee schedule:

A. For interpreters: $35.00 per hour, two hour minimum.

B. For an interpreter who is a Nebraska Supreme Court Certified Court Interpreter, $50.00 per hour, two hour minimum.

C. (1) Certified sign interpreters for the deaf and hard of hearing, $50.00 per hour. (Certified sign interpreters possess a Level I classification pursuant to rule 1D of the Supreme Court Rules Relating to Court Interpreters, i.e., interpreters who hold at least one of the following RID certificates: Specialist Certificate: Legal (SC:L), NIC Master, NIC Advanced, CI/CT, CSC. Deaf interpreters who hold CLIP-R or CDI).

(2) Non-certified sign interpreters, $35.00 per hour. (Non-certified sign interpreters possess a Level II classification pursuant to rule 1D of the Supreme Court Rules Relating to Court Interpreters, i.e., interpreters who hold RID NIC, RID CI, RID CT, NAD 4 or 5, QAST 4/4 or higher. Deaf interpreters who hold a Nebraska Specialist Intermediary License).

D. Unless otherwise agreed to, interpreters shall be paid by the hour in thirty minute increments. Time shall be determined by using the next highest thirty minute increment (i.e., 2 hours 4 minutes equals 2 hours 30 minutes).

IRS Mileage Reimbursement, Effective February 1, 2016

This is effective for 2016. The IRS has set the mileage reimbursable rate to 54 cents per mile. Section 23-1112 outlines the procedures for county officials to receive reimbursement for mileage to perform/attend county functions. http://www.gsa.gov/portal/content/100715

Nebraska Worker's Compensation Court update

Nebraska Workers' Compensation maximum income benefit set at $785.00 per week in 2016

http://www.wcc.ne.gov/legal/benefit_rates.aspx

Nebraska Worker's Compensation Court Web Site: www.wcc.ne.gov/

Effective January 1, 2016, the maximum weekly income benefit under the Nebraska Workers' Compensation Act is $785.00. This amount applies to work-related injuries and illnesses occurring on or after January 1, 2016. This amount equals 100 percent of the state average weekly wage as determined by the administrator of the Nebraska Workers' Compensation Court.

An historic look at worker's comp. benefit rates in Nebraska may be found at http://www.wcc.ne.gov/legal/benefits.pdf

For more information regarding workers' compensation in Nebraska, please call the Nebraska Workers' Compensation Court information line at 800-599-5155 or 402-471-6468. The court's Web site (www.wcc.ne.gov/) also contains information regarding the court's operations.
Note: Worker's compensation benefits are subject to withholding for child support.

Relevant recent legislation/policy news:

§43-1724. Any employer or other payor who fails to withhold and remit any income of an obligor receiving income from the employer or other payor, after proper notice as provided in section 43-1723, shall be required to pay the certified amount to the State Disbursement Unit. The county attorney or authorized attorney may file an action in district court to enforce this section. The court may sanction an employer or other payor **twenty-five dollars per day**, up to five hundred dollars per incident, for failure to comply with proper notice.

$25 Federal Pass-through – As part of federal deficit reduction legislation passed in 2006, IV-D cases where the custodial parent does *not* receive TANF benefits are now subject to an annual $25 fee, based on the State fiscal year of Oct. 1 – Sept. 30. The updated CSE 60 form explains this new rule.

(A daily report on happenings in the Unicameral, when it is in session):
http://nebraskalegislature.gov/web/public/home

- Unicameral Update link
- Session Calendar
- A list of all standing, special and select committees, and their membership:

Subscribe to weekly email updates:
Email unicameral update --> subscribe@googlegroups.com

LB 219
Custody and Visitation

Enacts the Uniform Deployed Parents Custody and Visitation Act (UDPCVA). The UDPCVA is made up of five articles that each address the varying issues affecting deployed parents in custody and visitation proceedings. Article 1 details definitions and general provisions, requires the deploying parent to notify the other parent of the deployment as soon as possible, and prohibits the court from considering past or future deployment when making a best interest of the child determination in custody proceedings. Article 2 sets the procedure for parents to make out-of-court agreements as to custody and visitation during deployment. Article 3 allows for expedited proceedings for parents who do not agree to ensure that a custody order is entered before deployment, and prohibits a permanent custody arrangement to be ordered without the deployed parent's consent. Article 4 establishes the procedure used to terminate the temporary custody arrangement when the parties agree, and when the parties do not agree and the court must intervene. Article 5 sets out the technical effective date and uniform act language. See NCSL's Military Parent Custody and Visitation Page for more.

LB 415
Enforcement

Enacts the 2008 amendments to the Uniform Interstate Family Support Act (UIFSA). UIFSA addresses procedure and jurisdiction of the establishment, enforcement and modification of child support orders when there is more than one state involved. In addition, it determines which state's law will be used to establish, enforce or modify the child support order. The 2008 amendments apply the same principles to international registration, recognition, enforcement and modification of child support orders. For more, visit NCSL's **Preventing Sex Trafficking and Strengthening Families Act of 2014** page.

LB 924 was passed on Final Reading. **LB 924** authorizes a noncustodial parent to make child support payments through automatic withdrawals, provided the custodial parent and the Department of Health

and Human Services consent. The bill only applies when services are provided under Title IV-D of the federal Social Security Act.

For national updates on new legislation, see the following link from the National Conference of State Legislatures link at: http://www.ncsl.org/research/human-services/2015-child-support-and-family-law-legislative-enactments-by-state.aspx

Unicameral Update link & http://nebraskalegislature.gov/

In the News

Politicians push marriage, but that's not what would help children

http://www.nytimes.com/2016/03/23/business/for-the-sake-of-the-children-not-marriage-but-help.html?_r=0

More Time for Dads? States Weigh Changes to Custody Laws

www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2016/03/15/more-time-for-dads-states-weigh-changes-to-custody-laws

Dad can use Facebook to serve child support papers, NY judge rules

https://gigaom.com/2014/09/19/dad-can-use-facebook-to-serve-child-support-papers-judge-rules/

The United States is now enjoying the **lowest** divorce rate in 37 years. Experts attribute this to many things, perhaps most importantly to the fact that couples are on average waiting much longer -- five years longer -- to marry now than they did in 1981. Statistically, couples who are better educated, or older when they first marry, have the lowest divorce rates. Also, marriages with two working spouses have a lower divorce rate than "traditional" marriages where the wife is not employed outside the home. Overall, the divorce rate is between 40% and 45% of all marriages. In the 1980s it was nearly 50%.

Full story: http://www.msnbc.msn.com/id/18600304

Federal Minimum Wage:

The Federal Minimum Wage stands at **$7.25 per hour as of July 24, 2009.** Many states (including Nebraska, which has a $9 per hour minimum wage) already have higher state minimum wage laws in place than the new federal minimum wage. A link to the various state minimum wages in place can be found here.

Internet Resources

Nebraska Related Links:

Creighton University School of Law - http://culaw2.creighton.edu/

Nebraska Blue Book Online - http://www.nebraskalegislature.gov/about/blue-book.php

Nebraska County Attorney's Association - www.necaa.org/

Nebraska Dept. of Correctional Services - www.corrections.state.ne.us/
(includes inmate locator)

Nebraska Dept. of Health & Human Services CSE - www.dhhs.ne.gov/cse/cseindex.htm
Child Support Administrative Rules: www.dhhs.ne.gov/reg/t466.htm

N-CJIS - www.cjis.state.ne.us/

Nebraska Information System (NIS): (user ID and password required) http://nis.ne.gov/

Nebraska Unicameral - www.nebraskalegislature.gov/index.php

Nebraska Statutes - www.nebraskalegislature.gov/bills/intro.php

Nebraska Supreme Court Child Support Goals and Rules –
www.supremecourt.ne.gov/rules/pdf/Ch4Art1.pdf

Nebraska Supreme Court Child Support Guidelines –
http://supremecourt.ne.gov/supreme-court-rules/ch4/art2

Nebraska Child Support Referee Rules:
http://supremecourt.ne.gov/supreme-court-rules/ch4/art1

Douglas County District Court Website – www.dc4dc.com

Nebraska Bar Association/ Casemaker Legal Research: www.nebar.com/

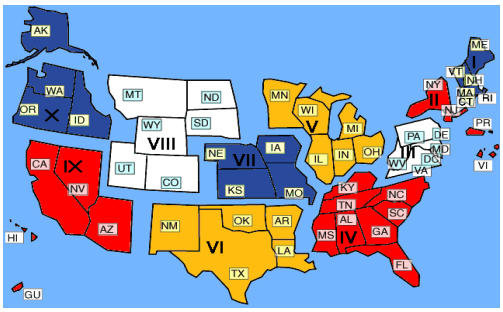
Nebraska Government Home Page - http://www.nebraska.gov/

Nebraska Administrative Code - www.sos.ne.gov/rules-and-regs/regsearch/Rules/index.cgi

Nebraska Judgment Interest Rates (archived back to 1987) –
http://court.nol.org/community/judgment-interest-rate.shtml

Sarpy County Jail – warrant search - www.sarpy.com/warrants/

Federal Links:



A Handbook for Attorneys on Court-ordered Retirement, Health Benefits and Life Insurance -
U.S. Office of Personnel Management
www.opm.gov/insure/health/reference/attorney.htm

Domestic Per Diem Rate Information –
http://www.gsa.gov/portal/content/104877

Intergovernmental Referral Guide (IRG) –
(a tremendous resource for reviewing child support laws in all 50 states)
https://extranet.acf.hhs.gov/irgauth/login

U.S. Supreme Court Opinions - http://supct.law.cornell.edu/supct/index.html

Title IV of the Social Security Act - www.ssa.gov/OP_Home/ssact/title04/0400.htm

Military Related:

Servicemembers Civil Relief Act of 2003
www.house.gov/chrissmith/laws/Civil_Relief.htm

A Judge's Guide to the Servicemembers Civil Relief Act of 2003
www.abanet.org/family/military/scrajudgesguidecklist.pdf

"DFAS Guide to Dividing Military Retired Pay"
www.dfas.mil/dms/dfas/garnishments/pdf/garn_atttorneyinstruct.pdf

Military Pay/Payroll Sites:

- **Defense Finance and Accounting Service - DFAS (with links to current and past pay grades) -** www.dod.mil/dfas/
- **Military Pay** - www.dod.mil/militarypay/pay/index.html
- **Military BAH levels** (updated annually as well as archived information for all bases) http://perdiem.hqda.pentagon.mil/perdiem/bah.html
- **BAH FAQ -** http://perdiem.hqda.pentagon.mil/perdiem/bahfaq.html
- **Military Retirement pay info –** www.defenselink.mil/militarypay/retirement/index.html

Military Locate Services:

Use these contacts to locate a member of the US Armed Forces or Reserves, and to determine rank and pay grade:

Navy Active Duty, Reserve or Retired
Navy World Wide Locator
Navy Personnel Command (PRS 34)
5720 Integrity Drive
Millington, TN 38055-3120
Customer Service Center
Phone: (901) 874-5111,
1-866-U-ASK-NPC or 1-866-827-5672
Email: CSCMailbox@navy.mil
Website: www.npc.navy.mil/uasknpc

Note: The Navy does not release unit addresses over or call the commercial number for further instruction and pay grade.

♦

Air Force Active Duty, Reserve, Retired, or Air N
Air Force World Wide Locator
HQ AFPC/DPDXIDL
5550 C Street West, Suite 50
Randolph AFB, TX 78150-4752
Phone: (210) 565-2660
Normal duty hours: 7:30 am to 4:30 pm CT

Note: Requests for information by state or federal agencies or law enforcement must be in writing and on official letterhead. Information available: date in/date out, rank, duty title, pay grade, and duty address (if releasable).

♦

Marine Corps - Marine Locator

Headquarters, US Marine Corps
Personnel Management Support Branch (MOMS-17)
2008 Elliot Road
Quantico, VA 22134-5030
Phone: (703) 784-3941, 3942, and 3943
Hours of operation: 8:00 am to 4:00 pm ET

Note: Requests for information by state or federal agencies or law enforcement must be in writing and on official letterhead; see the following web site: www.usmc-mccs.org/contactus/helpcontactus.cfm?selection=SelectOne.

♦

Coast Guard

Commander
Personnel Service Center
U.S. Coast Guard Stop 7200
4200 Wilson Boulevard, Suite 1100
Arlington, VA 20598-7200
Email: cglocator@ballston.uscg.mil

Note: Please provide the person's full name in the email.

♦

FPLS External Locate Requests for Information on Active, Reserve, National Guard, Retired Military and Retired Federal Government Civilian Employees

If you need an address for military service personnel for service of process (e.g., in order to establish paternity), submit an **FPLS external locate** request (through your state child support office) to OCSE for forwarding to the Defense Manpower Data Center (DMDC). DMDC returns these requests on a weekly basis. Include the military service person's name and Social Security number (SSN). FPLS will provide the following information to states:

Population	SSN Returned?	Address Provided	Annual Salary?
Active military	Yes	Unit/duty address	Not provided
Reserve/National Guard military	Yes	Unit/duty address	Not provided
Retired military	Yes	Home address	Yes
Retired civilian	Yes	Home address	Yes

More Information

For more information see ***Working with the Military as an Employer: A Quick Guide*** at http://www.acf.hhs.gov/programs/cse/newhire/employer/publication/military_quick_guide.htm.

Questions?
If you have questions, please contact Nancy Benner at 202-401-5528 or nancy.benner@acf.hhs.gov.

Other:

U.S. Bankruptcy Court for the District of Nebraska - https://ecf.neb.uscourts.gov/

All things Political (Guide to state and local government office & legal links) – www.allthingspolitical.com/

50 State Legal Links - www.loc.gov/law/guide/usstates.html

Legal Information Institute (Cornell Law) - https://www.law.cornell.edu/

50 State Court Links - www.law.cornell.edu/opinions.html#state

50 State Inmate Locator Links – www.ancestorhunt.com/prison_search.htm

County Jail Inmate Locator for counties across the U.S. – www.ancestorhunt.com/county-jail-inmates-search.htm

Daily Legal Newswire - www.law.com/newswire/

Perpetual Calendar - www.wiskit.com/calendar.html

Currency Converter - www.bankofcanada.ca/en/rates/exchform.html

World Time - www.worldtimeserver.com/

Social Security Death Index - www.ancestry.com/search/db.aspx?dbid=3693

Social Security Number Assignment Information - www.usrecordsearch.com/ssn.htm
(details what SS numbers are assigned to each state)

YWCA Domestic Violence 24 Hour Hotline - (402) 345-7273
Info online at: www.ywca.org/site/pp.asp?c=6nJCLONmGiF&b=225511

Appendix/ Glossary of Terms

Acronyms & Terms

ACF — Administration for Children and Families (not the American Chestnut Foundation) http://www.acf.hhs.gov/

ARP — Agency Related Person (used in the CHARTS system)

CHARTS — Children Have A Right To Support – the Nebraska child support computer system

COLA	Cost of Living Adjustment
CP	Custodial Parent
CSENet	Child Support Enforcement Network *(pronounced csiznet)* www.acf.hhs.gov/programs/cse/newhire/csenet/home.htm
DHHS	(Nebraska) Department of Health and Human Services Child support division - www.dhhs.state.ne.us/cse/cseindex.htm
Ex Rel.	"ex rel.," or *ex relatione*, is defined as "[l]egal proceedings which are instituted by the attorney general (or other proper person) in the name and behalf of the state, but on the information and at the instigation of an individual who has a private interest in the matter . . . ." Black's Law Dictionary. Paternity/child support cases should **not** use this caption. State "on behalf of" is the preferred caption, according to our appellate courts. ***Mooney v. Duer***, 1 Neb. App. 84, 487 N.W.2d 575 (1992)
FIDM	Financial Institution Data Match
FIPS	Federal Information Processing Standard (each county is assigned its own FIPS Code) www.census.gov/geo/www/fips/fips65/index.html
FPLS	Federal Parent Locator Service www.acf.hhs.gov/programs/cse/newhire/
IRG	Intergovernmental Referral Guide http://ocse.acf.hhs.gov/ext/irg/sps/selectastate.cfm
IV-D	Title IV-D of the Social Security Act of 1975, a.k.a. Child Support Enforcement www.law.cornell.edu/uscode/uscode42/usc_sup_01_42_10_7_20_IV_30_D.html
JUSTICE	The Nebraska county and district court computer program
MSFIDM	Multistate Financial Institution Data Match
NCP	Non custodial parent
NCSEA	Nebraska Child Support Enforcement Association - www.ncsea.info/
NCSEA	National Child Support Enforcement Association - www.ncsea.org/
OCSE	Office of Child Support Enforcement - www.acf.hhs.gov/programs/cse/
PRWORA	Personal Responsibility and Work Opportunity Reconciliation Act of 1996 - http://thomas.loc.gov/cgi-bin/query/z?c104:H.R.3734.ENR:htm
SDU	State Disbursement Unit - www.nebraskachildsupport.state.ne.us/
SSA	Social Security Administration - www.ssa.gov/
TANF	Temporary Assistance for Needy Families - www.hhs.state.ne.us/wer/TANFplan.htm
UEFJA	Uniform Enforcement of Foreign Judgments Act - §§25-1587.01 to 25-1587.09

UIFSA Uniform Interstate Family Support Act - Neb. Rev. Stat. §§42-701 to 42-751

URESA Uniform Reciprocal Enforcement Support Act (predecessor to UIFSA)

For new attorneys, in order to establish an email address through DHHS, contact:
DHHS Production Support -402-471-7382 or 1-877-832-8871

DHHS Review & Modification Office – 1-402-471-7362 or 800-831-4573
CHARTS Help Desk – 1-877-832-8871
JUSTICE Help Desk – 1-402-471-8887

"Ignorance more frequently begets confidence than does knowledge."
Charles Darwin (1809-1882)

"Oh yeah? Well my dad's child support payments are bigger than your dad's."

Above All Else:

Keep your sense of humor and sense of perspective.

You will not be able to solve everyone's problems. Behind each case is a broken marriage or relationship that the parties were not able to solve themselves.

Use your best judgment and best efforts on behalf of your customers. *Through your efforts you will make a difference in the lives of children.*