Nebraska Case Law &

Legislative Update

William P. MacKenzie – Statewide District Court Child Support Referee

Nebraska Child Support Enforcement Association ~ September 29, 2016 - Kearney

Lasu v. Issak, 23 Neb. App. 83, 867 N.W.2d 651 (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 $990 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.

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

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.

§ 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

Law v. Equity

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.

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.

No Support v. Zero 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.

General v. Special Appearances
Personal Service v. Alternate Service

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).

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.

Pro Se Appearances

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.

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

- 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.

Present Ability to Pay

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 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.
- 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.

Divorce Determines Paternity

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

- 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.

Disestablishment Do's and Don't

Bio Father v. Legal Father

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)*

Child Support Guidelines /Deviations

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.

Lasu v. Issak, 23 Neb. App. 83, 867 N.W.2d 651 (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.

Sellers v. Sellers, 23 Neb. App. 219, 869 N.W.2d 703 (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.

Guidelines/ Health Insurance Deductions

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.

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

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).

Mohr v. Mohr, 22 Neb. App. 772, 859 N.W.2d 377 (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).

Venue & the Jurisdictions

O'Neal v. State, 290 Neb. 943, 863 N.W.2d 162 (2015)

State penitentiary prisoner housed in Lancaster County files habeas corpus petition in Douglas County District Court. The State objects, claiming the Douglas County court lacks jurisdiction over a prisoner housed in Lancaster County.

Held: The Douglas County District Court could hear the case, since the State waived any **venue** objection.

- 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).

- Moreover, in a prior case, we determined that an objection to jurisdiction did not preserve an objection to venue.
- 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.

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.

Modification of Support

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).

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

Earning Capacity
Lump Sum Child Support Awards

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 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.

- **earning capacity** should be used in determining a child support obligation only when there is evidence that the parent can realize that capacity through reasonable efforts. Collins v. Collins, 19 Neb.App. 529, 808 N.W.2d 905 (2012).
- 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.
- The referee erred in excluding evidence of expenses, and the district court abused its discretion to the extent it adopted the referee's findings.

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.**
- we conclude that a court may consider the obligor's non-income-producing assets in determining whether to deviate from the guidelines. Courts have the discretion to depart from the guidelines **if their application would be unjust or inappropriate.**[
- We have stated that trial courts may consider the circumstances of the parties in determining the amount of child support. The parties' circumstances includes their financial condition. Other courts have recognized that the parties' assets--including those that are not currently producing income--are relevant to the support calculation.

Paternity

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."**

Acknowledgment of Paternity
Adoption
Full Faith and Credit

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.

Note: The presence of a man's name on the **birth certificate** of a minor child is EVIDENCE of paternity. It does not equate with a statutory determination of paternity. If a IV-D office only is presented with evidence of paternity via the name of the man on a birth certificate, the office should file a Complaint for determination of Paternity, and not a Complaint for Support.

Miscellaneous

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.

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).

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.

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 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.

U.S. Ratification of Hague Child Support Convention

http://www.acf.hhs.gov/css/resource/us-ratification-of-hague-child-support-convention

On August 30, 2016 President Obama signed the Instrument of Ratification for the Hague Convention on the International Recovery of Child Support and Other Forms of Family Maintenance (Hague Child Support Convention). This is the first global child support treaty ratified by the United States. It contains groundbreaking provisions that, for the first time on a world-wide scale, establish uniform, inexpensive, and effective procedures for the processing of international child support cases.

Interest Rates:

See: https://supremecourt.nebraska.gov/5017/judgment-interest-rate
for the present and past interest rates. [**2.345**% as of July 21, 2016, valid until mid October 2016]

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