Case Law Update

Nebraska Supreme Court Opinions
June 3, 2022 to July 7, 2023

Nebraska Court of Appeals Opinions
June 7, 2022 to June 20, 2023

NCSEA Seminar
September 27, 2023

Adam E. Astley
Astley Putnam, P.C., L.L.O.
1412 Howard Street, #200
Omaha, NE 68102
(402) 932-7900
adam@aplaw.com

Astley Putnam
ATTORNEYS

Nebraska Supreme Court Opinions
June 3, 2022 to July 7, 2023

Williams v. Williams
311 Neb. 772 (2022)

TL;DR: When an indispensable party is missing from a suit, the District Court must order that the party be brought into the suit. If the existing parties then fail to do so properly, the District Court should dismiss the suit without prejudice

Facts

Katherine is Katelyn's mother. Katelyn and Ted have a child together, who is Katherine's grandchild. Ted had been adjudicated to be the child's father. Katelyn and the grandchild lived with Katherine, with Ted, and on their own, all at different times. Katherine filed a Complaint to establish grandparent visitation with the grandchild after Katelyn moved out of her house and cut off her contact with the grandchild.

Katherine had Katelyn served with the Complaint, but did not name Ted as a party nor attempt to serve Ted. She claimed she did not know Ted's whereabouts and that Ted had not had any contact with the child for some time. The Court held a trial where only Katherine appeared. At trial, Katherine testified about her relationship with the grandchild, and her concerns that Katelyn could not properly care for the child and had effectively abandoned him. She concluded her testimony by stating not only that she thought it would be in the child's best interest for her to be awarded grandparent visitation, but also that she thought she stood in loco parentis, and should have custody of the child.

After hearing the evidence the District Court found that it lacked jurisdiction under the UCCJEA, that Ted undisputedly the adjudicated father of the child, and that Ted had not been given notice or the opportunity to be heard.

Katherine filed a Motion to Alter or Amend, then an Amended Motion to Alter or Amend. In the Amended Motion, Katherine added Ted to the caption, and included a Certificate of Service indicating that "defendant's attorney" had been served electronically and listed addresses for both Katelyn and Ted. The District Court denied the Motion and Amended Motion. Katherine appealed to the Court of Appeals.

The Court of Appeals summarily dismissed the appeal in a minute entry, stating that because Ted was an indispensable party, and was not included, the District Court lacked subject matter jurisdiction, and so did the Court of Appeals. The minute entry referenced *Davis v. Moats*, 308 Neb. 757 (2021) and *Morse v. Olmer*, 29 Neb. App. 346 (2021). Katherine filed a Petition for Further Review, which the Supreme Court granted.

Holdings

The Supreme Court held that the District Court correctly determined that Ted was an indispensable party, but having made that determination, it was required by Neb. Rev. Stat. § 25-323 to order Katherine to bring Ted into the suit. Since Katherine at least nominally tried to bring Ted into the suit in her Amended Motion to Alter or Amend, the District Court should not have dismissed the case, and instead, should have waited to see if Katherine actually added Ted as a party and served him before taking further action.

Legal Principles

A noncustodial parent is an indispensable party to an action for grandparent visitation due to his constitutionally protected parental rights. *Morse v. Olmer*, 29 Neb.App. 346 (2021); *Davis v. Moats*, 308 Neb. 757 (2021).

When a party fails to join an indispensable party, the District Court is required to order them to bring the party into the action, and only if they fail to do so should the action be dismissed. Neb. Rev. Stat. § 25.323.

Mann v. Mann
312 Neb. 275 (2022)

TL;DR: An appeal cannot be taken from an Order granting partial summary judgment as to one but not all causes of action which is not certified as a final order under Neb. Rev. Stat. § 25-1315.

Facts

We covered this case at the Court of Appeals in 2021. Asia and Brian married in 2011 and divorced in 2018. The divorce decree found that Brian stood in loco parentis to Asia's child from a prior relationship, and provided for joint legal and joint physical custody. However, the child was already subject to a custody order in California, and nobody had taken any action to terminate California's continuing exclusive jurisdiction over that child.

Brian filed a Complaint to Modify in 2019, and Asia counterclaimed, seeking to undo the custody arrangement for lack jurisdiction under the UCCJEA. The District Court granted partial summary judgment for Asia and Brian appealed. The Court of Appeals affirmed. Brian filed a Petition for Further Review before the Supreme Court and briefed the issue on the merits. The Supreme Court granted the Petition, and directed the parties to brief whether Brian was appealing from a final order.

Holdings

The Court found that Neb. Rev. Stat. § 25-1315 was implicated because Asia's counterclaim to challenge the custody order for her older child was a separate cause of action from Brian's complaint to modify custody, and because the District Court's grant of partial summary judgment adjudicated fewer than all of the claims.

Having found that § 25-1315 is implicated, the Court found that the District Court's failure to certify its partial summary judgment order as a final order under § 25-1315 rendered the order non-final, and not subject to appellate review at this time.

Legal Principles

Satisfying § 25-1902 alone [i.e., affecting a substantial right] is not sufficient to make an order appealable when § 25-1315 is implicated. *Tyrell v. Frakes*, 309 Neb. 85 (2021).

Yochum v. Yochum
312 Neb. 535 (2022)

TL;DR: District Court's finding of contempt for taking tax exemptions mother was not entitled to take is affirmed in part, reversed in part.

Facts

Chad and Heather divorced in 2011. Their divorce decree entitled Chad to claim half of the tax exemptions for their four children, provided that he was current on his child support, child care, and medical care obligations at the end of each tax year. Chad was unemployed for part of 2013 and fell behind on child support. He paid support for all of 2014 through income withholding, and he reduced his arrearage down to about $500 as of the end of 2014.

Heather testified that Chad never paid any portion of the children's daycare expense between 2010 and 2018. Chad responded that Heather worked at a daycare, and received Title XX benefits, and that he thought the daycare was free to her. He testified that she never provided him with an invoice or requested reimbursement. Heather responded that she sent him text messages indicating he had to pay for half.

Heather claimed all of the exemptions in 2014 and 2019. Chad brought an application for contempt, and the District Court found Heather to be in willful contempt for claiming the exemptions to which she wasn't entitled in both years. It sentenced her to 30 days in jail, but provided she could purge herself by making monthly payments towards Chad's damages and attorney's fees. The Court awarded Chad $3,975 for additional taxes he paid in 2014, a $2,000 tax refund Chad lost in 2019, $500 and $600 for covid relief payments Chad lost in 2020, and $3,000 of attorneys fees. Heather appealed.

Holdings

The Court found that Heather was entitled to claim the tax exemptions in 2014 because Chad was not "current" on his child support obligation as of December 31. It reasoned that Neb. Rev. Stat. § 43-1718.01 did not apply because it concerned Child Support Enforcement only, and even so, Chad's $500 arrearage at the end of the year was not a timing issue, but a result of events that had occurred in 2013.

The Court affirmed the District Court's determination that Chad was entitled to the exemptions in 2019 because he was current on his support obligation, and because he was not in default of his child care obligation to "reimburse Heather, as necessary for child care expenses within fifteen (15) days of receipt of the statement for the same." Because Heather had not provided Chad with any expense statements prior to December 31, 2019, there was nothing to reimburse.

Having found that Chad was entitled to claim the exemptions in 2019, the Court found that Chad had not adduced any evidence to show that he had missed out on a second covid relief payment for $600, so it reversed the District Court's decision on that payment.

Finally, having effectively cut the District Court's determination of Chad's damages by ore than half, the Court remanded to the District Court to reconsider its award of attorney's fees to Chad in light of the modification to the rest of the Order.

Legal Principles

A trial court's decision awarding or denying attorney fees in a contempt proceeding will be upheld on appeal absent an abuse of discretion. *Becher v. Becher*, 311 Neb. 1 (2022).

Bleich v. Bleich
312 Neb. 962 (2022)

TL;DR: District Court is reversed after it dismissed a complaint for divorce for lack of subject matter jurisdiction because the Defendant produced a certified copy of a foreign divorce decree.

Facts

Carmen and Arlin were married in 2003, though there was a dispute as to exactly when and where the marriage effectively took place. Carmen claimed that they were marred in Omaha on March 8, 2003, and Arlin claimed they were married both in Omaha on March 8, and in Maracaibo, Zulia, Venezuela, on March 11, 2003. Carmen filed a complaint for divorce in 2021.

Arlin filed a Motion to Dismiss for lack of subject matter jurisdiction under Rule 12(b)(1), lack of personal jurisdiction under Rule 12(b)(2), and failure to state a claim under Rule 12(b)(6). The District Court held a hearing where Arlin offered a certified copy of a Venezuelan dissolution decree from 2015 and a verified English translation of that Decree. The translation recited that the parties were married in Maracaibo, Venezuela, on March 11, 2003, that Arlin filed for divorce in 2012, and that the marriage contracted in Venezuela on March 11, 2003 was dissolved.

The District Court agreed with Arlin and found that the Venezuelan Decree was valid in Nebraska, as a result, the parties were no longer married, that Carmen was equitably estopped from bringing the action, and that the Court therefore lacked subject matter jurisdiction. The District Court dismissed the complaint under Rule 12(b)(1) without addressing the remaining issues.

Holdings

The Supreme Court reversed, holding that the District Court conflated the issues of judicial comity and subject matter jurisdiction. It reasoned that it might be improper for the District Court to *exercise* its jurisdiction in certain instances when faced with a foreign divorce decree, but that does not mean it *lacks* subject matter jurisdiction in a particular case.

The Court noted that on remand, the parties will certainly argue over whether the Venezuelan decree is entitled to be recognized in Nebraska, but the very existence of the Venezuelan decree does not deprive the District Court of subject matter jurisdiction.

Legal Principles

A party may challenge the court's subject matter jurisdiction under rule 12(b)(1) by presenting either a facial challenge or a factual challenge. In a facial challenge, the

party asserts the allegations of the complaint are insufficient to establish the court's jurisdiction over the subject matter of the case. When a facial challenge is presented, the court will look only to the complaint to determine whether the plaintiff has sufficiently alleged a basis of subject matter jurisdiction. In a factual challenge, the party asserts there is no jurisdiction over the subject matter of the case notwithstanding the allegations of the complaint. When a factual challenge is presented, the court may consider and weigh evidence outside of the pleadings to answer the jurisdictional question. *Washington v. Conley*, 273 Neb. 908 (2007).

A subsequent court that decides a case already pending in another court with concurrent subject matter jurisdiction errs in the exercise of its jurisdiction. Jurisdictional priority is neither a matter of subject matter jurisdiction nor personal jurisdiction. The subsequent court does not lack judicial power over the general class or category to which the proceedings belong and the general subject involved in the action before the court. *Charleen J. v. Blake O.*, 289 Neb. 454 (2014).

Mackiewicz v. Mackiewicz
313 Neb. 281 (2023)

TL;DR: District Court Order reducing the amount and term of alimony is affirmed when obligor lost his job and became self-employed and recipient earned more money than at the time of the original decree.

Facts

James and Kari were married in 1995 and divorced in 2017 under a consent decree. The Decree provided for Kari to receive alimony for thirteen (13) years, stepping down in amounts from $4,000 per month to $1,000 per month. The alimony was to survive James' death and Kari's remarriage and the Decree stated it "shall be in place until such time as it is fully satisfied."

At the time of the Decree, James earned about $162,000 per year, and Kari was a graduate student. After the Decree, James' income increased to $185,000, and he left his job to take a new position in Austin, Texas with a potential for more than $200,000 per year. Kari finished her graduate degree and began earning $73,000 per year. James was terminated from his new job for "unsatisfactory work performance," and returned to Omaha. Unable to find a suitable job, he started his own consulting firm, and filed to modify his alimony obligation in 2020.

After trial, the District Court modified James' alimony obligation to $700 per month for a total of sixty-four (64) months, starting on the first of the month after James filed. Kari appealed, arguing (1) the decree was a consent decree, (2) the decree provided the alimony was nonmodifiable, and (3) James' decision to leave his well-paid job in Omaha was a voluntary act.

Holdings

The Court affirmed the District Court's order in all respects.

First, the Court held that the award of alimony in the Decree was modifiable. It reasoned that the phrase "shall be in place until such time as it is fully satisfied" should be read in conjunction with language in the same sentence that the award would not terminate on James' death or Kari's remarriage, but termination is disctinct from modification.

It also found that the following language, tucked in under the "Waiver of Breach" heading contemplated modifications of the Decree: "No modifications of this Decree shall be binding upon either of the parties unless reduced to writing and subscribed to by both parties unless otherwise ordered by the Court."

Second, the Court affirmed the modification of James' alimony obligation. It found he had met his burden to show a material change in circumstances because he was earning

far less and Kari was earning far more than at the time of the original decree. It found that James' decision to leave his job for another was not unreasonable, and nothing in the record showed that it was a risky venture. Finally, even though James was terminated for "unsatisfactory work performance," there was nothing in the record describing the nature of that performance, and James testified that he never received any negative feedback.

Legal Principles

Where an award of alimony may be modified or revoked, that modification is for good cause shown. Good cause means a material and substantial change in circumstances and depends upon the circum- stances of each case. Good cause is demonstrated by a mate- rial 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. The moving party has the burden of demonstrating a material and substantial change in circumstances which would justify the modification of an alimony award. *Metcalf v. Metcalf*, 278 Neb. 258 (2009).

Chatterjee v. Chatterjee
313 Neb. 710 (2023)

TL;DR: A stranger to a marriage lacks standing to challenge the legal presumption of paternity given to a child born during the marriage.

Facts

Indraneel and Indraja were married to each other when Indraja became pregnant with twins. Apurba, having the same last name as Indraneel and Indraja, but not related to either of them, filed a complaint to establish paternity, custody, and support for Indraja's unborn children, claiming that he believed he was the children's biological father. Apurba filed a motion to add Indraneel as a third-party defendant and requested genetic testing.

After the twins were born, genetic testing indicated that Apurba was their biological father. The hospital caused birth certificates to be issued naming Indraneel as the father. After a trial, the District Court found that Apurba was the children's biological father, it ordered him to pay support, and for Apurba and Indraja to share joint legal and joint physical custody. Indraneel appealed and Indraja cross appealed.

Holdings

In a 4-3 decision, the Supreme Court reversed, holding that Apurba lacked standing to seek a determination of paternity because the twins did not meet the definition of "child" found in §§ 43-1401 to 43-1408. In that context, "child" means a child under the age of eighteen years born out of wedlock. And "out of wedlock" means a child whose parents were not married to each other at the time of its birth. Because Indraneel was presumed to be the children's father under § 42-377, the twins were not children born out of wedlock, and as a result Apurba lacked standing to challenge the marital presumption and seek to establish himself as the children's father.

In re Estate of Wiggins
314 Neb. 565 (2023)

TL;DR: County Court reformed a family settlement agreement when there was a mutual mistake of fact about the decedent's life insurance; Supreme Court ruled that the agreement should have been rescinded, not reformed.

Facts

Jordan and Allison were previously married. Their divorce decree required each of them to maintain a life insurance policy of at least $250,000 "to provide for the minor children" in the event either of them died. Jordan died in 2019. Prior to his death, he executed a will which created a trust for his children's benefit. Allison brought a claim against Jordan's estate for $250,000 on behalf of the children, claiming that the personal representative had not yet identified any life insurance policy for the children's benefit.

After Allison filed her claim, Jordan's former employer informed Jason (Jordan's brother) that Jason was the beneficiary of Jordan's two employer-provided life insurance policies. Later, Allison, Jason, and Robert (the personal representative of the Jordan's estate) entered into a family settlement agreement which provided that Jason would gift $250,000 to Jordan's Trust (which benefitted the children exclusively) and Allison would withdraw her claim against the estate.

After they signed the settlement agreement, the parties learned that Allison's daughter Elizabeth was actually the beneficiary of $120,000 worth of life insurance, and Jason was the beneficiary of the other $240,000. Jason paid $130,000 to the Trust, and sought to keep the remaining $110,000. Allison claimed that the Trust was owed the full $240,000. The parties jointly asked the County Court to declare their rights and obligations under the settlement agreement, and presented the question to the County Court with stipulated facts.

The County Court reformed the agreement, finding that Jordan has partially satisfied his obligations, and Jason was only required to pay $130,000 into the Trust. Allison appealed.

Holdings

The Supreme Court agreed with Allison that the County Court erred in reforming the agreement, but instead, it held that the County Court should have rescinded the agreement due to a mutual mistake of fact. It reversed and remanded with instructions to rescind the entire agreement.

Legal Principles

Reformation is based on the premise that the parties had reached an agreement concerning an instrument, but while reducing their agreement to a written form, and as the result of mutual mistake or fraud, some provision or language was omitted from, inserted, or incorrectly stated in the instrument intended to be an expression of the actual agreement of the parties. *Jelsma v. Acceptance Ins. Co.*, 233 Neb. 556 (1989).

Rescission may be granted where the parties have apparently entered into a contract evidenced by a writing, but owing to a mistake, their minds did not meet as to all the essential elements of the transaction, so that no real contract was made by them. *Johnson v. Stover*, 218 Neb. 250, 256, 354 N.W.2d 142, 146 (1984).

Equity strives to do justice; it is not a rigid concept, but, instead, is determined on a case- by-case basis according to concepts of justice and fairness. *Wisner v. Vandelay Investments*, 300 Neb. 825 (2018).

Nebraska Court of Appeals Opinions
June 7, 2022 to June 20, 2023

Kingston v. Kingston
31 Neb. App. 201 (2022)

TL;DR: Appeal dismissed as premature because the Notice of Appeal was filed while a tolling motion was pending.

Facts

Trevor and Laura had a contentious four day divorce trial before the District Court. The District Court entered a Decree on May 27, 2021. Laura filed a motion to alter or amend on June 3 and Trevor filed a motion for an Order Nunc Pro Tunc on June 4. The District Court resolved these motions in a written order filed June 14. Trevor then filed a "Motion to Reconsider" on June 21 which took issue with some of the changes that the District Court made to the Decree in its June 14 order.

Trevor noticed his motion to be heard on July 29, but Laura filed a Notice of Appeal on July 13. The District Court held a hearing on July 29 and filed an order on July 30 finding that the motion "should be denied because the Court no longer has jurisdiction over this matter because Laura filed an appeal on July 13, 2021." Neither party filed a second Notice of Appeal after July 30.

Holdings

The Court of Appeals dismissed Laura's appeal and Trevor's cross appeal for lack of jurisdiction. It determined that Trevor's June 21 motion was a successive tolling motion because it sought substantive alteration of the District Court's June 14 order. Because the June 21 motion was still pending, having been neither granted nor denied in a written order on the date of the appeal, the Notice of Appeal was ineffective.

Legal Principles

A determination as to whether a motion, however titled, should be deemed a motion to alter or amend a judgment depends upon the contents of the motion, not its title. In order to qualify for treatment as a motion to alter or amend a judgment, a motion must be filed no later than 10 days after the entry of judgment, as required under Neb. Rev. Stat. § 25-1329 (Reissue 2016), and must seek substantive alteration of the judgment. *McEwen v. Nebraska State College Sys.*, 303 Neb. 552 (2019).

Hudson v. Hudson
31 Neb. App. 630 (2023)

TL;DR: District Court's order which refused to allow a modification of a decree to apportion daycare costs is reversed.

Facts

Amber and Anthony married in 2011 and divorced in 2020. The original divorce decree gave Amber sole legal and physical custody of the children, provided Anthony with one weekend per month of visitation and four weeks over the summer. It required him to pay child support, § 4-212 direct costs, and the travel costs associated with his exercise of parenting time. It did not require him to pay any portion of Amber's child care costs.

Four months later, Amber filed a complaint to modify the Decree which alleged that the children did not attend daycare at the time of the Decree, but they now required it due to a change in her employment. She secured a voluntary appearance from Anthony three months later, and then dismissed her complaint one month after that.

Only one week later, Anthony filed his own complaint to modify the Decree. He alleged that his income had been reduced, that he had moved to Lincoln, that he planned to move to Pennsylvania, and he sought a reduction of child support, elimination of the § 4-212 cost sharing, a modification of his parenting time, and a contribution from Amber to the travel costs for his exercise of parenting time.

Amber filed a counterclaim, which stated, in relevant part: "[i]t is appropriate to modify the child support obligation and associated out of pocket expenses in accordance with the Nebraska Child Support Guidelines." Those 23 words caused a long, likely expensive fight over whether Amber had properly re-pled the request for contribution towards her daycare expenses that she had dismissed just a few weeks prior.

The parties filed a final Exhibit and Witness List and discussed the issues at a pre-trial conference. Amber's witness list included two daycare providers, and her exhibit list included daycare receipts. The pre-trial order identified the issues in controversy, but it did not include daycare. It did state that the Order does not preclude other issues properly raised in the pleadings.

Amber raised daycare in her opening statement. She testified about it. She was subject to extensive cross examination about her work schedule and need for child care. Anthony testified that he didn't have a problem paying it if the Court ordered it. The Court asked questions of Amber. The receipts were received without objection. Both providers testified.

After trial, Amber filed a motion seeking leave to amend her complaint to conform to the evidence. She did not attach a notice of hearing. The Court entered its order

modifying the decree without considering her motion. The order explained at length that the District Court did not believe the issue was properly before it, and that there was no material change in circumstances justifying a change to the decree to require reimbursement for daycare. It wrote:

> The first time the court heard that daycare (childcare) was at issue was at trial. That subject had not been broached in the pleadings nor at the Pretrial Conference when the pending issues were specifically identified. Amber argues that her generalized request for modification of child support and "associated out of pocket expenses" in accordance with the [Guidelines] properly placed the day care matter at issue. Under her interpretation of notice pleading any expenditure of money is "out of pocket" and there would be no limit to the issues raised at trial or to the relief requested if it involves money. Such an expansive interpretation is unwarranted. And while issues not raised by the pleadings may be tried by express or implied consent of the parties, no such consent was given. Anthony objected to the testimony regarding day- care as beyond the scope of the pleadings.
>
> Pleadings frame the issues … Procedural due process is at play. Amber did not plead a material change in circumstances nor did she request an award of childcare expenses until the time of trial.
>
> When reviewing the pleadings it is apparent that the apportionment of direct expenses per §4-212 of the Guidelines was the issue. The Decree, prepared by Amber's counsel, erroneously included that language because no joint custody had been awarded. Both parties recognized the mistake. It seems much more probable that Amber was referring to the apportionment language relating to a joint custody arrangement and those out of pocket expenses rather than to a previously unmentioned and unaddressed day care issue.
>
> Amber labors under the misconception that childcare is "an associated out of pocket expense" of child support; that the two go hand-in-hand. If child support is in play [then] so too are childcare expenses …
>
> The nexus Amber seeks is not found in the Guidelines …
>
> Amber also ignores fundamental law that requires proof of a material change in circumstances before a decree will be modified. There was no evidence of any material change regarding childcare expense[s] since the Decree was entered; only the tit for tat. In fact, Anthony's income is now less. …[T]hat cannot be the material change warranting an award of childcare expenses at this juncture. Nor is Anthony's move to

> Pennsylvania a material change warranting modification and an initial award of childcare expenses.
>
> Day care was not an issue at the time the Decree was entered; it was not awarded nor was it even mentioned. In opening Amber suggested that the parties bartered child support for day care at the time settlement was reached. The income information presented to the court and the child support calculation attributed roughly dou- ble Anthony's actual income to arrive at the child support suggesting he had no bartering skills. Moreover, the court notes Anthony was not represented and doubts he had the legal sophistication to barter for anything, let alone an increase in support in exchange for paying no childcare costs. Amber's attorney certainly should have known the difference between child support and childcare and using an incorrect income amount to determine child support was improper. Bottom line, Amber now seeks to add something after the fact and also have it relate back in time without any showing of a material change. The court declines to do so.

Amber appealed.

Holdings

The Court of Appeals held that Amber's complaint had not effectively raised the issue of child care. It noted that seven of the eight changes in circumstances she cited to had nothing to do with child care, and the only thing anywhere close to child care was a statement about out of pocket expenses. The Court was not persuaded that this put child care at issue.

The Court then turned to the question of whether Anthony had notice and gave implied consent to litigate the issue. It found that he had done both. First, child care witnesses and exhibits appeared on the final lists that the parties submitted to the Court. Second, Anthony confirmed that he and his counsel had talked about it. And finally, Anthony said he didn't have a problem contributing to child care expenses.

Citing to *United Gen. Title Ins. Co. v. Malone*, 289 Neb. 1006 (2015), the Court of Appeals reasoned that Anthony had impliedly consented to the issue being tried when it was raised in the joint witness and exhibit list, and he then treated the issue as if it had been pleaded. Finally, the Court noted no prejudice to Anthony. He confirmed that he and his attorney had discussed the issue in advance, he testified that he was willing to pay it, and his attorney did not object to the exhibits when offered.

The Court also found that the District Court did not have to consider Amber's express motion to amend the pleadings; it could have and should have constructively amended the pleadings as it made its decision.

Finally, the Court found that Amber had shown a material change in circumstances that justified the award of child care expenses because she was not working full-time at the time of the Decree, and now she was working full time and needed child care.

Legal Principles

A court's determination of questions raised by the facts, but not presented in the pleadings, should not come at the expense of due process. While the concept of due process defies precise definition, it embodies and requires fundamental fairness. Generally, procedural due process requires parties whose rights are affected by a proceeding to be given timely notice, which is reasonably calculated to inform the person concerning the subject and issues involved in the proceeding; a reasonable opportunity to refute or defend against a charge or accusation; a reasonable opportunity to confront and cross-examine adverse witnesses and present evidence on the charge or accusation; representation by counsel, when such representation is required by the constitution or statute; and a hearing before an impartial decisionmaker. The determination of whether the procedures afforded to an individual comport with constitutional requirements for procedural due process presents a question of law. *Simons v. Simons*, 312 Neb. 136 (2022).

When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect the result of the trial of these issues. Neb. Ct. R. Pldg. § 6-1115 (b).

Implied consent for purposes of § 6-1115(b) may arise in two situations. First, the claim may be introduced outside of the complaint—in another pleading or document—and then treated by the opposing party as if pleaded. Second, con- sent may be implied if during the trial the party acquiesces or fails to object to the introduction of evidence that relates only to that issue. Implied consent may not be found if the opposing party did not recognize that new matters were at issue during trial. The pleader must demonstrate that the opposing party understood that the evidence in question was introduced to prove new issues. *United Gen. Title Ins. Co. v. Malone*, 289 Neb. 1006 (2015).

Evan S. v. Laura H.
31 Neb. App. 750 (2023)

TL;DR: Dismissal of a paternity complaint on statute of limitations grounds is affirmed; a DNA test does not function as a substitute for a notarized acknowledgment of paternity.

Facts

Evan filed a complaint under Neb. Rev. Stat. § 43-1411 to establish paternity, custody, and visitation against Laura concerning a child who was born four years and five months prior to the date of the complaint. Even claimed to have submitted to a DNA test a few months after the child was born that provided a 99.9999% probability that he was the child's father. He requested that he be adjudicated as the father, awarded joint legal and physical custody, and that the Court establish a parenting plan and financial responsibilities for each of the parties.

Laura filed a "Special Appearance of Counsel" and a motion to dismiss which raised the statute of limitations.

The District Court held a hearing at which Laura offered an affidavit, and Evan offered the results of the genetic test. Laura's affidavit stated that she was dating Evan when she was still married to her husband but physically separated from him, she became pregnant, and she and Evan obtained the DNA test so that she could exclude the child from being included in her divorce decree from her husband. After that time, Evan moved to Colorado, came back and saw the child a few times per year, then moved back to Lincoln. When Laura told Evan that she did not want him to live with her, he became angry, and then filed to establish custody of the child.

The District Court dismissed the complaint for lack of subject-matter jurisdiction. Evan appealed. On appeal, Evan argued that the DNA test ought to be treated the same as a notarized acknowledgement of paternity, and that if it wasn't then § 43-1411 was unconstitutional.

Holdings

The Court of Appeals affirmed the District Court's order dismissing the complaint, though it construed the order as dismissing the complaint for failure to state a claim, because of the statute of limitations problem, not as a lack of subject matter jurisdiction.

The Court rejected Evan's argument that the DNA test established paternity more reliably than the notarized acknowledgment, and it ought to be treated the same. It reasoned that Evan was correct that both a DNA test and a notarized acknowledgment created an *evidentiary* presumption of paternity (See § 43-1415 (2) and § 43-1409), the evidentiary presumption only applies when a case is pending for which evidence can be

received. And only the notarized acknowledgment creates a *legal determination* of paternity if it is not rescinded within the 60-day window.

The Court of Appeals declined to consider Evan's constitutional challenge to § 43-1411 because he did not raise it before the District Court.

Kotas v. Barnett
31 Neb. App. 799 (2023)

TL;DR: District Court's Order terminating father's child support obligation is reversed for lack of a material change of circumstances.

Facts

Jennifer and Eric married in 2007, divorced in 2010, and have shared joint legal and joint physical custody of their only child since the divorce. Eric's child support obligation had been adjusted two times since the divorce, and it was set at $250 per month.

Jennifer filed a complaint to modify the decree, seeking sole legal and physical custody of the child, and a *recalculation* of Eric's child support obligation due solely to the expected change of custody. Eric filed an answer in which he alleged there have been no changes in circumstances, but if the Court found there was a material change in circumstances, he sought sole legal and physical custody and an order "setting the financial obligations of the parties … as determined by the custodial placement set."

Prior to trial, the parties stipulated to a resolution of custody which maintained their joint physical custody schedule with minor adjustments. They then presented evidence on child support, child-related expenses, and attorney's fees.

Jennifer testified that she was disabled as a result of a workplace injury, and had not worked for several years. Her earnings from social security were between $1,000 and $1,300 per month. Eric testified that at the time of the last modification, he was working as a hired farm hand, earning $3,293 per month. He decided to leave his job to become a self-employed farmer and handyman. Over the course of several years, he did less and less handyman work and spent more and more time on his farming operations, which lost money every year. He farmed at least one parcel that was owned by his family, and he reported that his family gave him periodic gifts to make up for the losses and to help him pay his expenses.

Jennifer created an exhibit from Eric's bank statements which showed several large deposits, and urged that his earning capacity was closer to $8,000 per month. The District Court found this exhibit misleading, as it was not prepared by a professional, and it did not factor in farming expenses.

The District Court filed an order which terminated Eric's child support obligation, and ordered the parties to share direct child-related costs equally. Jennifer appealed.

Holdings

The Court of Appeals reversed, finding that neither party sought an income-based modification of child support in their pleadings, and neither party alleged the existence of a financial change of circumstances in their operative complaints. Instead, both complaints sought a recalculation of child support which was predicated solely on each party expecting to receive sole physical custody of the child. Once the parties agreed to maintain joint physical custody, the only contemplated change of circumstances evaporated.

Even though no party pled a change in circumstances to their income, the Court went on to examine whether the evidence demonstrated a change of circumstances. It found that the change to Eric's income was a result of a voluntary reduction in income based on his personal wishes, and did not demonstrate a corresponding decrease in his earning capacity.

The Court also noted that there was no evidence in the record that the child's needs had changed.

Legal Principles

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 party seeking the modification 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. *Fetherkile v. Fetherkile*, 299 Neb. 76 (2018).

It is invariably concluded that a reduction in child support is not warranted when an obligor parent's financial position diminishes due to his or her own voluntary wastage or dissipation of his or her talents and assets and a reduction in child support would seriously impair the needs of the children. *Incontro v. Jacobs*, 277 Neb. 275 (2009).

Kee v. Gilbert
32 Neb. App. 1 (2023)

TL;DR: District Court's exercise of jurisdiction under the UCCJEA is affirmed when a court in the child's home state declined to exercise jurisdiction.

Facts

Paw and Christian are the parents of Cylise, who was born in 2016 in Iowa. Paw is from Burma. She met Christian at a job training program in Chadron. After graduating from the program, she moved to Iowa to live with Christian.

Paw filed a complaint in January of 2020 in Lancaster County District Court, alleging that she and Cylise were Nebraska residents, having fled her home in Iowa to escape immediate risk of harm due to Christian's mistreatment and abuse. Christian filed a motion to dismiss the complaint for lack of jurisdiction under the UCCJEA. He asserted that he had filed a petition in an Iowa district court the prior month, and that Iowa was Cylise's home state.

A couple of weeks later, the Lancaster County District Court held a hearing where it allowed the Iowa judge to join by telephone. After the hearing, the two judges conferred, and the Iowa judge decided that he would decline jurisdiction if the Nebraska judge was willing to accept the case. The next day, the Iowa judge filed an order dismissing his case, and sent a copy to the Clerk of the District Court in Lancaster County.

Several months later, the Court entered a stipulated temporary order which granted Paw physical custody of Cylise, subject to Christian's parenting time.

Later that year, and represented by new counsel, Christian filed a "Motion to Reconsider, Vacate, Motion to Modify, Objection and Motion to Strike." In this filing, Christian claimed that the District Court should vacate its prior orders because Nebraska lacked jurisdiction. Alternatively, Christian suggested that if Nebraska has jurisdiction under the UCCJEA, he should be awarded custody. Christian then filed an answer and counterclaim where he denied that Paw should be afforded any relief, but requested sole legal and physical custody of Cylise.

Trial then occurred over five days. The District Court then filed a decree of paternity, which found that Paw was a victim of Christian's abuse, and granted Paw sole legal and physical custody of Cylise, subject to a specific parenting time schedule for Christian. It ordered Christian to pay child support retroactive to February of 2020, awarded the tax exemption to Paw, and ordered Christian to pay $30,000 of Paw's attorney fees and costs. Christian appealed, taking issue with the District Court exercising jurisdiction under the UCCJEA and not making a record of its communications with the Iowa court,

with its award of custody, refusing to admit an exhibit, its child support calculations, and its attorney fee award.

Holdings

The Court of Appeals affirmed in all respects. It found that it was right for the District Court to exercise jurisdiction under the UCCJEA because the Iowa court had declined to exercise its jurisdiction, and Nebraska was therefore able to exercise jurisdiction under § 43-1238 (a). It also found that the judges' decision to hold a hearing in the courtroom to allow the litigants to present evidence and argument, followed by a private conversation, was appropriate because both court's orders reflected the substance of the private conversation, thus satisfying the UCCJEA's requirement that a record be made of conversations between the Courts under § 43-1235.

The Court affirmed the District Court's decisions on custody and parenting time, finding them to be supported by the evidence, including credibility findings. It noted that Paw had suffered abuse at Christian's hands, communication between the parties had been strained, and that Christian's evidence about his parenting involvement focused on timeframes long before trial.

The Court affirmed the award of child support, finding that neither party disputed the incomes used by the District Court, and that Christian hadn't asked for a deviation due to transportation-related costs. It noted that the District Court had discretion to award retroactive support.

The Court affirmed the award of attorney fees, noting that the fees incurred by both sides were substantial, and further noting that there was sufficient evidence for the District Court to find that the fee charged was reasonable for the service rendered. It noted that the preferred method to prove up on fees is to produce an itemized statement, but that is not strictly required.