STATE OF NEBRASKA

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December 21, 2018

Romulo Victor M. Israel, Jr.
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Republic of the Philippines, Chicago
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Mr. Israel:

This letter is regarding to your request of October 31, 2018 for more information on Nebraska Family law. These issues are contained in Chapter 42 of the Nebraska Revised Statutes. Chapter 42 is divided into 13 articles relating to certain topics.

Article Number	Subject	Neb. Rev. Stat. Section(s)
1	Marriage	§§ 42-101 - 42-128
2	Wife's Contracts, Debts and Separate Property	§§ 42-201 - 42-207
3	Divorce, Alimony, and Child Support	§§ 42-301 - 42-386
4	Marriage and Divorce of Indians (Native Americans)	§§ 42-401 - 42-408
5	Mortgage or Sale of Real Property of Mentally Incompetent Spouse	§§ 42-501 - 42-504
6	Community Property	§§ 42-601 - 42-620
7	Uniform Interstate Family Support Act	§§ 42-701 - 42-7,105
8	Conciliation Court	§§ 42-801 - 42-823
9	Domestic Violence	§§ 42-901 - 42-940
10	Premarital Agreements	§§ 42-1001 - 42-1011
11	Spousal Pension Rights Act	§§ 42-1101 - 42-1113
12	Address Confidentiality Act	§§ 42-1201 - 42-1210
13	Denial of Visitation	§§ 42-1301 - 42-1304

Within the articles are some key sections or acts that may be of interest to the consulate general. Nebraska's Uniform Divorce Recognition Act, which defines whether divorces from other jurisdictions are legally acknowledged, is located at Neb. Rev. Stat. §42-341, et. seg. Nebraska does require mediation for child custody issues (the Conciliation Court Law), specific mediation requirements may be specified on a county-to-county basis. Nebraska Statutes are available online at https://nebraskalegislature.gov/laws/browse-statutes.php.

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JONATHAN A. HIPE
Signing Officer

Finally, the Uniform Interstate Family Support Act (Article 7) does allow for child support, but actual guidelines are found in the Nebraska Supreme Court Rules, Chapter 4, Article 2 (Children and Families). The Child Support Guidelines are available online at:

https://supremecourt.nebraska.gov/supreme-court-rules/chapter-4-children-families/article-2-child-support-guidelines

It is important to note that the Nebraska Department of Health and Human Services (NDHHS) oversees Child Support Services that assists children receiving public benefits by collecting child support on their behalf. For more information on NDHHS Child Support Services are available at:

http://dhhs.ne.gov/children_family_services/CSE/Pages/CSEHome.aspx

Please let me know if you have any questions.

Sincerely,

Steven S. Chase,
Executive Director
Nebraska State Records Board
(On behalf of the Secretary of State)

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Office of Legal Affairs

21 MAR 2019

JONATHAN A. HIPE
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42-101. Marriage a civil contract.

In law, marriage is considered a civil contract, to which the consent of the parties capable of contracting is essential.

Source: R.S.1866, c. 34, § 1, p. 254; R.S.1913, § 1540; C.S.1922, § 1489; C.S.1929, § 42-101; R.S.1943, § 42-101.

Cross References

Agreements based on consideration of marriage, must be written, see section 36-202.
Child whose parents marry is legitimate, see section 43-1406.

Annotations

1. Nature of contract
2. Agreement of parties
3. Validity of marriage
4. Common-law marriage
5. Miscellaneous

1. Nature of contract

Although this section denotes marriage as a "civil contract," persons entering into matrimony establish a social status, not a contractual relation. Edmunds v. Edwards, 205 Neb. 255, 287 N.W.2d 420 (1980).

Where consent is obtained by fraud, marriage may be annulled. Zutavern v. Zutavern, 155 Neb. 395, 52 N.W.2d 254 (1952).

Marriage is a civil contract which, if procured by fraud, may be set aside. Hudson v. Hudson, 151 Neb. 210, 36 N.W.2d 851 (1949).

State is always a party. Willits v. Willits, 76 Neb. 228, 107 N.W. 379 (1906).

Consent of state is necessary. Eaton v. Eaton, 66 Neb. 676, 92 N.W. 995 (1902).

Marriage is a social status, and only in a limited sense is the relation contractual. University of Michigan v. McGuckin, 64 Neb. 300, 89 N.W. 778 (1902).

2. Agreement of parties

Consent of parties mentally competent is required. Kutch v. Kutch, 88 Neb. 114, 129 N.W. 169 (1910).

Mental weakness alone does not avoid contract. Aldrich v. Steen, 71 Neb. 33, 98 N.W. 445 (1904).

3. Validity of marriage

It is not a ground for annulment that license was wrongfully obtained where parties are competent and marriage is fully consummated. Baker v. Baker, 112 Neb. 738, 200 N.W. 1003 (1924).

Marriages valid in Indian tribe under Indian customs, are valid here. Ortley v. Ross, 78 Neb. 339, 110 N.W. 982 (1907).

Marriage is valid where minds of competent parties meet. University of Michigan v. McGuckin, 62 Neb. 489, 87 N.W. 180 (1901).

Where marriage is celebrated in good faith, it is binding though parties had agreed it should not be. Hills v. State, 61 Neb. 589, 85 N.W. 836 (1901).

4. Common-law marriage

Since 1923, common-law marriages cannot be made in this state. Collins v. Hoag & Rollins, 122 Neb. 805, 241 N.W. 766 (1932), reversing 121 Neb. 716, 238 N.W. 351 (1931).

5. Miscellaneous

Agreements to separate are against public policy. Brun v. Brun, 64 Neb. 782, 90 N.W. 860 (1902).

42-102. Minimum age; affliction with venereal disease, disqualification.

At the time of the marriage the male must be of the age of seventeen years or upward, and the female of the age of seventeen years or upward. No person who is afflicted with a venereal disease shall marry in this state.

Source: R.S.1866, c. 34, § 2, p. 254; R.S.1913, § 1541; C.S.1922, § 1490; Laws 1923, c. 40, § 1, p. 154; C.S.1929, § 42-102; R.S.1943, § 42-102; Laws 1963, c. 242, § 1, p. 735; Laws 1965, c. 230, § 1, p. 673; Laws 1971, LB 728, § 1; Laws 1978, LB 165, § 1.

Cross References

Marriage ends person's minority, see section 43-2101.

Annotations

Marriage of one afflicted with venereal disease is not void but voidable. Christensen v. Christensen, 144 Neb. 763, 14 N.W.2d 613 (1944).

Where party afflicted with venereal disease enters into marriage with full knowledge thereof, such party is barred from seeking annulment. Christensen v. Christensen, 144 Neb. 763, 14 N.W.2d 613 (1944).

If parties are of the age of consent, the marriage is valid, even though license was wrongfully obtained. Baker v. Baker, 112 Neb. 738, 200 N.W. 1003 (1924).

Prior to 1923, marriage was valid even if there was no license. Melcher v. Melcher, 102 Neb. 790, 169 N.W. 720 (1918).

Father of minor who brings suit to annul marriage of son under age is not liable for child support. Caulk v. Caulk, 91 Neb. 638, 136 N.W. 845 (1912).

Marriage of infant under age is voidable, but is valid until annulled by court. Willits v. Willits, 76 Neb. 228, 107 N.W. 379 (1906).

42-103. Marriages; when void.

Marriages are void (1) when either party has a husband or wife living at the time of the marriage, (2) when either party, at the time of marriage, is mentally incompetent to enter into the marriage relation, and (3) when the parties are related to each other as parent and child, grandparent and grandchild, brother and sister of half as well as whole blood, first cousins when of whole blood, uncle and niece, and aunt and nephew. This subdivision extends to children and relatives born out of wedlock as well as those born in wedlock.

Source: R.S.1866, c. 34, § 3, p. 254; Laws 1911, c. 76, § 1, p. 322; Laws 1913, c. 72, § 1, p. 216; R.S.1913, § 1542; C.S.1922, § 1491; C.S.1929, § 42-103; R.S.1943, § 42-103; Laws 1963, c. 243, § 1, p. 736; Laws 1976, LB 990, § 1; Laws 1986, LB 1177, § 14; Laws 1989, LB 22, § 1.

Cross References

Bigamy, penalty, see section 28-701.
Incest, penalty, see section 28-703.
Incestuous marriages are void, see section 28-702.

Annotations

1. **Void marriage, party has spouse**
2. **Void marriage, mental illness**
3. **Void marriage, related parties**

4. Miscellaneous

1. Void marriage, party has spouse

A marriage contract between a man and a woman, one of whom is married, is void. Boersen v. Huffman, 189 Neb. 469, 203 N.W.2d 489 (1973); Scott v. Scott, 153 Neb. 906, 46 N.W.2d 627 (1951), 23 A.L.R.2d 1431 (1951).

Marriage within six months of divorce is void, but cohabitation after impediment is removed, though removal is unknown, validates. Aldrich v. Steen, 71 Neb. 33, 98 N.W. 445 (1904); Eaton v. Eaton, 66 Neb. 676, 92 N.W. 995 (1902).

Applicant for widow's social security benefits denied entitlement where evidence revealed purported marriage to deceased consummated during interlocutory period of deceased's former divorce. McGuire v. Califano, 440 F.Supp. 1031 (D. Neb. 1977).

2. Void marriage, mental illness

In action to annul marriage, mental illness of party was not of such nature as to render marriage void. Homan v. Homan, 181 Neb. 259, 147 N.W.2d 630 (1967).

Absolute inability to contract, insanity or idiocy, but not mental weakness alone, will make marriage void. Aldrich v. Steen, 71 Neb. 33, 98 N.W. 445 (1904).

3. Void marriage, related parties

Marriage in Iowa of first cousins, residents of Nebraska, is valid here. Staley v. State, 89 Neb. 701, 131 N.W. 1028 (1911).

4. Miscellaneous

Marriages are void under this section only if there existed at the time of marriage such a want of understanding as to render the party incapable of assenting thereto. Edmunds v. Edwards, 205 Neb. 255, 287 N.W.2d 420 (1980).

This section declares what marriages are void. Baker v. Baker, 112 Neb. 738, 200 N.W. 1003 (1924).

42-104. Solemnization; license; application; requirements.

Prior to the solemnization of any marriage in this state, a license for that purpose shall be obtained from a county clerk in the State of Nebraska. Applications for a marriage license made with the county court prior to January 1, 1987, shall be processed and licenses shall be issued by the county court according

to the law and procedures in effect on the date each application was made. No marriage hereafter contracted shall be recognized as valid unless such license has been previously obtained and used within one year from the date of issuance and unless such marriage is solemnized by a person authorized by law to solemnize marriages. Each party shall present satisfactory documentary proof of and shall swear or affirm to the application giving: (1) Full name of each applicant and residence; and (2) the place, date, and year of birth of each.

Source: R.S.1866, c. 34, § 4, p. 254; R.S.1913, § 1543; C.S.1922, § 1492; Laws 1923, c. 40, § 2, p. 154; Laws 1925, c. 84, § 1, p. 261; C.S.1929, § 42-104; Laws 1943, c. 103, § 9, p. 348; R.S.1943, § 42-104; Laws 1971, LB 42, § 1; Laws 1971, LB 728, § 2; Laws 1975, LB 295, § 1; Laws 1986, LB 525, § 4; Laws 1988, LB 1126, § 2.

Annotations

1. Common-law marriage

2. Miscellaneous

1. Common-law marriage

By legislative enactment, common-law marriages in Nebraska are not recognized. Ropken v. Ropken, 169 Neb. 352, 99 N.W.2d 480 (1959); Scott v. Scott, 153 Neb. 906, 46 N.W.2d 627 (1951), 23 A.L.R.2d 1431 (1951).

Unless entered into prior to 1923, a common-law marriage entered into in this state is not valid. Bourelle v. Soo-Crete, Inc., 165 Neb. 731, 87 N.W.2d 371 (1958); Ragan v. Ragan, 158 Neb. 51, 62 N.W.2d 121 (1954).

Since 1923, common-law marriages in this state are prohibited. Bowman v. Bowman, 163 Neb. 336, 79 N.W.2d 554 (1956).

Common-law marriage in another state was not established. Abramson v. Abramson, 161 Neb. 782, 74 N.W.2d 919 (1956).

Common-law marriage was recognized as valid prior to act of 1923. Harrison v. Cargill Commission Co., 126 Neb. 185, 252 N.W. 899 (1924).

Amendment of 1923 whereby common-law marriages were banned was upheld as constitutional. Collins v. Hoag & Rollins, 122 Neb. 805, 241 N.W. 766 (1932), reversing 121 Neb. 716, 238 N.W. 351 (1931).

2. Miscellaneous

The plain language of this section includes only two requirements for a marriage to be valid: the issuance of a marriage license and the subsequent solemnization of the marriage by a person authorized to do so. Vlach v. Vlach, 286 Neb. 141, 835 N.W.2d 72 (2013).

The failure to obtain a license to marry voids a marriage performed without it. Randall v. Randall, 216 Neb. 541, 345 N.W.2d 319 (1984).

Where marriage ceremony is invalid, subsequent cohabitation after removal of impediment will not validate marriage. Binger v. Binger, 158 Neb. 444, 63 N.W.2d 784 (1954).

Under 1923 amendment to this section, a valid marriage can be contracted in this state only when the parties have previously obtained a license to marry, and when the marriage has been solemnized by a person authorized by law to solemnize marriages. Walden v. Walden, 122 Neb. 804, 241 N.W. 766 (1932), reversing 121 Neb. 715, 238 N.W. 356 (1931).

Provisions of this section are limited to marriages solemnized in Nebraska. Allen v. Allen, 121 Neb. 635, 237 N.W. 662 (1931).

Where parties are of the age of consent and otherwise competent, the fact that license is wrongfully obtained is no ground for annulment. Baker v. Baker, 112 Neb. 738, 200 N.W. 1003 (1924).

Prior to 1923, the fact that there was no license, or that it was wrongfully obtained, did not invalidate marriage. Melcher v. Melcher, 102 Neb. 790, 169 N.W. 720 (1918).

42-105. Marriage of minor; conditions upon which a license may be issued.

When either party is a minor, no license shall be granted without the written consent under oath of: (1) Either one of the parents of such minor, if the parents are living together; (2) the parent having the legal custody of such minor, if the parents are living separate and apart from each other; (3) the surviving parent, if one of the parents of such minor is deceased; or (4) the guardian, conservator, or person under whose care and government such minor may be, if both parents of such minor are deceased or if such guardian, conservator, or person has the legal and actual custody of such minor. The county clerk shall be justified in issuing the license, without further proof, upon receiving an affidavit setting forth the facts with reference to the conditions above specified and giving consent to the marriage, signed by the person authorized to give written consent under such circumstances.

Source: R.S.1866, c. 34, § 5, p. 254; R.S.1913, §§ 1543, 1544; C.S.1922, §§ 1492, 1493; Laws 1923, c. 40, § 2, p. 154; Laws 1925, c. 84, § 1, p. 261; C.S.1929, §§ 42-104, 42-105; R.S.1943, § 42-105; Laws 1945, c. 99, § 1, p. 327; Laws 1975, LB 481, § 28; Laws 1986, LB 525, § 5.

Annotations

Above section relates to the obtaining of license, and does not go to validity of marriage. Baker v. Baker, 112 Neb. 738, 200 N.W. 1003 (1924).

42-106. License issued by county clerk; contents; marriage record; forms.

When an application is made for a license to the county clerk, he or she shall, upon the granting of such license, state in the license the information contained in the application as provided in section 42-104. The license shall, prior to the issuing thereof, be entered of record in the office of the county clerk in a suitable book to be provided for that purpose.

The forms for the application, license, and certificate of marriage shall be provided by the Department of Health and Human Services at actual cost as determined by the department.

Source: R.S.1866, c. 34, § 6, p. 254; Laws 1869, § 1, p. 167; R.S.1913, § 1545; C.S.1922, § 1494; C.S.1929, § 42-106; R.S.1943, § 42-106; Laws 1971, LB 728, § 3; Laws 1986, LB 525, § 6; Laws 1989, LB 344, § 3; Laws 1996, LB 1044, § 96; Laws 2007, LB296, § 55.

Cross References

Fee for proceedings, see section 33-110.

42-107. License; issuance prohibited, when.

If the required proof is not given, if it shall appear that either of the parties is legally incompetent to enter into such contract or that there is any impediment in the way, or if either party is a minor and the consent mentioned in section 42-105 shall not be given, the county clerk shall refuse to grant a license.

Source: R.S.1866, c. 34, § 7, p. 255; R.S.1913, § 1546; C.S.1922, § 1495; C.S.1929, § 42-107; R.S.1943, § 42-107; Laws 1971, LB 728, § 4; Laws 1986, LB 525, § 7.

42-108. Marriage ceremony; who may perform; return; contents.

Every judge, retired judge, clerk magistrate, or retired clerk magistrate, and every preacher of the gospel authorized by the usages of the church to which he or she belongs to solemnize marriages, may perform the marriage ceremony in this state. Every such person performing the marriage ceremony shall make a return of his or her proceedings in the premises, showing the names and residences of at least two witnesses who were present at such marriage. The return shall be made to the county clerk who issued the license within fifteen days after such marriage has been performed. The county clerk shall record the return or cause it to be recorded in the same book where the marriage license is recorded.

Source: R.S.1866, c. 34, § 8, p. 255; Laws 1869, § 2, p. 168; R.S.1913, § 1547; C.S.1922, § 1496; Laws 1927, c. 77, § 1, p. 242; C.S.1929, § 42-108; R.S.1943, § 42-108; Laws 1951, c. 124, § 1, p. 542; Laws 1971, LB 42, § 2; Laws 1972, LB 1032, § 249; Laws 1973, LB 226, § 28; Laws 1981, LB 55, § 1; Laws 1986, LB 525, § 8; Laws 2006, LB 1115, § 28.

Annotations

While certain named classes of persons and officials are authorized to perform the marriage ceremony, they are not the only persons that have that authority. Collins v. Hoag & Rollins, 122 Neb. 805, 241 N.W. 766 (1932).

Performance of ceremony is not obligatory on clergyman or judges. Douglas County v. Vinsonhaler, 82 Neb. 810, 118 N.W. 1058 (1908).

42-109. Ceremony; requirements.

In the solemnization of marriage no particular form shall be required, except that the parties shall solemnly declare in the presence of the magistrate or minister and the attending witnesses, that they take each other as husband and wife; and in any case there shall be at least two witnesses, besides the minister or magistrate present at the ceremony.

Source: R.S.1866, c. 34, § 9, p. 255; R.S.1913, § 1548; C.S.1922, § 1497; C.S.1929, § 42-109; R.S.1943, § 42-109.

Annotations

Presence of clergyman or magistrate is not indispensable. Gibson v. Gibson, 24 Neb. 394, 39 N.W. 450 (1888).

42-110. Marriage certificate; provided to parties; form.

Whenever a marriage shall have been solemnized pursuant to the provisions of sections 42-101 to 42-117, the minister or magistrate who solemnized the same shall give to each of the parties, on request, a certificate under his hand, specifying the names, ages and places of residence of the parties married, the names and residences of at least two witnesses who were present at such marriage, and the time and place thereof.

Source: R.S.1866, c. 34, § 10, p. 255; R.S.1913, § 1549; C.S.1922, § 1498; C.S.1929, § 42-110; R.S.1943, § 42-110.

42-111. Repealed. Laws 1951, c. 124, § 2.

42-112. Returns; record.

The county clerk of each county in the state shall record all such returns of such marriages in a book to be kept for that purpose within one month after receiving the returns.

Source: R.S.1866, c. 34, § 12, p. 255; R.S.1913, § 1551; C.S.1922, § 1500; C.S.1929, § 42-112; R.S.1943, § 42-112; Laws 1986, LB 525, § 9.

Cross References

County clerk, reports to Department of Health and Human Services, see section 71-614.
Department of Health and Human Services, marriage records, duties, see section 71-616.

42-113. Violations; penalty.

If any justice, minister, or other person whose duty it is to make and transmit to the county clerk such certificate shall neglect to make and deliver the same; if the county clerk shall neglect to record such certificate; if any person shall undertake to join others in marriage, knowing that he or she is not legally authorized so to do or knowing of any legal impediment to the proposed marriage; if any person authorized to solemnize any marriage shall willfully and knowingly make a false certificate of any marriage to the county clerk; or if the county clerk shall willfully and knowingly make a false record of any certificate of marriage, he or she shall be guilty of a Class I misdemeanor.

Source: R.S.1866, c. 34, § 13, p. 255; R.S.1913, § 1552; C.S.1922, § 1501; C.S.1929, § 42-113; R.S.1943, § 42-113; Laws 1977, LB 40, § 225; Laws 1986, LB 525, § 10.

42-114. Want of jurisdiction; marriage not void, when.

No marriage solemnized before any person professing to be a minister of the gospel, shall be deemed or adjudged to be void, nor shall the validity thereof be in any way affected on account of any want of jurisdiction or authority in such supposed minister; *Provided,* the marriage be consummated with a full belief on the part of the persons so married, or either of them, that they have been lawfully joined in marriage.

Source: R.S.1866, c. 34, § 14, p. 256; R.S.1913, § 1533; C.S.1922, § 1502; C.S.1929, § 42-114; R.S.1943, § 42-114; Laws 1972, LB 1032, §

Annotations

This section authorizes anyone to perform a valid marriage ceremony if he holds himself out to be a minister or justice of the peace, provided the marriage is consummated with a full belief on the part of either of the parties that they have been lawfully joined in marriage. Collins v. Hoag & Rollins, 122 Neb. 805, 241 N.W. 766 (1932).

If person before whom marriage solemnized had no authority to perform same but professed to have and was believed to have by both parties so married, or either of them, marriage is valid. Haggin v. Haggin, 35 Neb. 375, 53 N.W. 209 (1892).

42-115. Marriage according to custom of religious society; certificate; transmission to county clerk.

It shall be lawful for every religious society to join together in marriage such persons as are of the society, according to the rites and customs of the society to which they belong. The clerk or keeper of the minutes, proceedings, or other book of the religious society in which such marriage shall be had, or if there be no such clerk or keeper of the minutes, then the moderator or person presiding in such society, shall make out and transmit to the county clerk of the county a certificate of the marriage, and the same shall be recorded in the same manner as is provided in sections 42-108 to 42-112.

Source: R.S.1866, c. 34, § 15, p. 256; R.S.1913, § 1554; C.S.1922, § 1503; C.S.1929, § 42-115; R.S.1943, § 42-115; Laws 1986, LB 525, § 11.

Annotations

Marriage solemnized under this section is valid. Collins v. Hoag & Rollins, 122 Neb. 805, 241 N.W. 766 (1932).

42-116. Marriage certificate and record as evidence.

The original certificate and record of marriage made by the minister, officer, or person, as prescribed in sections 42-101 to 42-117, and the record thereof, made as prescribed, a copy of such record, duly certified by such officer, or an abstract of marriage as defined in section 71-601.01, shall be received in all courts and places as presumptive evidence of the fact of such marriage.

Source: R.S.1866, c. 34, § 16, p. 256; R.S.1913, § 1555; C.S.1922, § 1504; C.S.1929, § 42-116; R.S.1943, § 42-116; Laws 2006, LB 1115, § 29.

Annotations

Proof of marriage may be made by either party. Bailey v. State, 36 Neb. 808, 55 N.W. 241 (1893).

Proof of official character of person performing ceremony is unnecessary; marriage may be proved by eyewitness. Lord v. State, 17 Neb. 526, 23 N.W. 507 (1885).

42-117. Marriage contracted out of state; when valid.

All marriages contracted without this state, which would be valid by the laws of the country in which the same were contracted, shall be valid in all courts and places in this state.

Source: R.S.1866, c. 34, § 17, p. 257; R.S.1913, § 1556; C.S.1922, § 1505; C.S.1929, § 42-117; R.S.1943, § 42-117.

Annotations

Residents of this state cannot enter into common-law marriage by temporary sojourns in another state. Binger v. Binger, 158 Neb. 444, 63 N.W.2d 784 (1954).

Where law of South Dakota was not pleaded, remarriage in South Dakota within three months after entry of divorce decree in Nebraska was invalid. Scott v. Scott, 153 Neb. 906, 46 N.W.2d 627 (1951), 23 A.L.R.2d 1431 (1951).

Marriage in Colorado was valid even though no license was obtained. Allen v. Allen, 121 Neb. 635, 237 N.W. 662 (1931).

Even though parties have left this state to evade our laws, a marriage is valid unless expressly declared void. Staley v. State, 89 Neb. 701, 131 N.W. 1028 (1911); State v. Hand, 87 Neb. 189, 126 N.W. 1002 (1910).

If marriage is valid where celebrated, it is valid in this state. Hills v. State, 61 Neb. 589, 85 N.W. 836 (1901); Bailey v. State, 36 Neb. 808, 55 N.W. 241 (1893); Gibson v. Gibson, 24 Neb. 394, 39 N.W. 450 (1888).

42-118. Marriages; when voidable.

In case of a marriage solemnized when either of the parties is under the age of legal consent, if they shall separate during such nonage, and not cohabit together afterwards, or in case the consent of one of the parties was obtained by force or fraud, and there shall have been no subsequently voluntary cohabitation of the parties, the marriage shall be deemed voidable.

Source: R.S.1866, c. 16, § 2, p. 128; R.S.1913, § 1557; C.S.1922, § 1506; C.S.1929, § 42-118; R.S.1943, § 42-118.

Annotations

Fraud sufficient to vitiate a marriage must go to the essence of the marriage relation. Zutavern v. Zutavern, 155 Neb. 395, 52 N.W.2d 254 (1952).

Marriage may be set aside for fraud. Hudson v. Hudson, 151 Neb. 210, 36 N.W.2d 851 (1949).

In annulment suit, plaintiff must not only show consent obtained by force or fraud but must prove that there was no subsequent voluntary cohabitation of the parties. Kanaly v. Bronson, 97 Neb. 322, 149 N.W. 781 (1914).

Father of minor who brings suit to annul marriage of son under age is not liable for child support. Caulk v. Caulk, 91 Neb. 638, 136 N.W. 845 (1912).

Disparity in age of the contracting parties is not one of the statutory causes for annulment. Kutch v. Kutch, 85 Neb. 702, 124 N.W. 108 (1909).

Where marriage is annulled for nonage of male, it is proper to make order for support of wife and child. Willits v. Willits, 76 Neb. 228, 107 N.W. 379 (1906).

42-119. Repealed. Laws 2004, LB 1207, § 49.

42-120. Repealed. Laws 2004, LB 1207, § 49.

42-121. Repealed. Laws 1998, LB 1073, § 179.

42-121.01. Repealed. Laws 1988, LB 804, § 1.

42-122. Repealed. Laws 1983, LB 497, § 2.

42-123. Repealed. Laws 1983, LB 497, § 2.

42-124. Repealed. Laws 1971, LB 728, § 5.

42-125. Repealed. Laws 1983, LB 497, § 2.

42-126. Repealed. Laws 1983, LB 497, § 2.

42-127. Repealed. Laws 1983, LB 497, § 2.

42-128. Repealed. Laws 1983, LB 497, § 2.

42-201. Wife's separate property; not available for husband or his debts; exception.

The property, real and personal, which any woman in the state may own at the time of her marriage, rents, issues, profits or proceeds thereof and real, personal or mixed property which shall come to her by descent, devise or the gift of any person except her husband or which she shall acquire by purchase or otherwise shall remain her sole and separate property, notwithstanding her marriage, and shall not be subject to disposal by her husband or liable for his debts; *Provided,* all property of a married woman, except ninety percent of her wages, not exempt by statute from sale on execution or attachment, regardless of when or how said property has been or may hereafter be acquired, shall be liable for the payment of all debts contracted for necessaries furnished the family of said married woman after execution against the husband for such indebtedness has been returned unsatisfied for want of goods and chattels, lands and tenements whereon to levy and make the same.

Source: Laws 1871, § 1, p. 68; Laws 1875, § 1, p. 88; Laws 1887, c. 49, § 1, p. 478; R.S.1913, § 1560; C.S.1922, § 1509; C.S.1929, § 42-201; R.S.1943, § 42-201; Laws 1945, c. 100, § 1, p. 328.

Cross References

Executions and exemptions, see sections 25-1501 to 25-15,105.

Annotations

1. Separate property of wife

2. Liability for debts of husband

3. Liability for necessaries

4. Miscellaneous

1. Separate property of wife

Property conveyed by husband to wife became her separate property and was a valid gift. Graff v. Graff, 179 Neb. 345, 138 N.W.2d 644 (1965).

42-301. Repealed. Laws 1972, LB 820, § 35.

42-302. Repealed. Laws 1972, LB 820, § 35.

42-302.01. Repealed. Laws 1972, LB 820, § 35.

42-302.02. Repealed. Laws 1972, LB 820, § 35.

42-303. Repealed. Laws 1972, LB 820, § 35.

42-304. Repealed. Laws 1972, LB 820, § 35.

42-305. Repealed. Laws 1972, LB 820, § 35.

42-305.01. Repealed. Laws 1972, LB 820, § 35.

42-305.02. Repealed. Laws 1972, LB 820, § 35.

42-305.03. Repealed. Laws 1972, LB 820, § 35.

42-306. Repealed. Laws 1972, LB 820, § 35.

42-307. Repealed. Laws 1972, LB 820, § 35.

42-308. Repealed. Laws 1972, LB 820, § 35.

42-309. Repealed. Laws 1972, LB 820, § 35.

42-310. Repealed. Laws 1972, LB 820, § 35.

42-311. Repealed. Laws 1972, LB 820, § 35.

42-312. Repealed. Laws 1972, LB 820, § 35.

42-313. Repealed. Laws 1972, LB 820, § 35.

42-314. Repealed. Laws 1972, LB 820, § 35.

42-315. Repealed. Laws 1972, LB 820, § 35.

42-316. Repealed. Laws 1972, LB 820, § 35.

42-317. Repealed. Laws 1972, LB 820, § 35.

42-318. Repealed. Laws 1972, LB 820, § 35.

42-318.01. Repealed. Laws 1972, LB 820, § 35.

42-319. Repealed. Laws 1972, LB 820, § 35.

42-319.01. Repealed. Laws 1972, LB 820, § 35.

42-319.02. Repealed. Laws 1972, LB 820, § 35.

42-320. Repealed. Laws 1972, LB 820, § 35.

42-321. Repealed. Laws 1972, LB 820, § 35.

42-322. Repealed. Laws 1972, LB 820, § 35.

42-323. Repealed. Laws 1972, LB 820, § 35.

42-324. Repealed. Laws 1972, LB 820, § 35.

42-325. Repealed. Laws 1972, LB 820, § 35.

42-326. Repealed. Laws 1972, LB 820, § 35.

42-327. Repealed. Laws 1972, LB 820, § 35.

42-328. Repealed. Laws 1972, LB 820, § 35.

42-329. Repealed. Laws 1972, LB 820, § 35.

42-330. Repealed. Laws 1972, LB 820, § 35.

42-331. Repealed. Laws 1972, LB 820, § 35.

42-332. Repealed. Laws 1972, LB 820, § 35.

42-333. Repealed. Laws 1972, LB 820, § 35.

42-334. Repealed. Laws 1972, LB 820, § 35.

42-335. Repealed. Laws 1972, LB 820, § 35.

42-336. Repealed. Laws 1972, LB 820, § 35.

42-337. Repealed. Laws 1972, LB 820, § 35.

42-338. Repealed. Laws 1972, LB 820, § 35.

42-339. Repealed. Laws 1972, LB 820, § 35.

42-340. Repealed. Laws 1972, LB 820, § 35.

42-341. Decree of another jurisdiction; no force or effect; when.

A divorce from the bonds of matrimony obtained in another jurisdiction shall be of no force or effect in this state, if both parties to the marriage were domiciled in this state at the time the proceeding for the divorce was commenced except as provided in section 30-2353.

Source: Laws 1949, c. 124, § 1, p. 331; Laws 1975, LB 481, § 29.

Annotations

Dominican Republic divorce decree involving Nebraska domiciliaries held of no effect and not entitled to comity. Weber v. Weber, 200 Neb. 659, 265 N.W.2d 436 (1978).

This section does not contravene full faith and credit clause of federal Constitution. Zenker v. Zenker, 161 Neb. 200, 72 N.W.2d 809 (1955).

Divorce obtained in foreign state is of no force and effect in this state if both parties were domiciled in this state at the time the proceeding was commenced. Yost v. Yost, 161 Neb. 164, 72 N.W.2d 689 (1955).

42-342. Residence; prima facie evidence.

Proof that a person obtaining a divorce from the bonds of matrimony in another jurisdiction was (1) domiciled in this state within twelve months prior to the commencement of the proceeding therefor, and resumed residence in this state within eighteen months after the date of his departure therefrom, or (2) at all times after his departure from this state, and until his return maintained a place of residence within this state, shall be prima facie evidence that the person was domiciled in this state when the divorce proceeding was commenced.

Source: Laws 1949, c. 124, § 2, p. 331.

Annotations

Rule as to prima facie evidence applied to Florida decree. Yost v. Yost, 161 Neb. 164, 72 N.W.2d 689 (1955).

42-343. Sections, how construed.

Sections 42-341 to 42-344 shall be so interpreted and construed as to effectuate their general purpose to make uniform the law of those states which enact them.

Source: Laws 1949, c. 124, § 3, p. 331.

42-344. Act, how cited.

Sections 42-341 to 42-344 may be cited as the Uniform Divorce Recognition Act.

Source: Laws 1949, c. 124, § 4, p. 332.

42-345. Decree of divorce; prior to August 27, 1951; validity.

When any district court in this state shall have entered of record a decree of divorce prior to August 27, 1951, it shall be conclusively presumed that the decree, and all instruments and proceedings in connection therewith, are valid in all respects, notwithstanding some defect or defects as may appear on the face of the record or the absence of any record of such court, unless an action is brought within two years from August 27, 1951, attacking the validity thereof.

Source: Laws 1951, c. 122, § 1, p. 536.

42-346. Decree of divorce; validity.

When any district court in this state has entered a decree of divorce after August 27, 1951, and when any county court in this state has entered a decree of divorce on or after October 1, 1997, it shall be conclusively presumed that the decree, and all instruments and proceedings in connection therewith are valid in all respects, notwithstanding some defect or defects as may appear on the face of the record or the absence of any record of such court, unless an action is brought within two years from the entry of such decree of divorce attacking the validity thereof.

Source: Laws 1951, c. 122, § 2, p. 536; Laws 1996, LB 1296, § 9.

42-347. Terms, defined.

For purposes of sections 42-347 to 42-381, unless the context otherwise requires:

(1) Authorized attorney means an attorney (a) employed by the county subject to the approval of the county board, (b) employed by the Department of Health and Human Services, or (c) appointed by the court, who is authorized to investigate and prosecute child and spousal support cases. An authorized attorney shall represent the state as provided in section 43-512.03;

(2) Custody includes both legal custody and physical custody;

(3) Dissolution of marriage means the termination of a marriage by decree of a court of competent jurisdiction upon a finding that the marriage is irretrievably broken. The term dissolution of marriage shall be considered synonymous with divorce, and whenever the term divorce appears in the statutes it means dissolution of marriage pursuant to sections 42-347 to 42-381;

(4) Joint legal custody has the same meaning as in section 43-2922;

(5) Joint physical custody has the same meaning as in section 43-2922;

(6) Legal custody has the same meaning as in section 43-2922;

(7) Legal separation means a decree of a court of competent jurisdiction providing that two persons who have been legally married shall thereafter live separate and apart and providing for any necessary adjustment of property, support, and custody rights between the parties but not dissolving the marriage;

(8) Physical custody has the same meaning as in section 43-2922;

(9) Spousal support, when used in the context of income withholding or any provisions of law which might lead to income withholding, means alimony or maintenance support for a spouse or former spouse when ordered as a part of an order, decree, or judgment which provides for child support and the child and spouse or former spouse are living in the same household;

(10) State Disbursement Unit has the same meaning as in section 43-3341;

(11) Support order has the same meaning as in section 43-1717; and

(12) Title IV-D Division has the same meaning as in section 43-3341.

Source: Laws 1972, LB 820, § 1; Laws 1985, Second Spec. Sess., LB 7, § 8; Laws 1987, LB 573, § 1; Laws 1989, LB 401, § 2; Laws 1994, LB 1224, § 42; Laws 1996, LB 1044, § 98; Laws 1997, LB 229, § 7; Laws 1997, LB 307, § 15; Laws 2000, LB 972, § 7; Laws 2007, LB554, § 28.

Annotations

That the parties must be married in order for the court to legally separate them is implicit in subsection (3) of this section. Bogardi v. Bogardi, 249 Neb. 154, 542 N.W.2d 417 (1996).

Child support orders entered under sections 42-347 to 42-379 must give effect to child support orders entered under section 43-512.04. Robbins v. Robbins, 219 Neb. 151, 361 N.W.2d 519 (1985).

The Nebraska divorce laws are not unconstitutional under the due process or equal protection clauses of the United States and Nebraska Constitutions. Roberts v. Roberts, 200 Neb. 256, 263 N.W.2d 449 (1978).

An unqualified allowance of alimony in gross before July 6, 1972, is not subject to modification. Kasper v. Kasper, 195 Neb. 754, 240 N.W.2d 591 (1976).

Divorce action pending on appeal is tried de novo on the record in the Supreme Court and decided under terms of the newly effective no fault marriage dissolution act. Hassler v. Hassler, 190 Neb. 86, 206 N.W.2d 40 (1973).

Where district court labeled award "spousal support," and parties had no children, it in fact awarded alimony. Mastrocesare v. Mastrocesare, 2 Neb. App. 231, 507 N.W.2d 683 (1993).

42-348. Proceedings; where brought; transfer of proceedings; orders; how treated.

All proceedings under sections 42-347 to 42-381 shall be brought in the district court of the county in which one of the parties resides. Proceedings may be transferred to a separate juvenile court or county court sitting as a juvenile court which has acquired jurisdiction pursuant to section 43-2,113. Certified copies of orders filed with the clerk of the court pursuant to such section shall be treated in the same manner as similar orders issued by the court.

Source: Laws 1972, LB 820, § 2; Laws 1985, Second Spec. Sess., LB 7, § 9; Laws 1996, LB 1296, § 10; Laws 1997, LB 229, § 8.

Annotations

If one of the parties to a dissolution action has had a Nebraska domicile for the duration prescribed by section 42-349, a party may commence a dissolution action under this section in the county where one of the parties lives and is not required to commence the action in the domiciliary county of either party to the dissolution action. Huffman v. Huffman, 232 Neb. 742, 441 N.W.2d 899 (1989).

A district court cannot acquire jurisdiction over dissolution of marriage proceedings unless one of the parties is a resident of the county in which the court is located at the time the original petition is filed. Small v. Small, 229 Neb. 344, 427 N.W.2d 42 (1988).

42-349. Dissolution; action; conditions.

No action for dissolution of marriage may be brought unless at least one of the parties has had actual residence in this state with a bona fide intention of making this state his or her permanent home for at least one year prior to the filing of the complaint, or unless the marriage was solemnized in this state and either party has resided in this state from the time of marriage to filing the complaint. Persons serving in the armed forces of the United States who have been continuously stationed at any military base or installation in this state for one year or, if the marriage was solemnized in this state, have resided in this state from the time of marriage to the filing of the complaint shall for the purposes of sections 42-347 to 42-381 be deemed residents of this state.

Source: Laws 1972, LB 820, § 3; Laws 1997, LB 229, § 9; Laws 2004, LB 1207, § 18.

Annotations

The inference that residency in Nebraska has been with the intent to make it one's permanent home is negated where he or she is a nonimmigrant alien residing in Nebraska on a visitor's visa. Rozsnyai v. Svacek, 272 Neb. 567, 723 N.W.2d 329 (2006).

One who proves he or she met the durational residency requirement shall be permitted the inference that such residency was with the intention to make Nebraska a permanent home, absent a showing that the residency was a sham and not bona fide. Rector v. Rector, 224 Neb. 800, 401 N.W.2d 167 (1987).

This section is not unconstitutional. Ashley v. Ashley, 191 Neb. 824, 217 N.W.2d 926 (1974).

In order to maintain an action for divorce in Nebraska, one of the parties must have had actual residence in this state with a bona fide intention of making this state his or her permanent home for at least 1 year prior to the

filing of the complaint. Catlett v. Catlett, 23 Neb. App. 136, 869 N.W.2d 368 (2015).

The requirement that one party have "actual residence in this state" means that one party must have a "bona fide domicile" in the state for 1 year before the commencement of a dissolution action. Catlett v. Catlett, 23 Neb. App. 136, 869 N.W.2d 368 (2015).

42-349.01. Repealed. Laws 2007, LB 554, § 49.

42-350. Legal separation; amendment of pleadings; when.

If a complaint for legal separation is filed before residence requirements for dissolution of marriage have been complied with, either party, upon complying with such requirements, may amend his or her pleadings to request a dissolution of marriage, and notice of such amendment shall be given in the same manner as for an original action under sections 42-347 to 42-381.

Source: Laws 1972, LB 820, § 4; Laws 1997, LB 229, § 10; Laws 2004, LB 1207, § 19.

Annotations

After residency requirement has been satisfied, dissolution of marriage may be requested by amendment. Ashley v. Ashley, 191 Neb. 824, 217 N.W.2d 926 (1974).

42-351. County or district court; jurisdiction.

(1) In proceedings under sections 42-347 to 42-381, the court shall have jurisdiction to inquire into such matters, make such investigations, and render such judgments and make such orders, both temporary and final, as are appropriate concerning the status of the marriage, the custody and support of minor children, the support of either party, the settlement of the property rights of the parties, and the award of costs and attorney's fees. The court shall determine jurisdiction for child custody proceedings under the Uniform Child Custody Jurisdiction and Enforcement Act.

(2) When final orders relating to proceedings governed by sections 42-347 to 42-381 are on appeal and such appeal is pending, the court that issued such orders shall retain jurisdiction to provide for such orders regarding support, custody, parenting time, visitation, or other access, orders shown to be necessary to allow

the use of property or to prevent the irreparable harm to or loss of property during the pendency of such appeal, or other appropriate orders in aid of the appeal process. Such orders shall not be construed to prejudice any party on appeal.

Source: Laws 1972, LB 820, § 5; Laws 1984, LB 276, § 1; Laws 1991, LB 732, § 100; Laws 1992, LB 360, § 10; Laws 1996, LB 1296, § 11; Laws 1997, LB 229, § 11; Laws 2002, LB 876, § 73; Laws 2003, LB 148, § 42; Laws 2007, LB554, § 29.

Cross References

Uniform Child Custody Jurisdiction and Enforcement Act, see section 43-1226.

Annotations

1. Jurisdiction of court

2. Investigations

3. Custody of children

4. Attorneys' fees

5. Miscellaneous

1. Jurisdiction of court

An order helping a party pay for his or her attorney's work on appeal is an order in aid of the appeal process under subsection (2) of this section. Brozek v. Brozek, 292 Neb. 681, 874 N.W.2d 17 (2016).

The word "support" in subsection (2) of this section includes spousal support, i.e., alimony. Spady v. Spady, 284 Neb. 885, 824 N.W.2d 366 (2012).

Pursuant to subsection (1) of this section, jurisdiction over a child custody proceeding is governed exclusively by the Uniform Child Custody Jurisdiction and Enforcement Act. Carter v. Carter, 276 Neb. 840, 758 N.W.2d 1 (2008).

Full and complete general jurisdiction over the entire marital relationship and all related matters, including child custody and support, is vested in the district court in which a petition for dissolution of a marriage is properly filed. Knerr v. Swigerd, 243 Neb. 591, 500 N.W.2d 839 (1993); Nemec v. Nemec, 219 Neb. 891, 367 N.W.2d 705 (1985); Robbins v. Robbins, 219 Neb. 151, 361 N.W.2d 519 (1985).

Full and complete general jurisdiction over child custody and support is vested in the district court in which a petition for dissolution of a marriage is properly filed. Smith v. Smith, 242 Neb. 812, 497 N.W.2d 44 (1993).

The district court in which a divorce is granted maintains continuing jurisdiction over the marital relationship and all related matters, including child custody and support, unless and until the case is transferred to another court. State ex rel. Storz v. Storz, 235 Neb. 368, 455 N.W.2d 182 (1990).

Where minor children are affected by a divorce proceeding, the district court has complete jurisdiction over the custody, support, and welfare of those children. Farmer v. Farmer, 200 Neb. 308, 263 N.W.2d 664 (1978).

Generally, once an appeal has been perfected, the trial court no longer has jurisdiction, although the district court retains jurisdiction under subsection (2) of this section for certain matters. Furstenfeld v. Pepin, 23 Neb. App. 673, 875 N.W.2d 468 (2016).

Subsection (2) of this section does not grant authority to hear and determine anew the very issues then pending on appeal and to enter permanent orders addressing these issues during the appeal process. Furstenfeld v. Pepin, 23 Neb. App. 673, 875 N.W.2d 468 (2016).

Satisfaction of the residency requirement in section 42-349 is required to confer subject matter jurisdiction on a district court hearing a dissolution proceeding. Catlett v. Catlett, 23 Neb. App. 136, 869 N.W.2d 368 (2015).

This section does not allow a district court to retain jurisdiction to permanently modify a decree concerning an issue which is pending appeal from a previous order concerning the same issue. Bayliss v. Bayliss, 8 Neb. App. 269, 592 N.W.2d 165 (1999).

Generally, once an appeal has been perfected, the trial court has no jurisdiction to determine any issues regarding the subject matter of the litigation. However, if a supersedeas bond has not been filed, the court retains jurisdiction to enforce the terms of the judgment. Kricsfeld v. Kricsfeld, 8 Neb. App. 1, 588 N.W.2d 210 (1999).

2. Investigations

In a divorce case, ex parte investigative reports are not evidence, and cannot be the basis for any adjudication. Jorgensen v. Jorgensen, 194 Neb. 271, 231 N.W.2d 360 (1975).

Error, if any, in such use as was made of the testimony of an independent investigator and her report which was submitted to the court and filed but not received in evidence, was harmless since the award of custody was amply supported by the record. Kockrow v. Kockrow, 191 Neb. 657, 217 N.W.2d 89 (1974).

Investigation was authorized and petitioner had opportunity to explore and introduce evidence with reference to the report, and even if it was in part inadmissible it is presumed the court did not base its decision thereon. Christensen v. Christensen, 191 Neb. 355, 215 N.W.2d 111 (1974).

3. Custody of children

The best interests and welfare of children is paramount in custody cases and the court may place the children in its custody if continuance thereof so requires. Broadstone v. Broadstone, 190 Neb. 299, 207 N.W.2d 682 (1973).

Under the divorce law it was held that when the court had placed custody of the children in the court, with possession and care in a parent, it could summarily modify the possession of the parent or parents in the best interests of the children. Benson v. Benson, 190 Neb. 87, 206 N.W.2d 51 (1973).

4. Attorneys' fees

A court has no authority under this section to fix the amount of attorney fees which the parties are to pay their respective attorneys. Griffin v. Vandersnick, 210 Neb. 590, 316 N.W.2d 299 (1982).

Adultery of party will not as a matter of law prevent an award of attorney's fees nor affect the payment of costs. Lockard v. Lockard, 193 Neb. 400, 227 N.W.2d 581 (1975).

5. Miscellaneous

A district court has no authority to include a child who is more than 19 years of age in its child support calculations. Henderson v. Henderson, 264 Neb. 916, 653 N.W.2d 226 (2002).

This section does not authorize a district court to modify, sua sponte, a final order from which no appeal has been taken. Martin v. Martin, 261 Neb. 125, 621 N.W.2d 511 (2001).

Under certain circumstances, an order that a part of child support payments be held in escrow while an appeal to the Supreme Court is pending is an abuse of discretion. Phelps v. Phelps, 239 Neb. 618, 477 N.W.2d 552 (1991).

A decree in a divorce case, insofar as minor children are concerned, is never final in the sense that it cannot be changed. Bartlett v. Bartlett, 193 Neb. 76, 225 N.W.2d 413 (1975).

The word "support" in this section is not limited to child support and, in fact, applies to spousal support. Furstenfeld v. Pepin, 23 Neb. App. 673, 875 N.W.2d 468 (2016).

42-352. Proceedings; complaint; filing; service.

A proceeding under sections 42-347 to 42-381 shall be commenced by filing a complaint in the district court. The proceeding may be heard by the county court or the district court as provided in section 25-2740. Summons shall be served upon the other party to the marriage by personal service or in the manner provided in section 25-517.02.

Source: Laws 1972, LB 820, § 6; Laws 1983, LB 447, § 46; Laws 1984, LB 845, § 25; Laws 1996, LB 1296, § 12; Laws 1997, LB 229, § 12; Laws 2004, LB 1207, § 20.

Annotations

Action to modify alimony obligation must satisfy the requirements of this section. Osborn v. Osborn, 4 Neb. App. 802, 550 N.W.2d 58 (1996).

42-353. Complaint; contents.

The pleadings required by sections 42-347 to 42-381 shall be governed by the rules of pleading in civil actions promulgated under section 25-801.01. The complaint shall include the following:

(1) The name and address of the plaintiff and his or her attorney, except that a plaintiff who is living in an undisclosed location because of safety concerns is only required to disclose the county and state of his or her residence and, in such case, shall provide an alternative address for the mailing of notice;

(2) The name and address, if known, of the defendant;

(3) The date and place of marriage;

(4) The name and year of birth of each child whose custody or welfare may be affected by the proceedings and whether (a) a parenting plan as provided in the Parenting Act has been developed and (b) child custody, parenting time, visitation, or other access or child support is a contested issue;

(5) If the plaintiff is a party to any other pending action for divorce, separation, or dissolution of marriage, a statement as to where such action is pending;

(6) Reference to any existing restraining orders, protection orders, or criminal no-contact orders regarding any party to the proceedings;

(7) A statement of the relief sought by the plaintiff, including adjustment of custody, property, and support rights; and

(8) An allegation that the marriage is irretrievably broken if the complaint is for dissolution of marriage or an allegation that the two persons who have been legally married shall thereafter live separate and apart if the complaint is for a legal separation.

Source: Laws 1972, LB 820, § 7; Laws 1997, LB 229, § 13; Laws 2004, LB 1207, § 21; Laws 2007, LB221, § 1; Laws 2007, LB554, § 30;

Laws 2008, LB1014, § 29; Laws 2012, LB899, § 1.

Cross References

Complaint, include whether to be heard by county or district court, see section 25-2740.
Parenting Act, see section 43-2920.

Annotations

The mere pendency of another action does not necessarily ipso facto require that a demurrer be sustained and the second action dismissed. Miller v. Miller, 213 Neb. 219, 328 N.W.2d 210 (1982).

Where a petition for dissolution of marriage was filed in the maiden name of a woman who had never adopted the surname of her husband and the parties were otherwise entitled to a decree of dissolution it was error for the trial court to refuse to enter the decree in the maiden name of the wife. Simmons v. O'Brien, 201 Neb. 778, 272 N.W.2d 273 (1978).

42-354. Repealed. Laws 2004, LB 1207, § 49.

42-355. Defendant; proper service or appearance.

No marriage shall be dissolved or legal separation decreed unless the defendant has been properly served with process or entered an appearance in the case.

Source: Laws 1972, LB 820, § 9; Laws 1983, LB 447, § 48; Laws 2004, LB 1207, § 22.

42-356. Hearings.

Hearings shall be held in open court upon the oral testimony of witnesses or upon the depositions of such witnesses taken as in other actions. The court may in its discretion close the hearing and may restrict the availability of the evidence or bill of exceptions.

Source: Laws 1972, LB 820, § 10.

Annotations

Notice and hearing required to modify custody of child except where court retained custody in original order. Brandl v. Brandl, 197 Neb. 778, 251 N.W.2d 155 (1977).

This section does not prohibit a trial court from allowing one of the parties, who is imprisoned and not permitted to personally attend, to appear by telephone during a final hearing held in open court upon the oral testimony of witnesses. Conn v. Conn, 13 Neb. App. 472, 695 N.W.2d 674 (2005).

In matters pertaining to dissolution, such as custody, hearings shall be held in open court upon the oral testimony of witnesses or upon the depositions of such witnesses taken as in other actions. Where a modification of custody is concerned, a judicial determination of the best interests of the children must be based on evidence preserved in the record. Burns v. Burns, 2 Neb. App. 795, 514 N.W.2d 848 (1994).

42-357. Temporary and ex parte orders; violation; penalty.

The court may order either party to pay to the clerk of the district court or to the State Disbursement Unit, as provided in section 42-369, a sum of money for the temporary support and maintenance of the other party and minor children if any are affected by the action and to enable such party to prosecute or defend the action. The court may make such order after service of process and claim for temporary allowances is made in the complaint or by motion by the plaintiff or by the defendant in a responsive pleading; but no such order shall be entered before three days after notice of hearing has been served on the other party or notice waived. During the pendency of any proceeding under sections 42-347 to 42-381 after the complaint is filed, upon application of either party and if the accompanying affidavit of the party or his or her agent shows to the court that the party is entitled thereto, the court may issue ex parte orders (1) restraining any person from transferring, encumbering, hypothecating, concealing, or in any way disposing of real or personal property except in the usual course of business or for the necessaries of life, and the party against whom such order is directed shall upon order of the court account for all unusual expenditures made after such order is served upon him or her, (2) enjoining any party from molesting or disturbing the peace of the other party or any minor children affected by the action, and (3) determining the temporary custody of any minor children of the marriage, except that no restraining order enjoining any party from molesting or disturbing the peace of any minor child shall issue unless, at the same time, the court determines that the party requesting such order shall have temporary custody of such minor child. Ex parte orders issued pursuant to subdivisions (1) and (3) of this section shall remain in force for no more than ten days or until a hearing is held thereon, whichever is earlier. After motion, notice to the party, and hearing, the court may order either party excluded from the premises occupied by the other upon a showing that physical or emotional harm would otherwise result. Any restraining order issued excluding either party from the premises occupied by the other shall specifically set forth the location of the premises and shall be served upon the adverse party by the sheriff in the manner prescribed for serving a summons, and a

return thereof shall be filed in the court. Any person who knowingly violates such an order after service shall be guilty of a Class II misdemeanor. In the event a restraining order enjoining any party from molesting or disturbing the peace of any minor children is issued, upon application and affidavit setting out the reason therefor, the court shall schedule a hearing within seventy-two hours to determine whether the order regarding the minor children shall remain in force. Section 25-1064 shall not apply to the issuance of ex parte orders pursuant to this section. Any judge of the county court or district court may grant a temporary ex parte order in accordance with this section.

Source: Laws 1972, LB 820, § 11; Laws 1974, LB 1015, § 2; Laws 1983, LB 371, § 1; Laws 1984, LB 276, § 2; Laws 1986, LB 516, § 14; Laws 1988, LB 1030, § 42; Laws 1989, LB 330, § 3; Laws 1996, LB 1296, § 13; Laws 1997, LB 229, § 14; Laws 2000, LB 972, § 8; Laws 2004, LB 1207, § 23; Laws 2008, LB1014, § 30.

Cross References

Arrest for violation of this section, see section 42-928.

Annotations

Where husband used moneys out of a joint account after being served with a restraining order, but was not ordered by the court to account for these expenditures which did not appear unusual, his failure to account for his expenditures did not entitle the wife to a return of the money. Blaser v. Blaser, 225 Neb. 104, 402 N.W.2d 875 (1987).

Section 42-1004(1)(d) is more specific than this section on the issue of modification or elimination of temporary spousal support. Edwards v. Edwards, 16 Neb. App. 297, 744 N.W.2d 243 (2008).

An accounting is not the sole remedy available for a violation of a hypothecation order entered pursuant to this section. Jessen v. Jessen, 5 Neb. App. 914, 567 N.W.2d 612 (1997).

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

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

the parties as ordered. If the court finds that the party responsible is indigent, the court may order the county to pay the costs.

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

(3) The clerk of each district court shall maintain records of support orders. The Title IV-D Division of the Department of Health and Human Services shall maintain support order payment records pursuant to section 43-3342.01 and the clerk of each district court shall maintain records of payments received pursuant to sections 42-369 and 43-3342.01. For support orders in all cases issued before September 6, 1991, and for support orders issued or modified on or after September 6, 1991, in cases in which no party has applied for services under Title IV-D of the federal Social Security Act, as amended, each month the Title IV-D Division shall certify all cases in which the support order payment is delinquent in an amount equal to the support due and payable for a one-month period of time. The Title IV-D Division shall provide the case information in electronic format, and upon request in print format, to the judge presiding over domestic relations cases and to the county attorney or authorized attorney. A rebuttable presumption of contempt shall be established if a prima facie showing is made that the court-ordered child or spousal support is delinquent. In cases in which one of the parties receives services under Title IV-D of the federal Social Security Act, as amended, the Title IV-D Division shall certify all such delinquent support order payments to the county attorney or the authorized attorney.

In each case certified, if income withholding has not been implemented it shall be implemented pursuant to the Income Withholding for Child Support Act. If income withholding is not feasible and no other action is pending for the collection of support payments, the court shall appoint an attorney to commence contempt of court proceedings. If the county attorney or authorized attorney consents, he or she may be appointed for such purpose. The contempt proceeding shall be instituted within ten days following appointment, and the case shall be diligently prosecuted to completion. The court shall by order fix the fee, including disbursements, for such attorney, which amount shall be taxed as costs and paid by the parties as ordered. Any fees allowed for the services of any county attorney or authorized attorney shall be paid to the Department of Health and Human Services when there is an assignment of support to the department pursuant to section 43-512.07 or when an application for child support services is on file with a county attorney or authorized attorney. If the court finds the party responsible is indigent, the court may order the county to pay the costs.

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

(5) The court may order access to all revenue information maintained by the Department of Revenue or other agencies concerning the income of persons liable or who pursuant to this section and sections 42-358.08 and 42-821 may be found liable to pay child or spousal support payments.

(6) Any person aggrieved by a determination of the court may appeal such decision to the Court of Appeals.

Source: Laws 1972, LB 820, § 12; Laws 1974, LB 961, § 1; Laws 1975, LB 212, § 1; Laws 1976, LB 926, § 1; Laws 1978, LB 960, § 1; Laws 1985, Second Spec. Sess., LB 7, § 10; Laws 1991, LB 457, § 1; Laws 1991, LB 732, § 101; Laws 1992, LB 1184, § 11; Laws 1994, LB 1224, § 43; Laws 1996, LB 1044, § 99; Laws 1996, LB 1155, § 7; Laws 1997, LB 307, § 16; Laws 2000, LB 972, § 9; Laws 2002, LB 1062, § 2; Laws 2005, LB 396, § 1; Laws 2007, LB296, § 56.

Cross References

Income Withholding for Child Support Act, see section 43-1701.

Annotations

1. Appointment of guardian ad litem

2. Evidence admissible

3. Miscellaneous

1. Appointment of guardian ad litem

This section authorizes a court to appoint an attorney or guardian ad litem to protect the interests of minor children and allows the attorney or guardian ad litem to recover his or her fees. Mitchell v. French, 267 Neb. 656, 676 N.W.2d 361 (2004).

An attorney appointed under this section is an advocate for the minor child and is not a guardian ad litem. An attorney appointed under this section shall act as attorney for the minor child, but shall not testify in the proceedings. From June 1, 1998, forward, when appointing a guardian ad litem or an attorney to represent the interests of the minor pursuant to this section in forums other than the juvenile court, the appointing court, in the

order making the appointment, shall specify whether the person appointed is to act as a guardian ad litem or as an attorney pursuant to this section. One person may not serve in both capacities. Betz v. Betz, 254 Neb. 341, 575 N.W.2d 406 (1998).

Under subsection (1) of this section, the appointment of a guardian ad litem in a marital dissolution proceeding is a matter within the sound discretion of the trial court. Ritter v. Ritter, 234 Neb. 203, 450 N.W.2d 204 (1990).

Appointment of a guardian ad litem is a discretionary matter. Generally, adequate representation by counsel for the respective parties, independent investigative power of the court, and continuing jurisdiction over minors protect the children's interests adequately. Chalupa v. Chalupa, 220 Neb. 704, 371 N.W.2d 706 (1985).

The court has authority to appoint a guardian ad litem to protect the interest of a minor child. Nye v. Nye, 213 Neb. 364, 329 N.W.2d 346 (1983).

When there is adequate representation of both parties to the dissolution, the trial court has made an independent investigation of the children's situation, and the court has continuing jurisdiction over the children, it is not error for the court to deny a request to appoint a guardian ad litem for the children. Deacon v. Deacon, 207 Neb. 193, 297 N.W.2d 757 (1980).

When it appears that minor children in a divorce action may have interests, independent of the parents, in the outcome of the litigation, the district court should ordinarily appoint counsel to represent them. Ford v. Ford, 191 Neb. 548, 216 N.W.2d 176 (1974).

District court may appoint attorney for minor children and limits on its discretion to do so must evolve case by case. Pieck v. Pieck, 190 Neb. 419, 209 N.W.2d 191 (1973).

2. Evidence admissible

Issues of visitation and previous failure to enforce a child support order are not relevant to proceedings under section 42-358, R.R.S.1943, or section 42-364.01, R.R.S.1943. Eliker v. Eliker, 206 Neb. 764, 295 N.W.2d 268 (1980).

In a divorce case, ex parte investigative reports are not evidence, and cannot be the basis for any adjudication. Jorgensen v. Jorgensen, 194 Neb. 271, 231 N.W.2d 360 (1975).

3. Miscellaneous

This section allows for payment of guardian ad litem fees by a county only if a court finds that the party responsible is indigent. Mitchell v. French, 267 Neb. 656, 676 N.W.2d 361 (2004).

This section is applicable to cases that begin as paternity actions in which the only controverted issues are custody and child support. Mitchell v.

French, 267 Neb. 656, 676 N.W.2d 361 (2004).

A finding of indigency is a matter within the initial discretion of the trial court, and such a finding will not be set aside on appeal in the absence of an abuse of discretion by the trial court. Mathews v. Mathews, 267 Neb. 604, 676 N.W.2d 42 (2004).

Under subsection (1) of this section, a person is indigent if he or she is unable to pay the guardian ad litem or attorney fees without prejudicing, in a meaningful way, his or her financial ability to provide the necessities of life, such as food, clothing, shelter, medical care, et cetera, for himself or herself or his or her legal dependents. Mathews v. Mathews, 267 Neb. 604, 676 N.W.2d 42 (2004).

A proceeding brought under this section is civil in nature. Eliker v. Eliker, 206 Neb. 764, 295 N.W.2d 268 (1980).

Counsel, appointed for children, participated in trial and appeal, and his fee was taxed to appellant as costs. Hermance v. Hermance, 194 Neb. 720, 235 N.W.2d 231 (1975).

Because subsection (1) of this section designates guardian ad litem fees as "costs," they must be determined by the time of the entry of a final, appealable order. McCaul v. McCaul, 17 Neb. App. 801, 771 N.W.2d 222 (2009).

Under subsection (3) of this section, the clerk of the district court must certify that the court-ordered child support is delinquent in an amount equal to the support due and owing payable for a 1-month period of time and report this amount to the county attorney or authorized attorney. McKibbin v. State, 5 Neb. App. 570, 560 N.W.2d 507 (1997).

The language of subsection (1) of this section requires that the fees and disbursements of an attorney appointed pursuant to subsection (1) "shall" be taxed as costs and paid by the parties as ordered. The county "may" be ordered to pay the amount so taxed as costs, but only upon a finding that the party responsible is indigent. Brackhan v. Brackhan, 3 Neb. App. 143, 524 N.W.2d 74 (1994).

42-358.01. Delinquent support order payments; records.

Records of delinquencies in support order payments shall be kept by the Title IV-D Division of the Department of Health and Human Services or by the clerks of the district courts pursuant to their responsibilities under law.

Source: Laws 1975, LB 212, § 3; Laws 2000, LB 972, § 10; Laws 2007, LB296, § 57.

42-358.02. Delinquent child support payments, spousal support payments, and medical support payments; interest; rate; report; Title IV-D Division; duties.

(1) All delinquent child support payments, spousal support payments, and medical support payments shall draw interest at the rate specified in section 45-103 in effect on the date of the most recent order or decree. Such interest shall be computed as simple interest.

(2) All child support payments, spousal support payments, and medical support payments shall become delinquent the day after they are due and owing, except that no obligor whose support payments are automatically withheld from his or her paycheck shall be regarded or reported as being delinquent or in arrears if (a) any delinquency or arrearage is solely caused by a disparity between the schedule of the obligor's regular pay dates and the scheduled date the support payment is due, (b) the total amount of support payments to be withheld from the paychecks of the obligor and the amount ordered by the support order are the same on an annual basis, and (c) the automatic deductions for support payments are continuous and occurring. Interest shall not accrue until thirty days after such payments are delinquent.

(3) The court shall order the determination of the amount of interest due, and such interest shall be payable in the same manner as the support payments upon which the interest accrues subject to subsection (2) of this section or unless it is waived by agreement of the parties. The Title IV-D Division of the Department of Health and Human Services shall compute interest and identify delinquencies pursuant to this section on the payments received by the State Disbursement Unit pursuant to section 42-369. The Title IV-D Division shall provide the case information in electronic format, and upon request in print format, to the judge presiding over domestic relations cases and to the county attorney or authorized attorney.

(4) Support order payments shall be credited in the following manner:

(a) First, to the payments due for the current month in the following order: Child support payments, then spousal support payments, and lastly medical support payments;

(b) Second, toward any payment arrearage owing, in the following order: Child support payment arrearage, then spousal support payment arrearage, and lastly medical support payment arrearage; and

(c) Third, toward the interest on any payment arrearage, in the following order: Child support payment arrearage interest, then spousal support payment arrearage interest, and lastly medical support payment arrearage interest.

(5) Interest which may have accrued prior to September 6, 1991, shall not be affected or altered by changes to this section which take effect on such date. All delinquent support order payments and all decrees entered prior to such date shall draw interest at the effective rate as prescribed by this section commencing as of such date.

Source: Laws 1975, LB 212, § 4; Laws 1981, LB 167, § 31; Laws 1983, LB 371, § 2; Laws 1984, LB 845, § 26; Laws 1985, Second Spec. Sess., LB 7, § 11; Laws 1987, LB 569, § 1; Laws 1991, LB 457, § 2; Laws 1997, LB 18, § 1; Laws 2000, LB 972, § 11; Laws 2005, LB 396, § 2; Laws 2007, LB296, § 58; Laws 2009, LB288, § 4.

Annotations

The district court erred, as a matter of law, in failing to account for the effective date of the amended statute as triggering a change in the applicable interest rate. Prior to September 6, 1991, interest on delinquent child support payments accrues at a rate determined by section 45-104.01, and as of September 6, 1991, interest on delinquent child support payments accrues at a rate determined by section 45-103. Welch v. Welch, 246 Neb. 435, 519 N.W.2d 262 (1994).

42-358.03. Permanent child support payments; failure to pay; work release program.

Any person found guilty of contempt of court for failure to pay permanent child support payments and imprisoned therefor shall be committed to a court-supervised work release program. Ninety percent of earnings realized from such program shall be applied to payment of delinquencies in support payments minus appropriate deductions for the cost of work release.

Source: Laws 1975, LB 212, § 5.

42-358.04. Delinquent permanent child support payments; remarriage; effect.

Remarriage of the person entitled to collect under a permanent child support decree shall not work to cut off delinquent payments due under such decree.

Source: Laws 1975, LB 212, § 6.

42-358.05. Child or spousal support; performance of decree; court powers.

After a hearing on the issue, the court may order immediate implementation of income withholding pursuant to the Income Withholding for Child Support Act or require the posting of a bond at the time that a temporary or permanent child support or spousal support decree is issued to insure performance of the decree.

Source: Laws 1975, LB 212, § 7; Laws 1985, Second Spec. Sess., LB 7, § 12.

Cross References

Income Withholding for Child Support Act, see section 43-1701.

42-358.06. Delinquent permanent child or spousal support payments; lien.

A lien upon the property of one who is delinquent in permanent child or spousal support payments may be instituted and enforced according to the terms of section 42-371.

Source: Laws 1975, LB 212, § 8; Laws 1985, Second Spec. Sess., LB 7, § 13.

42-358.07. Clerk of the district court; nonperformance of duties; removal from office.

Any clerk of the district court who fails to perform his or her duties under sections 42-358 to 42-358.07 or the Income Withholding for Child Support Act shall be removed from office after conviction for such offense.

Source: Laws 1975, LB 212, § 9; Laws 1985, Second Spec. Sess., LB 7, § 14.

Cross References

Income Withholding for Child Support Act, see section 43-1701.

42-358.08. Information regarding absent parent; duty to furnish; enforcement.

Notwithstanding any other provision of law regarding the confidentiality of records and when not prohibited by the federal Privacy Act of 1974, Public Law 93-579, as amended, each department and agency of state, county, and city government and each employer or other payor as defined in section 43-1709 shall, upon request, furnish to any court-appointed individuals, the county attorney, any

authorized attorney, or the Department of Health and Human Services an absent parent's address, social security number, amount of income, health insurance information, and employer's name and address for the exclusive purpose of establishing and collecting child or spousal support. Information so obtained shall be used for no other purpose. This section may be enforced by filing a court action.

Source: Laws 1976, LB 926, § 2; Laws 1985, Second Spec. Sess., LB 7, § 15; Laws 1994, LB 1224, § 44; Laws 1996, LB 1044, § 100; Laws 1996, LB 1296, § 14; Laws 1997, LB 229, § 15; Laws 1997, LB 307, § 17.

42-358.09. Repealed. Laws 1983, LB 417, § 2.

42-359. Applications for spousal support or alimony; financial statements.

Applications for spousal support or alimony shall be accompanied by a statement of the applicant's financial condition and, to the best of his or her knowledge, a statement of the other party's financial condition. Such other party may file his or her statement, if he or she so desires, and shall do so if ordered by the court. Statements shall be under oath and shall show income from salary or other sources, assets, debts and payments thereon, living expenses, and other relevant information. Required forms for financial statements may be furnished by the court.

Source: Laws 1972, LB 820, § 13; Laws 2007, LB554, § 31; Laws 2008, LB1014, § 31.

Annotations

The filing of a financial statement as required under this section is waived if the parties proceed without objection to hearing and trial without such filing. Danielson v. Danielson, 204 Neb. 776, 285 N.W.2d 494 (1979).

42-360. Reconciliation; transfer of action; when; counseling; costs.

No decree shall be entered under sections 42-347 to 42-381 unless the court finds that every reasonable effort to effect reconciliation has been made. Proceedings filed pursuant to sections 42-347 to 42-381 shall be subject to transfer to a conciliation court pursuant to section 42-822 or 42-823, in counties where such a court has been established. In counties having no conciliation court, the court hearing proceedings under sections 42-347 to 42-381 may refer the parties to qualified marriage counselors or family service agencies, or other persons or agencies determined by the court to be qualified to provide conciliation services, if the court finds that there appears to be some reasonable possibility of a

reconciliation being effected. In no case shall the court order marriage counseling upon the request of only one of the parties to the dissolution or his or her attorney. If both parties agree to attend counseling but do not agree on an assignment of the costs of such counseling, the court, after receiving an application for such costs and upon a showing that the parties cannot agree on an assignment of such costs, shall assign such costs in a temporary or permanent order.

Source: Laws 1972, LB 820, § 14; Laws 1984, LB 845, § 27; Laws 1997, LB 229, § 16.

Annotations

It is only when there exists a reasonable possibility of reconciliation that the statutes require efforts be made to effect it. Condreay v. Condreay, 190 Neb. 513, 209 N.W.2d 357 (1973).

42-361. Marriage irretrievably broken; findings; decree issued without hearing; when.

(1) If both of the parties state under oath or affirmation that the marriage is irretrievably broken, or one of the parties so states and the other does not deny it, the court, after hearing, shall make a finding whether the marriage is irretrievably broken.

(2) If one of the parties has denied under oath or affirmation that the marriage is irretrievably broken, the court shall consider all relevant factors, including the circumstances that gave rise to the filing of the complaint and the prospect of reconciliation, and shall make a finding whether the marriage is irretrievably broken.

(3) Sixty days or more after perfection of service of process, the court may enter a decree of dissolution without a hearing if:

(a) Both parties waive the requirement of the hearing and the court has sufficient basis to make a finding that it has subject matter jurisdiction over the dissolution action and personal jurisdiction over both parties; and

(b) Both parties have certified in writing that the marriage is irretrievably broken, both parties have certified that they have made every reasonable effort to effect reconciliation, all documents required by the court and by statute have been filed, and the parties have entered into a written agreement, signed by both parties under oath, resolving all issues presented by the pleadings in their dissolution action.

Source: Laws 1972, LB 820, § 15; Laws 2004, LB 1207, § 24; Laws 2011, LB669, § 25.

Annotations

It was not an abuse of discretion for the trial court to deny a motion to vacate its order finding the marriage irretrievably broken where the parties had reached a settlement agreement, but one party refused to sign the agreement until she was able to take possession of certain property. Kibler v. Kibler, 287 Neb. 1027, 845 N.W.2d 585 (2014).

Pursuant to subsection (1) of this section, dissolutions of marriage require that a hearing be conducted in open court and that oral testimony of witnesses or depositions of witnesses be received into evidence; relying upon pleadings alone is insufficient. Brunges v. Brunges, 255 Neb. 837, 587 N.W.2d 554 (1998).

A court must be presented with some form of evidence, be it oral testimony or depositions, in order to make a meaningful finding whether a marriage is irretrievably broken. Wilson v. Wilson, 238 Neb. 219, 469 N.W.2d 750 (1991).

In a case where the evidence was undisputed that the parties had not lived together for a long period of time, the trial court was correct in finding that the parties' marriage was irretrievably broken. Witcig v. Witcig, 206 Neb. 307, 292 N.W.2d 788 (1980).

The finding that marriage was irretrievably broken based upon criminal history of defendant and plaintiff's categorical refusal to effect reconciliation was not unreasonable. Condreay v. Condreay, 190 Neb. 513, 209 N.W.2d 357 (1973).

42-361.01. Legal separation; findings.

In a legal separation proceeding:

(1) If both of the parties state under oath or affirmation that they shall thereafter live separate and apart, or one of the parties so states and the other does not deny it, the court, after hearing, shall make a finding whether the legal separation should be granted and if so may enter a decree of legal separation;

(2) If one of the parties has denied under oath or affirmation that they will thereafter live separate and apart, the court shall, after hearing, consider all relevant factors, including the circumstances that gave rise to the filing of the complaint and the prospect of reconciliation, and shall make a finding whether the legal separation should be granted and if so may enter a decree of legal separation; or

(3) Sixty days or more after perfection of service of process, the court may enter a decree of legal separation without a hearing if:

(a) Both parties waive the requirement of the hearing and the court has sufficient basis to make a finding that it has subject matter jurisdiction over the legal separation proceeding and personal jurisdiction over both parties; and

(b) Both parties have certified in writing that they shall thereafter live separate and apart, both parties have certified that they have made every reasonable effort to effect reconciliation, all documents required by the court and by statute have been filed, and the parties have entered into a written agreement, signed by both parties under oath, resolving all issues presented by the pleadings in their legal separation proceeding.

Source: Laws 2012, LB899, § 2.

42-362. Spouse mentally ill; guardian ad litem; attorney; appointment; order for support.

When the pleadings or evidence in any action pursuant to sections 42-347 to 42-381 indicate that either spouse is mentally ill, a guardian ad litem or an attorney, or both, shall be appointed to represent the interests of such spouse. Such guardian's fee or attorney's fee, or both, shall be taxed as costs when allowed by the court and shall be paid by the county if the parties are unable to do so. When a marriage is dissolved and the evidence indicates that either spouse is mentally ill, the court may, at the time of dissolving the marriage or at any time thereafter, make such order for the support and maintenance of such mentally ill person as it may deem necessary and proper, having due regard to the property and income of the parties, and the court may require the party ordered to provide support and maintenance to file a bond or otherwise give security for such support. Such an order for support may be entered upon the application of the guardian or guardian ad litem or of any person, county, municipality, or institution charged with the support of such mentally ill person. The order for support may, if necessary, be revised from time to time on like application.

Source: Laws 1972, LB 820, § 16; Laws 1997, LB 229, § 17; Laws 1999, LB 24, § 1.

Annotations

A former wife was not entitled to have her marriage dissolution decree vacated for the trial court's failure to appoint a guardian ad litem for her, as a mentally ill party, where the wife was represented by counsel throughout the dissolution proceedings, the wife did not appeal from decree, the wife did not allege that she could not communicate effectively with her counsel;

and the record did not show that her interests were adversely affected by the fact that the guardian ad litem was not appointed. Hartman v. Hartman, 265 Neb. 515, 657 N.W.2d 646 (2003).

Statute contemplates that the guardian ad litem or one charged with support of a mentally ill spouse apply for a support order. Reasonableness is the test governing awards of support and maintenance. Awards are reviewed de novo in Supreme Court and affirmed absent an abuse of discretion. Payments continue until spouse recovers or remarries. Black v. Black, 223 Neb. 203, 388 N.W.2d 815 (1986).

Where the evidence does not clearly and affirmatively establish that a spouse is suffering from a mental illness or that such mental illness affects the spouse's ability to work, it is not an abuse of discretion to deny support and maintenance for a mentally ill spouse. Ginn v. Ginn, 17 Neb. App. 451, 764 N.W.2d 889 (2009).

Although support and maintenance to a mentally ill spouse in some respects parallels alimony, the two are not the same in all respects. The condition which triggers the support and maintenance to be paid under this section is the mental illness; thus, the payment of such support and maintenance should continue so long as, and only so long as, the mental illness continues or the mentally ill individual acquires another spouse. Kearney v. Kearney, 11 Neb. App. 88, 644 N.W.2d 171 (2002).

Reasonableness is the ultimate criterion to be applied in testing whether support and maintenance is to be awarded to a mentally ill spouse under the provisions of this section and, if so, the amount and duration thereof. The support and maintenance to be awarded under this section is a matter initially entrusted to the discretion of the trial judge, which award, on appeal, is reviewed de novo on the record and affirmed in the absence of an abuse of that discretion. Kearney v. Kearney, 11 Neb. App. 88, 644 N.W.2d 171 (2002).

This section empowers the court to order the payment of such support and maintenance to a mentally ill spouse as it may deem necessary and proper, giving due consideration to the property and income of the parties. Kearney v. Kearney, 11 Neb. App. 88, 644 N.W.2d 171 (2002).

42-363. Waiting period.

No suit for divorce shall be heard or tried until sixty days after perfection of service of process, at which time the suit may be heard or tried and a decree may be entered.

Source: Laws 1972, LB 820, § 17; Laws 1974, LB 1015, § 3; Laws 1989, LB 23, § 1.

Annotations

The waiting period for obtaining a divorce is a jurisdictional requirement. A divorce decree entered after expiration of the 60-day waiting period but based upon evidence adduced at a hearing held prior to expiration of the waiting period is null and void. Wymore v. Wymore, 239 Neb. 940, 479 N.W.2d 778 (1992).

If no attempt is made to have an appellate court review the decree within six months after it is entered, the decree becomes final. As such, it is res judicata as to the rights of the parties. Neither what the parties thought the judge meant nor what the judge thought he or she meant, after time for appeal has passed, is of any relevance. What the decree, as it became final, means as a matter of law as determined from the four corners of the decree is what is relevant. Neujahr v. Neujahr, 223 Neb. 722, 393 N.W.2d 47 (1986).

42-364. Action involving child support, child custody, parenting time, visitation, or other access; parenting plan; legal custody and physical custody determination; rights of parents; child support; termination of parental rights; court; duties; modification proceedings; use of school records as evidence.

(1)(a) In an action under Chapter 42 involving child support, child custody, parenting time, visitation, or other access, the parties and their counsel, if represented, shall develop a parenting plan as provided in the Parenting Act. If the parties and counsel do not develop a parenting plan, the complaint shall so indicate as provided in section 42-353 and the case shall be referred to mediation or specialized alternative dispute resolution as provided in the Parenting Act. For good cause shown and (i) when both parents agree and such parental agreement is bona fide and not asserted to avoid the purposes of the Parenting Act, or (ii) when mediation or specialized alternative dispute resolution is not possible without undue delay or hardship to either parent, the mediation or specialized alternative dispute resolution requirement may be waived by the court. In such a case where waiver of the mediation or specialized alternative dispute resolution is sought, the court shall hold an evidentiary hearing and the burden of proof for the party or parties seeking waiver is by clear and convincing evidence.

(b) The decree in an action involving the custody of a minor child shall include the determination of legal custody and physical custody based upon the best interests of the child, as defined in the Parenting Act, and child support. Such determinations shall be made by incorporation into the decree of (i) a parenting plan developed by the parties, if approved by the court, or (ii) a parenting plan developed by the court based upon evidence produced after a hearing in open court if no parenting plan is developed by the parties or the plan developed by the parties is not approved by the court. The decree shall conform to the Parenting Act.

(c) The social security number of each parent and the minor child shall be furnished to the clerk of the district court but shall not be disclosed or considered a public record.

(2) In determining legal custody or physical custody, the court shall not give preference to either parent based on the sex or disability of the parent and, except as provided in section 43-2933, no presumption shall exist that either parent is more fit or suitable than the other. Custody shall be determined on the basis of the best interests of the child, as defined in the Parenting Act. Unless parental rights are terminated, both parents shall continue to have the rights stated in section 42-381.

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

(4) In determining the amount of child support to be paid by a parent, the court shall consider the earning capacity of each parent and the guidelines provided by the Supreme Court pursuant to section 42-364.16 for the establishment of child support obligations. Upon application, hearing, and presentation of evidence of an abusive disregard of the use of child support money or cash medical support paid by one party to the other, the court may require the party receiving such payment to file a verified report with the court, as often as the court requires, stating the manner in which child support money or cash medical support is used. Child support money or cash medical support paid to the party having physical custody of the minor child shall be the property of such party except as provided in section 43-512.07. The clerk of the district court shall maintain a record of all decrees and orders in which the payment of child support, cash medical support, or spousal support has been ordered, whether ordered by a district court, county court, separate juvenile court, or county court sitting as a juvenile court. Orders for child support or cash medical support in cases in which a party has applied for services under Title IV-D of the federal Social Security Act, as amended, shall be reviewed as provided in sections 43-512.12 to 43-512.18.

(5) Whenever termination of parental rights is placed in issue the court shall transfer jurisdiction to a juvenile court established pursuant to the Nebraska Juvenile Code unless a showing is made that the county court or district court is a more appropriate forum. In making such determination, the court may consider such factors as cost to the parties, undue delay, congestion of trial dockets, and relative resources available for investigative and supervisory assistance. A determination that the county court or district court is a more appropriate forum

shall not be a final order for the purpose of enabling an appeal. If no such transfer is made, the court shall conduct the termination of parental rights proceeding as provided in the Nebraska Juvenile Code.

(6) Modification proceedings relating to support, custody, parenting time, visitation, other access, or removal of children from the jurisdiction of the court shall be commenced by filing a complaint to modify. Modification of a parenting plan is governed by the Parenting Act. Proceedings to modify a parenting plan shall be commenced by filing a complaint to modify. Such actions shall be referred to mediation or specialized alternative dispute resolution as provided in the Parenting Act. For good cause shown and (a) when both parents agree and such parental agreement is bona fide and not asserted to avoid the purposes of the Parenting Act, or (b) when mediation or specialized alternative dispute resolution is not possible without undue delay or hardship to either parent, the mediation or specialized alternative dispute resolution requirement may be waived by the court. In such a case where waiver of the mediation or specialized alternative dispute resolution is sought, the court shall hold an evidentiary hearing and the burden of proof for the party or parties seeking waiver is by clear and convincing evidence. Service of process and other procedure shall comply with the requirements for a dissolution action.

(7) In any proceeding under this section relating to custody of a child of school age, certified copies of school records relating to attendance and academic progress of such child are admissible in evidence.

(8) For purposes of this section, disability has the same meaning as in 42 U.S.C. 12102, as such section existed on January 1, 2018.

Source: Laws 1983, LB 138, § 1; Laws 1985, LB 612, § 1; Laws 1985, Second Spec. Sess., LB 7, § 16; Laws 1991, LB 457, § 3; Laws 1991, LB 715, § 1; Laws 1993, LB 629, § 21; Laws 1994, LB 490, § 1; Laws 1996, LB 1296, § 15; Laws 1997, LB 752, § 96; Laws 2004, LB 1207, § 25; Laws 2006, LB 1113, § 35; Laws 2007, LB554, § 32; Laws 2008, LB1014, § 32; Laws 2009, LB288, § 5; Laws 2010, LB901, § 1; Laws 2013, LB561, § 5; Laws 2018, LB193, § 76; Laws 2018, LB845, § 17.

Note: The Revisor of Statutes has pursuant to section 49-769 correlated LB193, section 76, with LB845, section 17, to reflect all amendments.

Note: Changes made by LB193 became operative July 19, 2018. Changes made by LB845 became effective July 19, 2018.

Cross References

Nebraska Juvenile Code, see section 43-2,129.
Parenting Act, see section 43-2920.

Violation of custody, penalty, see section 28-316.

Annotations

1. Custody of children

2. Termination of parental rights

3. Child support

4. Change in custody

5. Visitation

6. Special proceeding

7. Miscellaneous

1. Custody of children

A court is required to devise a parenting plan and to consider joint legal and physical custody, but the court is not required to grant equal parenting time to the parents if such is not in the child's best interests. Kamal v. Imroz, 277 Neb. 116, 759 N.W.2d 914 (2009).

A district court abuses its discretion to order joint custody when it fails to specifically find that joint physical custody is in the child's best interests as required by this section. Zahl v. Zahl, 273 Neb. 1043, 736 N.W.2d 365 (2007).

A trial court's authority under subsection (5) of this section to order joint physical custody when the parties have not requested it must be exercised in a manner consistent with due process requirements. Zahl v. Zahl, 273 Neb. 1043, 736 N.W.2d 365 (2007).

The factual inquiry necessary to impose joint physical custody is substantially different from that required for making a sole custody determination. Zahl v. Zahl, 273 Neb. 1043, 736 N.W.2d 365 (2007).

When a trial court determines at a general custody hearing that joint physical custody is, or may be, in a child's best interests, but neither party has requested this custody arrangement, the court must give the parties an opportunity to present evidence on the issue before imposing joint custody. Zahl v. Zahl, 273 Neb. 1043, 736 N.W.2d 365 (2007).

This section mandates that custody of minor children be determined on the basis of their best interests. In determining a child's best interests under this section, courts may consider factors such as general considerations of moral fitness of the child's parents, including the parents' sexual conduct; respective environments offered by each parent; the emotional relationship between child and parents; the age, sex, and health of the child and parents; the effect on the child as the result of continuing or disrupting an existing relationship; the attitude and stability of each parent's character; parental

capacity to provide physical care and satisfy educational needs of the child; the child's preferential desire regarding custody if the child is of sufficient age of comprehension regardless of chronological age, and when such child's preference for custody is based on sound reasons; and the general health, welfare, and social behavior of the child. In addition, this section requires courts to consider credible evidence of abuse inflicted on any family or household member as one of the factors in its custody determination. Davidson v. Davidson, 254 Neb. 357, 576 N.W.2d 779 (1998).

In the absence of a contrary statutory provision, in a child custody controversy between a biological or adoptive parent and one who is neither biological nor an adoptive parent of the child involved in the controversy, a fit biological or adoptive parent has a superior right to custody of the child. Stuhr v. Stuhr, 240 Neb. 239, 481 N.W.2d 212 (1992).

When a court retains legal custody of a child pursuant to this section, the question of whether to change physical custody is determined by the best interests of the child without the necessity of showing any change of circumstances otherwise required for a change in legal custody of the child. Grindle v. Grindle, 237 Neb. 302, 465 N.W.2d 749 (1991).

An inquiry regarding "the best interests of the children" includes, but is not limited to, a consideration of the relationship of the children to each parent and the general health, welfare, and social behavior of the children; the Supreme Court also looks to the moral fitness of the parents, including their sexual conduct; the respective environments each offers; the emotional relationship between the child and the parents; the age, sex, and health of the child and parents; the effect on the child as the result of continuing or disrupting an existing relationship; the attitude and stability of each parent's character; and the capacity of each parent to provide physical care and to satisfy the needs of the child. McDougall v. McDougall, 236 Neb. 873, 464 N.W.2d 189 (1991).

A parent's status as the primary caretaker is an important factor to be considered when determining the custody of a child. However, it is not determinative in a child custody proceeding and is just one of several factors set forth in this section. Applegate v. Applegate, 236 Neb. 418, 461 N.W.2d 419 (1990).

As a general rule, a custodial parent in a marital dissolution proceeding may determine the nature and extent of the education for a child unless there is an affirmative showing that the custodial parent's decision has injured or harmed, or will jeopardize, the child's safety, well-being, or health, whether physical or mental. Von Tersch v. Von Tersch, 235 Neb. 263, 455 N.W.2d 130 (1990).

Under subsection (1) of this section, when custody of a minor child is an issue in a proceeding to dissolve the marriage of the child's parents, child custody is determined by parental fitness and the child's best interests; child custody is denied to an unfit parent or a fit parent when the best interests of the child require such denial of custody. Parental unfitness means a personal deficiency or incapacity which has prevented, or will probably prevent, performance of a reasonable parental obligation in child rearing and which

has caused, or probably will result in, detriment to a child's well-being. Ritter v. Ritter, 234 Neb. 203, 450 N.W.2d 204 (1990).

In determining a child's best interests under subsection (1) of this section, the court may consider factors such as general considerations of moral fitness of the child's parents, including the parents' sexual conduct; respective environments offered by each parent; the emotional relationship between a child and parents; the age, sex, and health of the child and parents; the effect on a child as the result of continuing or disrupting an existing relationship; the attitude and stability of each parent's character; parental capacity to provide physical care and satisfy educational needs of the child; the child's preferential desire regarding custody if the child is of sufficient age of comprehension regardless of chronological age, and when such child's preference is based on sound reasons; and the general health, welfare, and social behavior of the child. Miles v. Miles, 231 Neb. 782, 438 N.W.2d 139 (1989).

The "tender years" doctrine is no longer controlling in child custody matters in light of subdivision (2) of this section. Vance v. Vance, 231 Neb. 334, 436 N.W.2d 177 (1989).

If a parent is fit to have custody of a child involved in a dissolution proceeding, a court's acquired and retained legal custody of such child should be a rare disposition warranted only in the extraordinary situation where the court lacks adequate information concerning the best interests of the child in relation to the custody question. Ensrud v. Ensrud, 230 Neb. 720, 433 N.W.2d 192 (1988).

Parental agreement is a prerequisite for joint custody pursuant to subsection (3) of this section. Ensrud v. Ensrud, 230 Neb. 720, 433 N.W.2d 192 (1988).

When a court has retained legal custody of a child pursuant to this section, a question whether to change physical custody is determined by the best interests of the child without the necessity of showing any change of circumstances otherwise required for a change in legal custody of the child. Clark v. Clark, 228 Neb. 440, 422 N.W.2d 793 (1988); Christen v. Christen, 228 Neb. 268, 422 N.W.2d 92 (1988).

The district court may maintain legal custody of minor children, while awarding physical custody to a parent or other party. Grindle v. Grindle, 226 Neb. 807, 415 N.W.2d 150 (1987); Peterson v. Peterson, 224 Neb. 557, 399 N.W.2d 792 (1987).

Joint custody is not favored by the courts of this state and will be reserved for only the rarest of cases. Wilson v. Wilson, 224 Neb. 589, 399 N.W.2d 802 (1987).

This section does not require that a court derive a minor child's wishes only from the child's testimony, as opposed to evidence from some source other than the child's testimony which adequately establishes the child's desires and wishes regarding custody and visitation. Smith v. Smith, 222 Neb. 752, 386 N.W.2d 873 (1986).

Although former subsection (3) of this section permits joint custody, such an award is not favored and must be reserved for the most rare cases. Korf v. Korf, 221 Neb. 484, 378 N.W.2d 173 (1985).

The best interests of the child include, but are not limited to, the general health, welfare, and social behavior of the child. Mettenbrink v. Mettenbrink, 220 Neb. 650, 371 N.W.2d 310 (1985).

In order for error to be predicated upon the district court's failure to interview children as to their custody preference, an offer of proof is necessary. Krohn v. Krohn, 217 Neb. 158, 347 N.W.2d 869 (1984).

The polar star by which all child custody determinations must be guided is the best interests and welfare of the child. Moeller v. Moeller, 215 Neb. 360, 338 N.W.2d 749 (1983).

Under the facts of this case, the best interests of the children required approval of an application by the custodial parent to remove the minor children to the State of Louisiana. Gottschall v. Gottschall, 210 Neb. 679, 316 N.W.2d 610 (1982).

Where the issue of child custody is involved, both the mother and father have an equal right to custody, and the court shall not give preference to either parent on the basis of the sex of the parent. Although the courts should preserve an attitude of impartiality between religions and will not disqualify a parent solely because of his or her religious beliefs, the court does have a duty to consider whether such beliefs threaten the health and well-being of the child, and it is proper for the court to examine the impact of the parent's beliefs on the child. Burnham v. Burnham, 208 Neb. 498, 304 N.W.2d 58 (1981).

Under section 42-364(2), R.R.S.1943, neither parent is presumed to be more fit than the other to have custody of the parties' minor children. Kringel v. Kringel, 207 Neb. 241, 298 N.W.2d 150 (1980).

The right of a parent to the custody of his minor child is not lightly to be set aside in favor of more distant relatives or unrelated parties, and the courts may not deprive a parent of such custody unless he is shown to be unfit or to have forfeited his superior right to such custody. Nielsen v. Nielsen, 207 Neb. 141, 296 N.W.2d 483 (1980).

The trial court was correct in finding that the best interests of the child required placing custody with his grandmother rather than with either parent. Whitlatch v. Whitlatch, 206 Neb. 527, 293 N.W.2d 856 (1980).

The tender age of the child is a factor to consider in a child custody dispute, however, there is no presumption of fitness based on sex of the parent. Turner v. Turner, 205 Neb. 6, 286 N.W.2d 100 (1979).

A decree placing legal custody of a minor child in the court with possession in one of the parents is not required to state specific provisions for monitoring that possession. Berry v. Berry, 202 Neb. 540, 276 N.W.2d 200 (1979).

An award of custody in a dissolution proceeding will not be upheld when the evidence is insufficient to show the requirements of the best interest of the child. Lautenschlager v. Lautenschlager, 201 Neb. 741, 272 N.W.2d 40 (1978).

Personal observations by the court are insufficient to support an award of custody in a dissolution proceeding in the absence of evidence establishing the best interest of the child. Lautenschlager v. Lautenschlager, 201 Neb. 741, 272 N.W.2d 40 (1978).

When the trial court disapproves a stipulation for custody or support in a dissolution proceeding, an opportunity should be given to the parties to secure and to present evidence relevant to a complete reexamination of the question of custody and the best interest of the child if such evidence has not previously been presented to the court. Lautenschlager v. Lautenschlager, 201 Neb. 741, 272 N.W.2d 40 (1978).

Where custody of the child is in issue, a comparative standard of fitness of each parent is the proper test, and custody shall be determined by the best interests of the child. Long v. Long, 200 Neb. 405, 263 N.W.2d 825 (1978).

In a custody dispute over twelve and fourteen year old siblings, no preference exists favoring the fitness of either parent, and where both are qualified, the court (1) favors leaving children together where possible, and (2) considers the children's expressed parental preference. Boroff v. Boroff, 197 Neb. 641, 250 N.W.2d 613 (1977).

Under the facts in this case, the best interests of the child appear to be served by the more stable situation in the father's home. Peterson v. Peterson, 196 Neb. 328, 243 N.W.2d 51 (1976).

Under ordinary circumstances, neither parent has superior right over the other to custody of minor children. Knight v. Knight, 196 Neb. 63, 241 N.W.2d 360 (1976).

Each parent of minor children born in lawful wedlock, or lawfully adopted, has an equal and joint right to their custody. Young v. Young, 195 Neb. 163, 237 N.W.2d 135 (1976).

Adultery of party is not necessarily determinative of who shall be awarded custody of children. Lockard v. Lockard, 193 Neb. 400, 227 N.W.2d 581 (1975).

The court may place custody of minor children in the court in order to facilitate judicial supervision and summary power to act swiftly in the best interests of the children. Bartlett v. Bartlett, 193 Neb. 76, 225 N.W.2d 413 (1975).

The ultimate standard is that custody and visitation of minor children shall be determined on the basis of their best interests and considerations of public policy do not, in all cases, prevent the splitting of custody between the parents upon divorce. Braeman v. Braeman, 192 Neb. 510, 222 N.W.2d 811 (1974).

Under the no fault divorce statute, the father and mother of minor children have an equal and joint right to their custody and control, and while the father has the primary responsibility to support his children, the court has the responsibility of adjusting the equities between the parties. Kockrow v. Kockrow, 191 Neb. 657, 217 N.W.2d 89 (1974).

In awarding custody of children upon divorce, the paramount consideration is the best interests and welfare of the children. Christensen v. Christensen, 191 Neb. 355, 215 N.W.2d 111 (1974); Schuller v. Schuller, 191 Neb. 266, 214 N.W.2d 617 (1974).

The best interests and welfare of children is paramount in custody cases and the court may place the children in its custody if continuance thereof so requires. Broadstone v. Broadstone, 190 Neb. 299, 207 N.W.2d 682 (1973).

The requirement in this section that a court make a specific finding of best interests before awarding joint custody does not apply in paternity actions where the parties were never married. Aguilar v. Schulte, 22 Neb. App. 80, 848 N.W.2d 644 (2014).

Subsection (3)(b) of this section requires that in dissolution cases, if the parties do not agree to joint custody in a parenting plan, the trial court can award joint custody if it specifically finds, after a hearing in open court, that it is in the best interests of the child. Hill v. Hill, 20 Neb. App. 528, 827 N.W.2d 304 (2013).

Although there was no evidence that the mother was currently engaged in abusive behaviors or an abusive relationship, the trial court acted within its discretion in finding that the father's custody was in the best interests of the child based on the mother's history of domestic violence, the previous removal of a child, and the mother's questionable rehabilitation. State on behalf of Keegan M. v. Joshua M., 20 Neb. App. 411, 824 N.W.2d 383 (2012).

Fundamental fairness requires that when a trial court determines at a general custody hearing that joint legal custody is, or may be, in a child's best interests, but neither party has requested this custody arrangement, the court must give the parties an opportunity to present evidence on the issue before imposing joint legal custody. Jessen v. Line, 16 Neb. App. 197, 742 N.W.2d 30 (2007).

There is no presumption in favor of joint custody, and joint custody remains disfavored to the extent that if both parties do not agree, the court can award joint custody only if it holds a hearing and makes the required finding. Spence v. Bush, 13 Neb. App. 890, 703 N.W.2d 606 (2005).

Regarding custody arrangements, the preference of a mature, responsible, intelligent minor child regarding his or her custody is a factor to be given consideration, but it is not controlling. Adams v. Adams, 13 Neb. App. 276, 691 N.W.2d 541 (2005).

Subsection (5) of this section clearly gives the trial court the authority to order joint custody, even where one of the parents refuses to consent, if the

court holds a hearing and specifically finds that joint custody is in the child's best interests. Kay v. Ludwig, 12 Neb. App. 868, 686 N.W.2d 619 (2004).

In determining a child's best interests under this section, courts may consider factors such as general considerations of moral fitness of the child's parents, including the parents' sexual conduct; respective environments offered by each parent; the emotional relationship between the child and parents; the age, sex, and health of the child and parents; the effect on the child as the result of continuing or disrupting an existing relationship; the attitude and stability of each parent's character; parental capacity to provide physical care and satisfy educational needs of the child; the child's preferential desire regarding custody if the child is of sufficient age of comprehension regardless of chronological age, and when such child's preference for custody is based on sound reasons; and the general health, welfare, and social behavior of the child. Coffey v. Coffey, 11 Neb. App. 788, 661 N.W.2d 327 (2003).

2. Termination of parental rights

The standard for termination of parental rights set out in this section, "best interests and welfare of the children," is unconstitutionally vague. Linn v. Linn, 205 Neb. 218, 286 N.W.2d 765 (1980).

Under Nebraska statutes, a termination of parental rights can only be decreed by a juvenile court in a proceeding brought for that purpose. Sosso v. Sosso, 196 Neb. 242, 242 N.W.2d 621 (1976).

The termination of parental rights to children is an issue separate and apart from the award of custody usually made in a proceeding for dissolution of a marriage. Perkins v. Perkins, 194 Neb. 201, 231 N.W.2d 133 (1975).

In cases of termination of parental rights under this section, the standard of proof must be by clear and convincing evidence. Timothy T. v. Shireen T., 16 Neb. App. 142, 741 N.W.2d 452 (2007).

Under subsection (7) of this section, the standard of proof for termination of parental rights is clear and convincing evidence. Under subsection (7) of this section, the Nebraska rules of evidence do apply to termination proceedings in district court. Joyce S. v. Frank S., 6 Neb. App. 23, 571 N.W.2d 801 (1997).

3. Child support

Although this section does not permit a district court in a dissolution action to order child support beyond the age of majority, the district court has the authority to enforce the terms of an approved settlement which may include an agreement to support a child beyond the age of majority. Wood v. Wood, 266 Neb. 580, 667 N.W.2d 235 (2003).

Pursuant to subsection (6) of this section, when a minor child is living with, and being supported by, both of his or her natural parents, the statutory responsibility for that child's support is solely that of the natural

parents, and not that of an ex-stepparent. Weinand v. Weinand, 260 Neb. 146, 616 N.W.2d 1 (2000).

Pursuant to subsection (6) of this section, when earning capacity is used as a basis for an initial determination of child support under the Nebraska Child Support Guidelines, there must be some evidence that the parent is capable of realizing such capacity through reasonable effort. State v. Porter, 259 Neb. 366, 610 N.W.2d 23 (2000).

Although this section does not permit a district court in a dissolution action to order child support beyond the age of majority, the district court has the authority to enforce the terms of an approved settlement, which may include an agreement to support a child beyond the age of majority. Zetterman v. Zetterman, 245 Neb. 255, 512 N.W.2d 622 (1994).

Only parents may be ordered to pay child support or expenses for child care pursuant to a decree of marital dissolution. Pattrin v. Pattrin, 239 Neb. 844, 479 N.W.2d 122 (1992).

Child support payments are a vested property right of the payee as each accrues, and a court, therefore, may not forgive or modify past-due child support, but may modify the amount of future payments. Berg v. Berg, 238 Neb. 527, 471 N.W.2d 435 (1991).

Under former subsection (4) of this section, parental earning capacity is a factor to be considered with the best interests of a child in determining the amount of child support. A determination of the best interests of a child or children includes a judicial decision based on evidence, not exclusively on a parental stipulation for disposition of a question concerning the parties' child or children. Schulze v. Schulze, 238 Neb. 81, 469 N.W.2d 139 (1991).

This section does not compel the direct support of an adult handicapped child. Meyers v. Meyers, 222 Neb. 370, 383 N.W.2d 784 (1986).

Earning capacity, as used in this section, means the overall capability of a parent to make child support payments based on the overall situation of the parent making such payments, including investment income, and is not limited to the ability to earn a wage. Lainson v. Lainson, 219 Neb. 170, 362 N.W.2d 53 (1985).

The law in Nebraska imposes upon the trial court the obligation to approve a decree, and grants to the court the continuing jurisdiction to modify child support. Johnson v. Johnson, 215 Neb. 689, 340 N.W.2d 393 (1983).

When a change of circumstances is proven calling for a modification of child support payments, said modification is to be determined under the same factors applied in an original establishment of support payments, including the cost to the noncustodial parent of exercising reasonable visitation rights. Harb v. Harb, 209 Neb. 875, 312 N.W.2d 279 (1981).

A mother, who is not granted custody of a minor child, may be required to pay child support. The court is required to consider the earning capacity

of each parent, together with other attendant circumstances. Meysenburg v. Meysenburg, 208 Neb. 456, 303 N.W.2d 783 (1981).

Subject to section 42-364, R.R.S.1943, Reissue 1974, and section 42-365, R.R.S.1943, Reissue 1978, amount of support can be modified after the decree has been entered. State v. Easley, 207 Neb. 443, 299 N.W.2d 439 (1980).

The signing of a consent to adoption does not, in itself, release the consenting parent from an obligation to support the child and the court's earlier opinion in Smith v. Smith, 201 Neb. 21, 265 N.W.2d 855 (1978), should not be read that way. Williams v. Williams, 206 Neb. 630, 294 N.W.2d 357 (1980).

The father has the primary responsibility for child support but the ability of the mother to support the children must also be considered. The trial court has the responsibility to adjust the equities between the parties. Scarpino v. Scarpino, 201 Neb. 564, 270 N.W.2d 913 (1978).

The rising cost of supporting children, together with great increase in an ex-husband's income, were sufficiently substantial changes of circumstances to justify a court order modifying the amount of child support. Pfeiffer v. Pfeiffer, 201 Neb. 56, 266 N.W.2d 82 (1978).

In the best interests of the children, subsequent changes in child support may be made by the court when required after notice and hearing. Greenfield v. Greenfield, 200 Neb. 608, 264 N.W.2d 675 (1978).

In addition to other things, in determining the amount of child support to be paid by a parent, the court shall consider the earning capacity of each parent. Lynch v. Lynch, 195 Neb. 804, 241 N.W.2d 123 (1976).

Financial position of husband and estimated cost of support must be considered together with all attendant circumstances in determining amount of child support. Hermance v. Hermance, 194 Neb. 720, 235 N.W.2d 231 (1975).

Child support allowances may be changed when required after notice and hearing. Wheeler v. Wheeler, 193 Neb. 615, 228 N.W.2d 594 (1975).

This section construed with former section 13-102, authorizes court to modify child support in paternity action in interests of children. Riederer v. Siciunas, 193 Neb. 580, 228 N.W.2d 283 (1975).

A judgment for child support may be modified only upon a showing of a material change in facts or circumstances which has occurred since the judgment was entered. Gray v. Gray, 192 Neb. 392, 220 N.W.2d 542 (1974).

Child support is equitable relief, which can be awarded by the court under this section. Johnson v. Johnson, 15 Neb. App. 292, 726 N.W.2d 194 (2006).

In the absence of a showing of bad faith, it is an abuse of discretion for a court to award retroactive child support when the evidence shows the obligated parent does not have the ability to pay the retroactive support and still meet current obligations. Cooper v. Cooper, 8 Neb. App. 532, 598 N.W.2d 474 (1999).

Pursuant to subsection (6) of this section, the trial court did not abuse its discretion when considering the earning capacity of a mother, who chose to work only part time in order to spend more time with her children, rather than her actual income when no specific evidence showed an inability to spend adequate time with the children while she was working 40 hours per week. Cooper v. Cooper, 8 Neb. App. 532, 598 N.W.2d 474 (1999).

Per subsection (6) of this section, the entire net amount received from personal injury settlement award constituted income for child support purposes. Mehne v. Hess, 4 Neb. App. 935, 553 N.W.2d 482 (1996).

Past expenses, such as for medical care and other reasonable and necessary expenses, are to be considered in the modification of the amount of child support payable in the future. Hoover v. Hoover, 2 Neb. App. 239, 508 N.W.2d 316 (1993).

4. Change in custody

Where facts relevant to the determination of best interests of minor children are not available to the court at the time of the initial custody determination, such facts may be considered upon a subsequent application for modification of a custody order. State ex rel. Laughlin v. Hugelman, 219 Neb. 254, 361 N.W.2d 581 (1985).

A decree fixing custody of minor children will not be modified unless there has been a change of circumstances indicating that the person having custody is unfit for that purpose or that the best interests of the children require such action. Tautfest v. Tautfest, 215 Neb. 233, 338 N.W.2d 49 (1983).

Notice and hearing required to modify custody of child except where court retained custody in original order. Brandl v. Brandl, 197 Neb. 778, 251 N.W.2d 155 (1977).

Trial court properly considered adultery and cohabitation of natural parent in action modifying decree awarding custody of minor. Bartley v. Bartley, 197 Neb. 246, 248 N.W.2d 39 (1976).

Under this section, the trial court on its own motion may make subsequent changes in a divorce decree in relation to minor children and their maintenance when required, but only after notice and opportunity to be heard. Francis v. Francis, 195 Neb. 417, 238 N.W.2d 468 (1976).

Pursuant to subsection (2) of this section, sexual activity by a parent, whether it is heterosexual or homosexual, is governed by the rule that to establish a material change in circumstances justifying a change in custody, there must be a showing that the minor child or children were exposed to such activity or were adversely affected or damaged by reason of such

activity and that a change of custody is in the child or children's best interests. Hassenstab v. Hassenstab, 6 Neb. App. 13, 570 N.W.2d 368 (1997).

Pursuant to this section, a district court may obtain and retain legal custody of a minor child and grant a parent physical custody. The best interests of the child determine whether a change of physical custody is necessary. It is not necessary to show any change of circumstances otherwise required for a change in legal custody of the child. Vorderstrasse v. Vorderstrasse, 2 Neb. App. 256, 508 N.W.2d 872 (1993).

5. Visitation

The only statutory authority conferred on district courts to deal with children in dissolution actions is that contained in this section. This section confers jurisdiction upon the district court in the course of dissolution proceedings to grant visitation rights to an ex-stepparent who stood in loco parentis to the former stepchild. Hickenbottom v. Hickenbottom, 239 Neb. 579, 477 N.W.2d 8 (1991).

A noncustodial parent's access to her children should not be denied unless the court is convinced that visitation would be detrimental to the children's best interests and, in any case, only under extraordinary circumstances. Deacon v. Deacon, 207 Neb. 193, 297 N.W.2d 757 (1980).

The fact children do not want to visit their noncustodial parent is not, in itself, sufficient reason to deny that parent's visitation rights when the visitation appears to be in the children's best interests and it also appears that the custodial parent has influenced the children against the other parent. Deacon v. Deacon, 207 Neb. 193, 297 N.W.2d 757 (1980).

The right of visitation is subject to continuous review by the court. Murdoch v. Murdoch, 206 Neb. 327, 292 N.W.2d 795 (1980).

Generally, visitation relates to continuing and fostering the normal parental relationship of the noncustodial parent with the minor child or children of the marriage. Heyne v. Kucirek, 203 Neb. 59, 277 N.W.2d 439 (1979).

In determining reasonable visitation rights, the primary consideration is the best interest and welfare of the child, considering age, health, welfare, educational and social needs, the need for a stable home environment free of unsettling influences, the fitness of the noncustodial parent for such visitation, and the relationship of the child to that parent. Heyne v. Kucirek, 203 Neb. 59, 277 N.W.2d 439 (1979).

Trial court did not abuse discretion in limiting visitation rights of father, who was serving life sentence, by denying father's application for order requiring former wife to make minor children available for visitation. Casper v. Casper, 198 Neb. 615, 254 N.W.2d 407 (1977).

The best interests of the child are paramount in decisions concerning child visitation modifications. Walters v. Walters, 12 Neb. App. 340, 673 N.W.2d 585 (2004).

The primary consideration in all visitation disputes is the best interests of the child, which interests surpass considerations of strictly legal rights of the parents. Davis v. Davis, 7 Neb. App. 78, 578 N.W.2d 907 (1998).

A hearing defining specific rights of visitation requires the presentation of evidence concerning the visitation schedule and evidence which explains how and why the visitation schedule would be in the best interests of the children. Norris v. Norris, 2 Neb. App. 570, 512 N.W.2d 407 (1994).

6. Special proceeding

Proceedings regarding modification of a marital dissolution and custody determinations are both special proceedings. Furstenfeld v. Pepin, 287 Neb. 12, 840 N.W.2d 862 (2013).

Modification of child custody and support in a dissolution action is a special proceeding, and thus, the statute governing the procedure for a default judgment in a civil action is not controlling. Fitzgerald v. Fitzgerald, 286 Neb. 96, 835 N.W.2d 44 (2013).

Proceedings regarding modification of a marital dissolution, which are controlled by this section, are special proceedings as defined by section 25-1902. Steven S. v. Mary S., 277 Neb. 124, 760 N.W.2d 28 (2009).

Custody determinations which are controlled by this section are considered special proceedings. State ex rel. Reitz v. Ringer, 244 Neb. 976, 510 N.W.2d 294 (1994).

Custody determinations, which are controlled by this section, are considered special proceedings. Michael B. v. Donna M., 11 Neb. App. 346, 652 N.W.2d 618 (2002).

7. Miscellaneous

The language of subsection (6) of this section is broad enough to encompass extraordinary expenses of a child. Caniglia v. Caniglia, 285 Neb. 930, 830 N.W.2d 207 (2013).

Potential reduction of movant's indebtedness to the IRS if granted ex-wife's tax dependency deductions in exchange for larger child support payments does not constitute sufficient change of circumstances to justify modification of divorce decree. A tax dependency exemption is nearly identical to an award of child support or alimony and is thus capable of being modified as an order of support. Hall v. Hall, 238 Neb. 686, 472 N.W.2d 217 (1991).

Courts have a duty to consider whether religious beliefs threaten the health and well-being of a child. LeDoux v. LeDoux, 234 Neb. 479, 452 N.W.2d 1 (1990).

The only statutory authority conferred on district courts to deal with children in dissolution actions is that contained in this section. Meyers v. Meyers, 222 Neb. 370, 383 N.W.2d 784 (1986).

It would be unreasonable to conclude that the district court should not have retained jurisdiction where the district court had presided over proceedings for ten years. R.D.N. v. T.N., 218 Neb. 830, 359 N.W.2d 777 (1984).

Under this section the trial court, on its own motion, may make subsequent changes or modifications in a decree of dissolution of a marriage in relation to any minor children and their maintenance when required, but only after a notice to the parties and an opportunity to be heard. Tautfest v. Tautfest, 215 Neb. 233, 338 N.W.2d 49 (1983).

Allowances of alimony in the amount of ten thousand dollars annually plus child support of four hundred dollars per month, which would require approximately seventy-five percent of former husband's present net income, were beyond the reasonable reach and capacity of former husband; and considering property division made by the trial court and the circumstances of the parties, such allowances were excessive and represented an abuse of discretion. Petersen v. Petersen, 208 Neb. 1, 301 N.W.2d 592 (1981).

In a divorce action, a court may not order a party to award specific property to a child but the parties may agree to such a provision. Lockwood v. Lockwood, 205 Neb. 818, 290 N.W.2d 636 (1980).

This section authorizes the court to make changes in a divorce decree after term of court to cover children conceived during marriage but born after the divorce. Perkins v. Perkins, 198 Neb. 401, 253 N.W.2d 42 (1977).

In determining a child's best interests in custody and visitation matters, factors to be considered include the relationship of the minor child to each parent; the desires and wishes of the minor child; the general health, welfare, and social behavior of the minor child; and credible evidence of abuse. Schnell v. Schnell, 12 Neb. App. 321, 673 N.W.2d 578 (2003).

Although this section provides that the trial court on its own motion may make subsequent changes or modifications in a decree of dissolution of a marriage in relation to any minor children and their maintenance when required, such changes may be made only after notice to the parties and an opportunity to be heard. Templeton v. Templeton, 9 Neb. App. 937, 622 N.W.2d 424 (2001).

42-364.01. Child support; withholding of earnings; court; powers.

In any proceeding when a district court, county court, or separate juvenile court has ordered, temporarily or permanently, a parent, referred to as parent-employee in sections 42-364.01 to 42-364.12, to pay any amount for the support of a minor child, that court shall, following application, hearing, and findings, as required by sections 42-364.02 to 42-364.12, order the employer of such parent:

(1) To withhold, from the parent-employee's nonexempt, disposable earnings presently due and to be due in the future, such amounts as shall reduce and satisfy the parent-employee's previous arrearage in child support payments arising from the parent-employee's failure to comply fully with an order previously entered to pay child support, the parent-employee's obligation to pay child support as ordered by the court as such obligation accrues in the future;

(2) To pay to the parent-employee, on his or her regularly scheduled payday such earnings then due which are not ordered withheld;

(3) To deduct from the sums so withheld an amount set by the court, but not to exceed two dollars and fifty cents in any calendar month, as compensation for the employer's reasonable cost incurred in complying with such order;

(4) To remit within seven calendar days after the date the obligor is paid such sums withheld, less the deduction as allowed by the court pursuant to subdivision (3) of this section, to the State Disbursement Unit;

(5) To refrain from dismissing, demoting, disciplining, and in any way penalizing the parent-employee on account of the proceeding to collect child support, on account of any order or orders entered by the court in such proceeding, and on account of employer compliance with such order or orders; and

(6) To notify in writing the clerk of the court entering such order of the termination of the employment of such parent-employee, the last-known address of the parent-employee, and the name and address of the parent-employee's new employer, if known, and to provide such written notification within thirty days after the termination of employment.

Source: Laws 1974, LB 1015, § 6; Laws 1983, LB 371, § 4; Laws 2000, LB 972, § 12.

Annotations

Issues of visitation and previous failure to enforce a child support order are not relevant to proceedings under section 42-358, R.R.S.1943, or section 42-364.01, R.R.S.1943. Eliker v. Eliker, 206 Neb. 764, 295 N.W.2d 268 (1980).

Sections 42-364.01 to 42-364.12 amend section 25-1588, R.R.S.1943, insofar as it contains no limitations on garnishment of disposable earnings in aid of an order for support of a person, and is inconsistent with the provisions of these sections. Ferry v. Ferry, 201 Neb. 595, 271 N.W.2d 450 (1978).

42-364.02. Child support; withholding of earnings; application; who may file.

Any person having a direct interest in the welfare of a minor child may file an application, with the court that has previously ordered a parent to pay any amount for the support of the minor child, requesting the court to hold a hearing on such application and to enter an order as allowed by the provisions of section 42-364.01. Persons having a direct interest in the welfare of a child shall include a parent or legal guardian of the child, a person having custody of the child pursuant to an order of a court of competent jurisdiction, a county attorney, a deputy or assistant county attorney, and an employee of a county welfare office. No court, even if it has custody of a minor child, may initiate such an application.

Source: Laws 1974, LB 1015, § 7; Laws 1983, LB 371, § 5.

42-364.03. Child support; withholding of earnings; hearing notice; interrogatories.

Upon the filing of an application to withhold and transmit earnings, the court shall set a date, time, and place for a hearing thereon, which hearing shall be set not more than three weeks later than the date such application is filed. The applicant shall then cause to be served on the employer a copy of the application, a notice of hearing and interrogatories to be completed and returned by the employer to the court no later than three days prior to the hearing, which interrogatories when completed shall show whether the parent-employee is an employee of the employer, whether such parent-employee performs work or provides services or makes sales for the employer in Nebraska, the present length of employment of the parent-employee with the employer, the present pay period for such parent-employee, the average earnings for such parent-employee per pay period, the average disposable earnings for such parent-employee per pay period, and the name and address of the person, office or division of the employer responsible for the preparation of the parent-employee's earnings payments. The applicant shall also cause to be served on the parent-employee a copy of the application and a notice of hearing.

Source: Laws 1974, LB 1015, § 8.

42-364.04. Child support; withholding of earnings; service of documents.

Service of the documents required by the provisions of section 42-364.03 shall be made in the manner provided for service of a summons in a civil action, except that certified mail service may not be used.

Source: Laws 1974, LB 1015, § 9; Laws 1983, LB 447, § 49; Laws 1984, LB 845, § 28.

42-364.05. Child support; withholding of earnings; court; jurisdiction.

The court that entered the order requiring the parent to pay any amount for the support of a minor child and in which the application to withhold and transmit earnings is filed shall have jurisdiction of any employer who transacts any business in the state or contracts to supply services or things in the state and of the parent-employee and all the parent-employee's earnings if the parent-employee be a resident of the state, and, if the parent-employee not be a resident of the state, of those earnings of the parent-employee arising from the performance of work, the providing of services, or the sale of goods or services for the employer by the parent-employee in the state. Such court has jurisdiction regardless of where in the state the employer transacts business or contracts to supply services or things, or where the parent-employee resides or performs work, provides services, or sells goods and services. A failure of service, as required by the provisions of sections 42-364.03 and 42-364.04, upon the parent-employee shall not affect the court's jurisdiction of the earnings and of the employer.

Source: Laws 1974, LB 1015, § 10.

42-364.06. Child support; withholding of earnings; court order.

The court shall enter an order as allowed by section 42-364.01 at the hearing on the application for such order, if it finds that it has jurisdiction of the employer and the earnings of the parent-employee, that the parent-employee is an employee as defined in section 42-364.11 of the employer, and that the parent-employee has not complied in full with the previous order of the court requiring such parent-employee to pay for the support of a minor child. Noncompliance with a child support order shall not be found if the child support payments are automatically withheld from the paycheck if (1) any delinquency or arrearage is solely caused by a disparity between the schedule of the regular pay dates and the scheduled date the child support is due, (2) the total amount of child support to be withheld from the paychecks and the amount ordered by the support order are the same on an annual basis, and (3) the automatic deductions for child support are continuous and occurring. Nothing shall prohibit the court from continuing the order to withhold and transmit after the parent-employee has become current on the court-ordered obligation to pay child support. In fixing the amount to be withheld by the employer from the parent-employee's nonexempt, disposable earnings, the court shall determine that amount of earnings which, if paid over a reasonable period, would satisfy in full the child support arrearage existing as of the time of the hearing and would satisfy each child support obligation to come due in the future as such came due and would satisfy over a reasonable period of time the attorney's fee awarded, if any, pursuant to section 42-364.07. The court shall set flat amounts

to be withheld, or, if the parent-employee's pay varies substantially from pay period to pay period, it may set a percentage of the nonexempt, disposable earnings to be withheld.

Source: Laws 1974, LB 1015, § 11; Laws 1983, LB 371, § 6; Laws 1984, LB 845, § 29; Laws 1997, LB 18, § 2.

42-364.07. Child support; withholding of earnings; attorney's fee.

The court may award a reasonable attorney's fee to the applicant for the services of the applicant's attorney in obtaining the order to withhold and transmit earnings. Such fee shall be reasonably related to the time spent by the attorney in obtaining such order and not to the amounts collected or to be collected pursuant to such order. If the court awards an attorney's fee, it shall provide that such fee shall be paid from that portion of the amounts withheld and transmitted to the clerk of the court which the court designates as the attorney fee award.

Source: Laws 1974, LB 1015, § 12.

42-364.08. Child support; withholding of earnings; limitations.

The amount to be withheld from the parent-employee's disposable income under any order to withhold and transmit earnings entered pursuant to sections 42-364.01 to 42-364.12 shall not in any case exceed the maximum amount permitted to be withheld under section 303(b) of the Consumer Protection Credit Act, 15 U.S.C. 1673(b)(2)(A) and (B), nor shall any amount withheld to satisfy a child or spousal support arrearage, when added to the amount withheld to pay current support and the fee provided for in subdivision (3) of section 42-364.01, exceed such maximum amount.

Source: Laws 1974, LB 1015, § 13; Laws 1986, LB 600, § 8.

42-364.09. Child support; withholding of earnings; priority.

Any order to withhold and transmit earnings shall have priority over any attachment, execution, garnishment, or wage assignment, unless otherwise ordered by the court.

Source: Laws 1974, LB 1015, § 14.

42-364.10. Child support; withholding of earnings; order; dissolution; revocation; modification; service.

An order to withhold and transmit earnings shall dissolve without any court action thirty days after the parent-employee ceases employment with the employer. An order to withhold and transmit earnings may be revoked by the court upon application when the parent-employee is not in arrears of any court-ordered child support as of the date of the application. An order to withhold and transmit earnings may be modified or revoked by the court upon application and for good cause shown. All applications to revoke or modify shall be served upon the employer and all persons having an interest in the order to withhold and transmit earnings, by United States certified mail, return receipt requested, addressed to the last-known addresses of such persons.

Source: Laws 1974, LB 1015, § 15; Laws 1983, LB 371, § 7.

42-364.11. Child support; withholding of earnings; terms, defined.

For the purposes of sections 42-364.01 to 42-364.14, unless the context otherwise requires:

(1) Earnings shall mean compensation paid or payable for personal services, whether denominated as wages, salary, commission, bonus, or otherwise, and shall include any periodic payments pursuant to a pension or a retirement program and any payments made to an independent contractor for services performed;

(2) Disposable earnings shall mean that part of the earnings of any individual remaining after the deduction from those earnings of any amounts required by law to be withheld, excepting the amounts required to be deducted and withheld pursuant to sections 42-357 and 42-363 to 42-365 or those provisions allowing garnishment, attachment, or execution;

(3) Employer shall mean any person, partnership, limited liability company, firm, corporation, association, political subdivision, or department of the state in possession of earnings;

(4) Employee shall mean any person who is compensated by an employer for services performed, regardless of how such compensation is denominated, and shall include independent contractors who receive compensation for services;

(5) Workweek shall mean any seven consecutive days during which a parent-employee performs work, provides services, or sells goods or services for an employer; and

(6) Pay period shall mean that regular interval of time, whether it be daily, weekly, biweekly, semimonthly, monthly, or some other regular interval, for which an employer pays earnings to a parent-employee.

Source: Laws 1974, LB 1015, § 16; Laws 1983, LB 371, § 8; Laws 1993, LB 121, § 215; Laws 2004, LB 1207, § 26.

42-364.12. Child support; withholding of earnings; employer; civil contempt; liability for damages; injunction.

Any employer failing to make answer truthfully and completely to the interrogatories propounded pursuant to section 42-364.03 may be punished by the court for civil contempt. The court shall first afford such employer a reasonable opportunity to purge itself of such contempt. Any employer who shall fail or refuse to deliver earnings pursuant to an order to withhold and transmit earnings, when such employer has had in its possession such earnings, shall be personally liable for the amount of such earnings which the employer failed or refused to deliver, together with costs, interest, and reasonable attorney's fees. Any employer who fails to notify in writing the clerk of the court entering an order to withhold and transmit earnings of the termination of the parent-employee and the name and address of the parent-employee's new employer, if known, within thirty days after the termination of employment, may be punished by the court for civil contempt. Any employer who dismisses, demotes, disciplines, or in any way penalizes a parent-employee on account of any proceeding to collect child support, on account of any order or orders entered by the court in such proceeding, or on account of the employer's compliance with such order or orders, shall be liable to the parent-employee for all damages, together with costs, interest thereon, and a reasonable attorney's fee, resulting from the employer's action and may be enjoined by any court of competent jurisdiction from continuing such action. Any proceeding to punish an employer for contempt, to hold the employer liable for earnings not withheld and transmitted, to hold the employer liable for actions taken against the parent-employee, or to enjoin the employer from continuing such actions, must be commenced within ninety days after the employer's act or failure to act upon which such proceeding is based.

Source: Laws 1974, LB 1015, § 17.

42-364.13. Support order; requirements.

(1) Any order for support entered by the court shall specifically provide that any person ordered to pay a judgment shall be required to furnish to the clerk of the district court his or her address, telephone number, and social security number, the name of his or her employer, whether or not such person has access to employer-related health insurance coverage and, if so, the health insurance policy information, and any other information the court deems relevant until such judgment is paid in full. The person shall also be required to advise the clerk of any changes in such information between the time of entry of the decree and the

payment of the judgment in full. If both parents are parties to the action, such order shall provide that each be required to furnish to the clerk of the district court all of the information required by this subsection. Failure to comply with this section shall be punishable by contempt.

(2) All support orders entered by the court shall include the year of birth of any child for whom the order requires the provision of support.

(3) Until the Title IV-D Division of the Department of Health and Human Services has operative the statewide automated data processing and retrieval system necessary for centralized collection and disbursement of support order payments:

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

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

(b) If the court orders income withholding regardless of whether or not payments are in arrears pursuant to section 43-1718.01 or 43-1718.02, the statement in this subsection may be altered to read as follows:

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

(4) When the Title IV-D Division of the Department of Health and Human Services has operative the statewide automated data processing and retrieval system necessary for centralized collection and disbursement of support order payments:

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

In the event that the (plaintiff or defendant) fails to pay any child, medical, or spousal support payment, as such failure is certified each month by the State Disbursement Unit in cases in which court-ordered support is delinquent in an amount equal to the support due and payable for a one-month period of time, he or she shall be subject to income withholding and may be required to appear in court on a date to be determined by the court and show cause why such payment was not made. In the event that the (plaintiff or defendant) fails to pay and appear as ordered, a warrant shall be issued for his or her arrest.

(b) If the court orders income withholding regardless of whether or not payments are in arrears pursuant to section 43-1718.01 or 43-1718.02, the statement in this subsection may be altered to read as follows:

In the event that the (plaintiff or defendant) fails to pay any child, medical, or spousal support payment, as such failure is certified each month by the State Disbursement Unit in cases in which court-ordered support is delinquent in an amount equal to the support due and payable for a one-month period of time, he or she may be required to appear in court on a date to be determined by the court and show cause why such payment was not made. In the event that the (plaintiff or defendant) fails to pay and appear as ordered, a warrant shall be issued for his or her arrest.

Source: Laws 1983, LB 371, § 9; Laws 1984, LB 845, § 30; Laws 1985, Second Spec. Sess., LB 7, § 17; Laws 1993, LB 523, § 1; Laws 1994, LB 1224, § 45; Laws 2000, LB 972, § 13; Laws 2004, LB 1207, § 27; Laws 2006, LB 1113, § 36; Laws 2007, LB296, § 59; Laws 2008, LB1014, § 34.

42-364.14. Parent-employee; consent to withholding of earnings; procedure.

Nothing in the Income Withholding for Child Support Act or sections 42-364.01 to 42-364.13 shall be construed as prohibiting a parent-employee from consenting to an order to withhold and transmit earnings as part of a property settlement agreement incorporated into a decree dissolving a marriage or by agreement in a proceeding in the district court, county court, or separate juvenile court in which the payment of child support is an issue. If the parent-employee has consented to such an order, the court shall not be required to hold a separate hearing or make findings as provided in the act or such sections. The clerk of the court shall notify the employer, if any, of the parent-employee of any such order by first-class mail and file a record of such mailing in the court.

Source: Laws 1983, LB 371, § 10; Laws 2007, LB554, § 33.

Cross References

Income Withholding for Child Support Act, see section 43-1701.

42-364.15. Enforcement of parenting time, visitation, or other access orders; procedure; costs.

In any proceeding when a court has ordered a parent to pay, temporarily or permanently, any amount for the support of a minor child and in the same proceeding has ordered parenting time, visitation, or other access with any minor child on behalf of such parent, the court shall enforce its orders as follows:

(1) Upon the filing of a motion which is accompanied by an affidavit stating that either parent has unreasonably withheld or interfered with the exercise of the court order after notice to the parent and hearing, the court shall enter such orders as are reasonably necessary to enforce rights of either parent including the modification of previous court orders relating to parenting time, visitation, or other access. The court may use contempt powers to enforce its court orders relating to parenting time, visitation, or other access. The court may require either parent to file a bond or otherwise give security to insure his or her compliance with court order provisions; and

(2) Costs, including reasonable attorney's fees, may be taxed against a party found to be in contempt pursuant to this section.

Source: Laws 1983, LB 371, § 3; Laws 2000, LB 972, § 14; Laws 2007, LB554, § 34.

42-364.16. Child support guidelines; establishment; use.

The Supreme Court shall provide by court rule, as a rebuttable presumption, guidelines for the establishment of all child support obligations. Child support shall be established in accordance with such guidelines, which guidelines are presumed to be in the best interests of the child, unless the court finds that one or both parties have produced sufficient evidence to rebut the presumption that the application of the guidelines will result in a fair and equitable child support order.

Source: Laws 1985, Second Spec. Sess., LB 7, § 18; Laws 1994, LB 1224, § 46.

Cross References

Review of and recommendations for child support guidelines by the Child Support Advisory Commission, see section 43-3342.05.

Annotations

1. General

2. Miscellaneous

1. General

All orders for child support 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 application of the guidelines will result in a fair and equitable child support order. Dueling v. Dueling, 257 Neb. 862, 601 N.W.2d 516 (1999).

Generally, child support payments should be set according to the Nebraska Child Support Guidelines. Bondi v. Bondi, 255 Neb. 319, 586 N.W.2d 145 (1998).

The court may deviate from the Nebraska Child Support Guidelines whenever application of the guidelines in an individual case would be unjust or inappropriate. Knippelmier v. Knippelmier, 238 Neb. 428, 470 N.W.2d 798 (1991).

The child support guidelines set out a rebuttable presumption of a fair and equitable child support order. Stuczynski v. Stuczynski, 238 Neb. 368, 471 N.W.2d 122 (1991).

The Nebraska Supreme Court's child support guidelines apply to any child support matter adjudicated from and after October 1, 1987. Formanack v. Formanack, 234 Neb. 325, 451 N.W.2d 250 (1990).

Generally, child support payments should be set according to the guidelines. McDonald v. McDonald, 21 Neb. App. 535, 840 N.W.2d 573 (2013).

Child support payments should be set according to the Nebraska Child Support Guidelines established pursuant to this section, unless sufficient evidence rebuts the presumption that applying the guidelines will result in a fair and equitable child support order. Pool v. Pool, 9 Neb. App. 453, 613 N.W.2d 819 (2000).

The Nebraska Child Support Guidelines apply in juvenile cases where child support is ordered. In re Interest of Tamika S. et al., 3 Neb. App. 624, 529 N.W.2d 147 (1995).

In general, child support payments should be set according to the guidelines, but the trial court may deviate from the guidelines in an individual case if application of the guidelines would be unjust or inappropriate. McCall v. McCall, 1 Neb. App. 373, 496 N.W.2d 8 (1992).

2. Miscellaneous

Trial court did not abuse its discretion in considering expenses incurred by a person in raising offspring from a subsequent marriage in calculating

that person's child support obligation to a former spouse. Czaplewski v. Czaplewski, 240 Neb. 629, 483 N.W.2d 751 (1992).

The Nebraska Child Support Guidelines constitute a material change of circumstances sufficient to justify consideration of proposed modification of child support orders entered before October 1, 1987, and may in some cases be retroactively applied to the date of the original ruling on the modification. State ex rel. Crook v. Mendoza, 1 Neb. App. 180, 491 N.W.2d 62 (1992).

42-364.17. Dissolution, legal separation, or order establishing paternity; incorporate financial arrangements.

A decree of dissolution, legal separation, or order establishing paternity shall incorporate financial arrangements for each party's responsibility for reasonable and necessary medical, dental, and eye care, medical reimbursements, day care, extracurricular activity, education, and other extraordinary expenses of the child and calculation of child support obligations.

Source: Laws 2008, LB1014, § 33.

Annotations

A party's responsibility under this section for reasonable and necessary medical, dental, and eye care; medical reimbursements; daycare; extracurricular activity; education; and other extraordinary expenses of the child to be made in the future may be modified if the applicant proves that a material change in circumstances has occurred since entry of the decree or a previous modification. Caniglia v. Caniglia, 285 Neb. 930, 830 N.W.2d 207 (2013).

An appellate court views this section in the context of the statutory scheme governing child support. Caniglia v. Caniglia, 285 Neb. 930, 830 N.W.2d 207 (2013).

The expenses stated in this section represent other incidents of support to be addressed in a dissolution decree that are outside of the monthly installment established in Neb. Ct. R. section 4-207. Caniglia v. Caniglia, 285 Neb. 930, 830 N.W.2d 207 (2013).

The words of this section are plain, direct, and unambiguous. Caniglia v. Caniglia, 285 Neb. 930, 830 N.W.2d 207 (2013).

42-364.18. Individuals with disabilities; legislative findings.

The Legislature finds that individuals with disabilities, as defined in section 42-364, continue to face unfair, preconceived, and unnecessary societal biases as well as antiquated attitudes regarding their ability to successfully parent their children.

Source: Laws 2018, LB845, § 16.
Effective Date: July 19, 2018

42-365. Decree; alimony; division of property; criteria; modification; revocation; termination.

When dissolution of a marriage is decreed, the court may order payment of such alimony by one party to the other and division of property as may be reasonable, having regard for the circumstances of the parties, duration of the marriage, a history of the contributions to the marriage by each party, including contributions to the care and education of the children, and interruption of personal careers or educational opportunities, and the ability of the supported party to engage in gainful employment without interfering with the interests of any minor children in the custody of such party. Reasonable security for payment may be required by the court. A proceeding to modify or revoke an order for alimony for good cause shall be commenced by filing a complaint to modify. Service of process and other procedure shall comply with the requirements for a dissolution action. Amounts accrued prior to the date of filing of the complaint to modify may not be modified or revoked. A decree may not be modified to award alimony if alimony was not allowed in the original decree dissolving a marriage. A decree may not be modified to award additional alimony if the entire amount of alimony allowed in the original decree had accrued before the date of filing of the complaint to modify. Except as otherwise agreed by the parties in writing or by order of the court, alimony orders shall terminate upon the death of either party or the remarriage of the recipient.

While the criteria for reaching a reasonable division of property and a reasonable award of alimony may overlap, the two serve different purposes and are to be considered separately. The purpose of a property division is to distribute the marital assets equitably between the parties. The purpose of alimony is to provide for the continued maintenance or support of one party by the other when the relative economic circumstances and the other criteria enumerated in this section make it appropriate.

Source: Laws 1972, LB 820, § 19; Laws 1974, LB 1015, § 5; Laws 1980, LB 622, § 1; Laws 2004, LB 1207, § 28.

Annotations

1. Award

2. Modification or revocation

3. Considerations

4. Miscellaneous

1. Award

An alimony award which drives an obligor's net income below the basic subsistence limitation of Neb. Ct. R. section 4-218 of the Nebraska Child Support Guidelines is presumptively an abuse of judicial discretion unless the court specifically finds that conformity with section 4-218 would work an "unjust or inappropriate" result in that particular case. Gress v. Gress, 274 Neb. 686, 743 N.W.2d 67 (2007).

Equitable property division is a three-step process. The first step is to classify the parties' property as marital or nonmarital. The second step is to value the marital assets and liabilities of the parties. The third step is to calculate and divide the net marital estate between the parties in accordance with the principles contained in this section. Gangwish v. Gangwish, 267 Neb. 901, 678 N.W.2d 503 (2004); Mathews v. Mathews, 267 Neb. 604, 676 N.W.2d 42 (2004); Patton v. Patton, 20 Neb. App. 51, 818 N.W.2d 624 (2012); Sughroue v. Sughroue, 19 Neb. App. 912, 815 N.W.2d 210 (2012); Ging v. Ging, 18 Neb. App. 145, 775 N.W.2d 479 (2009).

The purpose of a property division is to distribute the marital assets equitably between the parties. Gangwish v. Gangwish, 267 Neb. 901, 678 N.W.2d 503 (2004).

Any alimony award included in a decree entered on or after July 1, 2004, will be governed by the language in this section unless the decree or a written agreement of the parties includes explicit language stating that the death of either party and/or remarriage of the alimony recipient shall not terminate the alimony order. Holm v. Holm, 267 Neb. 867, 678 N.W.2d 499 (2004).

The purpose of a property division is to distribute the marital assets equitably between the parties. Although the division of property is not subject to a precise mathematical formula, the general rule is to award a spouse one-third to one-half of the marital estate, the polestar being fairness and reasonableness as determined by the facts of each case. Equitable property division under this section is a three-step process. The first step is to classify the parties' property as marital or nonmarital. The second step is to value the marital assets and marital liabilities of the parties. The third step is to calculate and divide the net marital estate between the parties in accordance with the principles contained in this section. Gibilisco v. Gibilisco, 263 Neb. 27, 637 N.W.2d 898 (2002).

Equitable property division under this section is a three-step process. The first step is to classify the parties' property as marital or nonmarital. The second step is to value the marital assets and marital liabilities of the parties. The third step is to calculate and divide the net marital estate

between the parties in accordance with the principles contained in this section. Heald v. Heald, 259 Neb. 604, 611 N.W.2d 598 (2000).

Alimony is proper when one spouse has earning potential far exceeding the other, who must receive further education or training to engage in gainful employment. Druba v. Druba, 238 Neb. 279, 470 N.W.2d 176 (1991).

Alimony is not to be used simply to equalize the income of the parties or to punish one of the parties; it may be used to assist the other party during a reasonable time to bridge that period of unavailability for employment or during that period to get proper training for employment. Murrell v. Murrell, 232 Neb. 247, 440 N.W.2d 237 (1989).

The ultimate test in determining correctness in the amount of alimony awarded as well as the appropriateness of the division of property is reasonableness as determined by the facts of each case. Busekist v. Busekist, 224 Neb. 510, 398 N.W.2d 722 (1987).

The test for the award of alimony is one of reasonableness as determined by the facts of each case. Ray v. Ray, 222 Neb. 324, 383 N.W.2d 752 (1986).

How property owned at marriage and acquired by gift or inheritance will be considered in determining division of property or award of alimony must depend upon the facts of the particular case and the equities involved. Lord v. Lord, 213 Neb. 557, 330 N.W.2d 492 (1983).

Alimony awards in gross are not excluded from the workings of this section. A provision in a court order which states that certain alimony payments shall be made "until the total alimony award. . . is paid in full" is not an order providing "otherwise." Kingery v. Kingery, 211 Neb. 795, 320 N.W.2d 441 (1982).

Allowances of alimony in the amount of ten thousand dollars annually plus child support of four hundred dollars per month, which would require approximately seventy-five percent of former husband's present net income, were beyond the reasonable reach and capacity of former husband; and considering property division made by the trial court and the circumstances of the parties, such allowances were excessive and represented an abuse of discretion. Petersen v. Petersen, 208 Neb. 1, 301 N.W.2d 592 (1981).

The award of alimony and the division of property are determined by the circumstances of the parties at the time of the dissolution of the marriage. Amen v. Amen, 207 Neb. 694, 301 N.W.2d 74 (1981).

Despite the language of section 42-379(3), R.R.S.1943, the provisions of section 42-365, R.R.S.1943, do not apply to awards of alimony in gross entered prior to July 6, 1972. Chamberlin v. Chamberlin, 206 Neb. 808, 295 N.W.2d 391 (1980).

The fixing of alimony or distribution of property rests in the sound discretion of the district court and in the absence of an abuse of discretion

will not be disturbed on appeal. Lockwood v. Lockwood, 205 Neb. 818, 290 N.W.2d 636 (1980).

On appeal, judgment modified to allow wife alimony, in addition to settlement award fixed by trial court. Brown v. Brown, 199 Neb. 394, 259 N.W.2d 24 (1977).

Under this section a court may order payment of alimony by one party to the other having regard for the circumstances. Essex v. Essex, 195 Neb. 385, 238 N.W.2d 235 (1976).

Upon the dissolution of a marriage, the court may order the payment of such alimony by one party to the other as may be reasonable under the circumstances of the parties. Walker v. Walker, 193 Neb. 540, 227 N.W.2d 878 (1975).

Alimony should not be used to equalize the incomes of the parties or to punish one of the parties. Patton v. Patton, 20 Neb. App. 51, 818 N.W.2d 624 (2012).

Disparity in income or potential income may partially justify an award of alimony. Patton v. Patton, 20 Neb. App. 51, 818 N.W.2d 624 (2012).

In addition to the specific criteria listed in this section, in dividing property and considering alimony upon a dissolution of marriage, a court is to consider the income and earning capacity of each party, as well as the general equities of each situation. Patton v. Patton, 20 Neb. App. 51, 818 N.W.2d 624 (2012); Titus v. Titus, 19 Neb. App. 751, 811 N.W.2d 318 (2012); Grams v. Grams, 9 Neb. App. 994, 624 N.W.2d 42 (2001).

The purpose of property division is to equitably distribute the marital assets between the parties, and the polestar for such distribution is fairness and reasonableness as determined by the facts of each case. Shuck v. Shuck, 18 Neb. App. 867, 806 N.W.2d 580 (2011).

The purpose of a property division is to distribute the marital assets equitably between the parties. Ging v. Ging, 18 Neb. App. 145, 775 N.W.2d 479 (2009).

A marital debt is one incurred during the marriage and before the date of separation by either spouse or both spouses for the joint benefit of the parties. McGuire v. McGuire, 11 Neb. App. 433, 652 N.W.2d 293 (2002).

Although disparity in income or potential income may partially justify an award of alimony, it is error to award alimony under this section if the sole reason for the award of alimony is a disparity in the parties' incomes or potential incomes. Kosiske v. Kosiske, 8 Neb. App. 694, 600 N.W.2d 840 (1999).

A workers' compensation award is marital property to the extent it recompenses for the couple's loss of income during the marriage. To the extent that it compensates an employee for loss of premarriage or postdivorce earnings, it is that person's separate property. Gibson-Voss v. Voss, 4 Neb. App. 236, 541 N.W.2d 74 (1995).

The purpose of alimony is to provide for the continued maintenance or support of one party by the other when the relative economic circumstances and the other criteria enumerated in this section make it appropriate. Kramer v. Kramer, 1 Neb. App. 641, 510 N.W.2d 351 (1993).

2. Modification or revocation

In an action to modify a decree of dissolution, it is the decree that was affirmed as modified, from the time it was originally entered, that provides the appropriate frame of reference for the subsequent application to modify. Finney v. Finney, 273 Neb. 436, 730 N.W.2d 351 (2007).

To determine whether there has been a material and substantial change in circumstances warranting modification of a divorce decree, a trial court should compare the financial circumstances of the parties at the time of the divorce decree, or last modification of the decree, with their circumstances at the time the modification at issue was sought, and an intervening appellate decision has no bearing on the analysis. Finney v. Finney, 273 Neb. 436, 730 N.W.2d 351 (2007).

A petition for the modification or termination of alimony shall be denied if the change in financial condition is due to fault or voluntary wastage or dissipation of one's talents and assets. Pope v. Pope, 251 Neb. 773, 559 N.W.2d 192 (1997).

A tax dependency exemption is nearly identical to an award of child support or alimony and is thus capable of being modified as an order of support. Hall v. Hall, 238 Neb. 686, 472 N.W.2d 217 (1991).

An increase in income is a circumstance that may be considered in determining whether alimony should be modified. Northwall v. Northwall, 238 Neb. 76, 469 N.W.2d 136 (1991).

In a proceeding to modify an alimony award, that matter is initially entrusted to the sound discretion of the trial judge, which matter, on appeal, will be reviewed de novo on the record and affirmed in the absence of an abuse of the trial judge's discretion. Kelly v. Kelly, 220 Neb. 441, 370 N.W.2d 161 (1985).

Alimony is not awarded as a reward to the receiving spouse or as punishment of the spouse against whom it is charged. It is an effort, insofar as is reasonably possible, to rectify the frequent economic imbalance in the earning power and standard of living of the divorced husband and wife. Its continuation is not dependent on the good conduct of either spouse. Else v. Else, 219 Neb. 878, 367 N.W.2d 701 (1985).

Good cause means a material and substantial change in circumstances and depends upon the circumstances of each case. Creager v. Creager, 219 Neb. 760, 366 N.W.2d 414 (1985).

Good cause for altering alimony provisions in a divorce decree is demonstrated by a material and substantial change of circumstances. An alimony recipient's obtaining employment after the date of the decree is a

circumstance that permits the situation of the parties to be reexamined. In dissolution of marriage cases one may in good faith make an occupational change even though that may reduce his ability to meet his financial obligations. Cooper v. Cooper, 219 Neb. 64, 361 N.W.2d 202 (1985).

A material change in circumstances, not within the reasonable contemplation of the parties at the time of the alimony award, and not accomplished by the mere passage of time, may constitute good cause to justify modification of the award. Sholl v. Sholl, 216 Neb. 289, 343 N.W.2d 742 (1984).

Where parties recognize that child support payments will terminate when the children reach majority, such termination is not such a change in circumstances as to modify an alimony award. Sloss v. Sloss, 212 Neb. 610, 324 N.W.2d 663 (1982).

An unqualified allowance of alimony in gross made before July 6, 1972, is not subject to modification. Watley v. Watley, 208 Neb. 155, 302 N.W.2d 690 (1981); Bryant v. Bryant, 191 Neb. 539, 216 N.W.2d 162 (1974); Karrer v. Karrer, 190 Neb. 610, 211 N.W.2d 116 (1973).

Subject to section 42-365, R.R.S.1943, Reissue 1978, and section 42-364, R.R.S.1943, Reissue 1974, amount of support can be modified after the decree has been entered. State v. Easley, 207 Neb. 443, 299 N.W.2d 439 (1980).

Based on the facts of this case, the wife is entitled to one-half of the value of the property acquired during the twenty-seven-year marriage and the decree is modified accordingly. Chrisp v. Chrisp, 207 Neb. 348, 299 N.W.2d 162 (1980).

Alimony provisions may be modified, even if based upon property settlement agreements, unless the parties or the court provide otherwise in writing. Euler v. Euler, 207 Neb. 4, 295 N.W.2d 397 (1980).

The phrase "good cause" depends upon circumstances of individual case, and finding of its existence lies largely in discretion of officer or court to which decision is committed. Chamberlin v. Chamberlin, 206 Neb. 808, 295 N.W.2d 391 (1980).

Where the only changed circumstances are an increase in the payor spouse's gross income and a relief from debts through bankruptcy, the payor's petition to reduce alimony payments was properly denied. Anderson v. Anderson, 206 Neb. 655, 294 N.W.2d 372 (1980).

Where the decree expressly precludes modification, the award is such a definite and final adjustment of mutual rights and obligations as to be capable of a present vesting and to constitute an absolute judgment. Van Pelt v. Van Pelt, 206 Neb. 350, 292 N.W.2d 917 (1980).

Property distributions which are punitive in nature may be subject to modification. Falcone v. Falcone, 204 Neb. 800, 285 N.W.2d 694 (1979).

An alimony award may be modified if it appears the court abused its discretion in considering the circumstances of the parties and their relative earning capacities. Jenks v. Jenks, 200 Neb. 298, 263 N.W.2d 469 (1978).

The court did not err in ordering alimony should terminate upon death of either party or remarriage of the wife. Van Bloom v. Van Bloom, 196 Neb. 792, 246 N.W.2d 588 (1976).

Orders for alimony may be modified for good cause shown but nunc pro tunc decree entered without notice is a nullity. Howard v. Howard, 196 Neb. 351, 242 N.W.2d 884 (1976).

Unless amounts have accrued prior to date of service on a petition to modify, orders for alimony may be modified or revoked for good cause shown, but when alimony is not allowed in the original decree dissolving a marriage, such decree may not be modified to award alimony. Haug v. Haug, 195 Neb. 377, 238 N.W.2d 455 (1976).

Alimony orders may be modified or revoked for good cause shown. Good cause means a material and substantial change in circumstances and depends on the circumstances of each case. Metcalf v. Metcalf, 17 Neb. App. 138, 757 N.W.2d 124 (2008).

Because alimony may be modified only for good cause shown, a petition for modification will be denied if a change in financial condition is due to fault or voluntary wastage or dissipation of one's talents and assets. Lambert v. Lambert, 9 Neb. App. 661, 617 N.W.2d 645 (2000).

Action to modify alimony obligation must satisfy the procedural requirements of section 42-352. Osborn v. Osborn, 4 Neb. App. 802, 550 N.W.2d 58 (1996).

3. Considerations

Under this section, a trial court may adjust its equitable division of the marital estate to account for the tax consequences of the parties' filing of separate income tax returns. If a party seeking an equitable adjustment presents the court with the tax disadvantages of filing separate returns, a trial court may consider whether the other party unreasonably refused to file a joint return. Evidence of a tax disadvantage would normally include the parties' calculated joint and separate returns for comparison. Bock v. Dalbey, 283 Neb. 994, 815 N.W.2d 530 (2012).

No matter which party has the larger pension, the value acquired during the marriage should be divided relatively equally, and it would be incongruous to reduce one party's equitable share simply because one has elected to retire early, while the other continues to work. Webster v. Webster, 271 Neb. 788, 716 N.W.2d 47 (2006).

In considering the specific criteria of this section concerning an award of alimony, a court's polestar must be fairness and reasonableness as determined by the facts of each case. Alimony should not be used to equalize the incomes of the parties or to punish one of the parties. Alimony may be used to assist the other party during a reasonable time to bridge that

period of unavailability for employment or during that period to get proper training for employment. In awarding alimony, a court should consider, in addition to the specific criteria listed in this section, the income and earning capacity of each party as well as the general equities of each situation. In entering a decree awarding alimony, the court may take into account all of the property owned by the parties at the time of entering the decree, whether accumulated by their joint efforts or acquired by inheritance, and make such award as is proper under all the circumstances disclosed by the record. Bauerle v. Bauerle, 263 Neb. 881, 644 N.W.2d 128 (2002).

Serious health problems experienced by either party may support an award of alimony which does not terminate according to the default provisions of this section. An alimony recipient's inability to work or improve his or her earning capacity is a circumstance which may support an award of alimony which does not terminate according to the default provisions of this section. An obligor spouse's tenuous financial condition or unique economic circumstances may support an award of alimony which does not terminate according to the default provisions of this section. The specific criteria in this section, such as duration of the marriage, contributions to the marriage, and contributions to the care and education of the children, are also circumstances which may support an award of alimony which does not terminate according to the default provisions of this section. Bauerle v. Bauerle, 263 Neb. 881, 644 N.W.2d 128 (2002).

The attainment by one spouse of a professional degree with aid from the other is one factor a district court may consider in the division of assets and award of alimony in a marital dissolution proceeding. Schaefer v. Schaefer, 263 Neb. 785, 642 N.W.2d 792 (2002).

The debts of the parties should be considered in making a property division pursuant to a divorce. While income tax liability incurred during the marriage should generally be treated as marital debt, an innocent spouse who filed separate tax returns and paid taxes in a timely fashion should not be forced to share in the statutory penalties for the late filings of a dilatory spouse. Carter v. Carter, 261 Neb. 881, 626 N.W.2d 576 (2001).

A party's separate property, while not subject to division in a property settlement, may properly be taken into account when determining alimony. Ainslie v. Ainslie, 249 Neb. 656, 545 N.W.2d 90 (1996).

In determining whether alimony should be awarded, the ultimate criterion is one of reasonableness, and the trial court should consider the enumerated factors in this section. Thiltges v. Thiltges, 247 Neb. 371, 527 N.W.2d 853 (1995).

When considering an award of alimony, the need for maintenance is not precluded by a baseline of income or level of employment potential. The ultimate test for determining correctness in the amount of alimony is reasonableness. In awarding alimony, a court should consider the income and earning capacity of each party as well as the general equities of each situation. Kelly v. Kelly, 246 Neb. 55, 516 N.W.2d 612 (1994).

When determining whether to award alimony, a court should consider what effect, if any, the marriage had on the spouses' ability to secure gainful

employment in the future and the spouses' earning capacity. When a spouse sacrifices employment seniority for the sake of a marriage, a court may consider that loss of seniority as favoring an award of alimony. Reichert v. Reichert, 246 Neb. 31, 516 N.W.2d 600 (1994).

The debts of the parties should be considered in making a property division. Property division is not subject to a rigid mathematical formula, but, rather, turns upon the facts and circumstances of each case. The ultimate test for determining an appropriate division of marital property is one of reasonableness. In determining whether alimony should be awarded, in what amount, and over what period the ultimate criterion is one of reasonableness. Regarding property division, when the marriage is of long duration and the parties are parents of all the children, the "one-third to one-half" rule is of particular significance. Preston v. Preston, 241 Neb. 181, 486 N.W.2d 902 (1992).

In determining whether alimony should be awarded, in what amount, and over what period of time, the ultimate criterion is one of reasonableness. Stuczynski v. Stuczynski, 238 Neb. 368, 471 N.W.2d 122 (1991); Patton v. Patton, 20 Neb. App. 51, 818 N.W.2d 624 (2012).

The division of property and the awarding of alimony in dissolution cases are matters initially entrusted to the discretion of the trial judge. On appeal, such matters will be reviewed de novo on the record and affirmed in the absence of an abuse of discretion. The earning capacity of a spouse operating a business is an element to be considered in determining alimony. Ritz v. Ritz, 229 Neb. 859, 429 N.W.2d 707 (1988).

A division of property is not subject to a precise mathematical formula. Rather, an appropriate division of marital property must turn on reasonableness and the circumstances of each particular case in the light of the factors set forth in this section. Keim v. Keim, 228 Neb. 684, 424 N.W.2d 112 (1988); Sullivan v. Sullivan, 223 Neb. 273, 388 N.W.2d 516 (1986).

A division of property and the awarding of alimony are not subject to a precise mathematical formula. Rather, an appropriate division of marital property and amount of alimony must turn on reasonableness and the circumstances of each particular case in the light of the factors set forth in this section. Kimbrough v. Kimbrough, 228 Neb. 358, 422 N.W.2d 556 (1988).

The ultimate test for the division of property as well as an award of alimony is reasonableness as determined by the facts of each case. Maricle v. Maricle, 221 Neb. 552, 378 N.W.2d 855 (1985).

The division of property in a dissolution case is based on equitable principles, and its purpose is to divide the marital assets equitably. Black v. Black, 221 Neb. 533, 378 N.W.2d 849 (1985).

The actual earning capacity or ability of a spouse to engage in gainful employment is frequently more important than the profitability of a spouse's business in resolving questions of alimony. Gleason v. Gleason, 218 Neb. 629, 357 N.W.2d 465 (1984).

The ultimate criterion in determining alimony is one of reasonableness. Pittman v. Pittman, 216 Neb. 746, 345 N.W.2d 332 (1984); Baird v. Baird, 196 Neb. 124, 241 N.W.2d 543 (1976); Mathias v. Mathias, 194 Neb. 598, 234 N.W.2d 212 (1975); Magruder v. Magruder, 190 Neb. 573, 209 N.W.2d 585 (1973).

After looking at the overall circumstances of the parties, the court should attempt, if possible, to provide for the award of alimony for such period of time and under such conditions as would minimize any substantial and unnecessary disruption in the lives of the parties occasioned by reason of the dissolution of the marriage. Pyke v. Pyke, 212 Neb. 114, 321 N.W.2d 906 (1982).

In determining what amount of alimony is paid over what period of time, the ultimate criterion is reasonableness, and the Supreme Court is not inclined to disturb the trial court's award unless it is patently unfair on the record. Johnson v. Johnson, 209 Neb. 317, 307 N.W.2d 783 (1981).

There is no mathematical formula by which awards of alimony or division of property in an action for dissolution of marriage can be precisely determined. They are to be determined by the facts of each case and the court will consider all pertinent facts in reaching an award that is just and equitable. Cole v. Cole, 208 Neb. 562, 304 N.W.2d 398 (1981).

In making an award of alimony and a division of property the court should not consider the issue of whether the unilateral acts of one party to the marriage led to its irretrievable breakdown. Campbell v. Campbell, 202 Neb. 575, 276 N.W.2d 220 (1979).

In determining an award of alimony, the trial court must consider the circumstances of the parties, the duration of the marriage, and the ability of the supported party to engage in gainful employment. Gregg v. Gregg, 193 Neb. 811, 229 N.W.2d 546 (1975); Yelkin v. Yelkin, 193 Neb. 789, 229 N.W.2d 59 (1975).

Among matters to be considered in making allowance of alimony are the circumstances of the parties, the duration of the marriage, the contributions to the marriage by each party, and the ability of the supported party to engage in gainful employment. Tuttle v. Tuttle, 193 Neb. 397, 227 N.W.2d 27 (1975).

Amount of alimony allowed, considered under rules of this section and circumstances in case, and approved. Casselman v. Casselman, 191 Neb. 138, 214 N.W.2d 278 (1974).

Division of property and award of alimony in a divorce action are to be determined by all pertinent facts in each case. Bliven v. Bliven, 190 Neb. 492, 209 N.W.2d 168 (1973).

Having regard for circumstances in each case, court may order payment of such alimony by one party to the other as may be reasonable. Albrecht v. Albrecht, 190 Neb. 392, 208 N.W.2d 669 (1973); Corn v. Corn, 190 Neb. 383, 208 N.W.2d 678 (1973).

Factors which should be considered by a court in determining alimony include: (1) the circumstances of the parties; (2) the duration of the marriage; (3) the history of contributions to the marriage, including contributions to the care and education of the children, and interruption of personal careers or educational opportunities; and (4) the ability of the supported party to engage in gainful employment without interfering with the interests of any minor children in the custody of each party. Zoubenko v. Zoubenko, 19 Neb. App. 582, 813 N.W.2d 506 (2012).

The criteria listed in this statute are not an exhaustive list, and the income and earning capacity of each party as well as the general equities of each situation must be considered. Zoubenko v. Zoubenko, 19 Neb. App. 582, 813 N.W.2d 506 (2012).

An anomaly or substantial fluctuation in the income of one party should be considered in determining whether alimony should be awarded and in what amount and also in the calculation of child support. It was not error for a trial court to credit a party with the full amount of assets liquidated during the pendency of the divorce, to refuse to consider as debt the unproven balances of certain credit cards, or to opine that certain obligations and awards were in the nature of support and maintenance and therefore nondischargeable in bankruptcy, even though that is a matter properly left to the bankruptcy court. Halouska v. Halouska, 7 Neb. App. 730, 585 N.W.2d 490 (1998).

The fact that property is inherited and therefore excluded from division does not prevent the income it generates from being considered when determining alimony. Ainslie v. Ainslie, 4 Neb. App. 70, 538 N.W.2d 175 (1995).

4. Miscellaneous

A trial court does not have discretion to compel parties seeking marital dissolution to file a joint income tax return. Bock v. Dalbey, 283 Neb. 994, 815 N.W.2d 530 (2012).

The antiassignment clause of the Social Security Act and the Supremacy Clause of the U.S. Constitution prohibit a direct offset to adjust for disproportionate Social Security benefits in the property division of a dissolution decree. Webster v. Webster, 271 Neb. 788, 716 N.W.2d 47 (2006).

The ultimate test for determining the appropriateness of a division of property is reasonableness as determined by the facts of each case. Carter v. Carter, 261 Neb. 881, 626 N.W.2d 576 (2001).

This section's language with regard to service of process was not repealed by implication as a result of an amendment to section 25-217, which states that an action is commenced on the date the petition is filed with the court. Only those amounts which have not accrued prior to the date of service of process are subject to modification. A decree under which all rights and obligations have accrued is not subject to modification in any respect. Hamilton v. Hamilton, 242 Neb. 687, 496 N.W.2d 507 (1993).

To be properly within the purview of this section as property divisible and distributable in a dissolution proceeding, goodwill must be a business asset with value independent of the presence or reputation of a particular individual; an asset which may be sold, transferred, conveyed, or pledged. Taylor v. Taylor, 222 Neb. 721, 386 N.W.2d 851 (1986).

Material change in circumstances in reference to modification of child support is analogous to modification of alimony for good cause. Morisch v. Morisch, 218 Neb. 412, 355 N.W.2d 784 (1984).

This section gives guidance to the trial court as to how the property of the parties is to be divided and whether alimony is to be awarded. Ruhnke v. Ruhnke, 218 Neb. 355, 355 N.W.2d 339 (1984).

Section 42-365, R.R.S.1943, Reissue 1978, is limited in its application to those situations in which, except for section 42-372, R.R.S.1943, Reissue 1978, the court could not otherwise modify or vacate the decree. Howard v. Howard, 207 Neb. 468, 299 N.W.2d 442 (1980).

A decree that provides that alimony is not terminable, as permitted by this section, creates an unqualified allowance of alimony in gross which is a definite and final adjustment of rights and obligations between the parties capable of present vesting and constituting an absolute judgment. Torrey v. Torrey, 206 Neb. 485, 293 N.W.2d 402 (1980).

It was reasonable for the trial court to exclude from the marital property subject to division, property held jointly by the husband and his sister for which there was no evidence of any contribution by the husband and property held jointly by the husband and the parties' son when the evidence showed that the property was placed in joint ownership in order to provide for son's education and future needs. Witcig v. Witcig, 206 Neb. 307, 292 N.W.2d 788 (1980).

Remarriage of a party will not terminate alimony payments if there is a written agreement between the parties or a court's decree which provides a specific amount of alimony to be paid for a specific time with termination only on the occurrence of the specific event set out in the agreement or decree and otherwise not subject to modification or revision. Watters v. Foreman, 204 Neb. 670, 284 N.W.2d 850 (1979).

Under the no fault divorce statute neither the granting, denial, or reduction of alimony nor the division of property are to be considered as punitive. Ragains v. Ragains, 204 Neb. 50, 281 N.W.2d 516 (1979).

The criteria to be used in determining the amount to be awarded in a property settlement is what appears to be fair and equitable between the parties under the circumstances present in the case. Steele v. Steele, 201 Neb. 549, 270 N.W.2d 903 (1978).

A married person's interest in the marital status is not a property right, the state has plenary powers with regard to it, and Nebraska divorce laws are not unconstitutional. Buchholz v. Buchholz, 197 Neb. 180, 248 N.W.2d 21 (1976).

Rule for allowance of alimony and division of property under 1974 statute quoted and prior decision distinguished. Browers v. Browers, 195 Neb. 743, 240 N.W.2d 585 (1976).

Reasonable security for payment of alimony may be required but such remedy should be invoked in the original decree only under compelling circumstances. Wheeler v. Wheeler, 193 Neb. 615, 228 N.W.2d 594 (1975).

The Supreme Court is not necessarily bound by decision under the former law in determining alimony under the no fault divorce law. Barnes v. Barnes, 192 Neb. 295, 220 N.W.2d 22 (1974).

Under the no fault divorce statute, the father and mother of minor children have an equal and joint right to their custody and control, and while the father has the primary responsibility to support his children, the court has the responsibility of adjusting the equities between the parties. Kockrow v. Kockrow, 191 Neb. 657, 217 N.W.2d 89 (1974).

A forced sale of all the parties' property was held unreasonable where the trial court made no findings to explain its order forcing the sale rather than distributing the property in kind. Kellner v. Kellner, 8 Neb. App. 316, 593 N.W.2d 1 (1999).

Installments of alimony become vested as they accrue, and courts are generally without authority to retroactively cancel or reduce such amounts. Mathis v. Mathis, 4 Neb. App. 307, 542 N.W.2d 711 (1996).

42-366. Property settlements; effect; enforcement; modification.

(1) To promote the amicable settlement of disputes between the parties to a marriage attendant upon their separation or the dissolution of their marriage, the parties may enter into a written property settlement agreement containing provisions for the maintenance of either of them, the disposition of any property owned by either of them, and the support and custody of minor children.

(2) In a proceeding for dissolution of marriage or for legal separation, the terms of the agreement, except terms providing for the support and custody of minor children, shall be binding upon the court unless it finds, after considering the economic circumstances of the parties and any other relevant evidence produced by the parties, on their own motion or on request of the court, that the agreement is unconscionable.

(3) If the court finds the agreement unconscionable, the court may request the parties to submit a revised agreement or the court may make orders for the disposition of property, support, and maintenance.

(4) If the court finds that the agreement is not unconscionable as to support, maintenance, and property: (a) Unless the agreement provides to the contrary, its terms may be set forth in the decree of dissolution or legal separation and the parties shall be ordered to perform them; or (b) if the agreement provides that its terms shall not be set forth in the decree, the decree shall identify the agreement and shall state that the court has found the terms not unconscionable, and the parties shall be ordered to perform them.

(5) Terms of the agreement set forth in the decree may be enforced by all remedies available for the enforcement of a judgment, including contempt.

(6) Alimony may be ordered in addition to a property settlement award.

(7) Except for terms concerning the custody or support of minor children, the decree may expressly preclude or limit modification of terms set forth in the decree.

(8) If the parties fail to agree upon a property settlement which the court finds to be conscionable, the court shall order an equitable division of the marital estate. The court shall include as part of the marital estate, for purposes of the division of property at the time of dissolution, any pension plans, retirement plans, annuities, and other deferred compensation benefits owned by either party, whether vested or not vested.

Source: Laws 1972, LB 820, § 20; Laws 1980, LB 622, § 2.

Annotations

1. Property settlement agreements

2. Constitutionality

3. Conscionability

4. Pension and similar benefits

5. Miscellaneous

1. Property settlement agreements

The parties to a marriage may enter into a written settlement agreement to settle disputes attendant upon separation of their marriage, including a dispute over modification of a previous decree. Marcovitz v. Rogers, 276 Neb. 199, 752 N.W.2d 605 (2008).

A decree of dissolution of marriage which approves and incorporates an agreement and stipulation of the parties is not a consent judgment. Chamberlin v. Chamberlin, 206 Neb. 808, 295 N.W.2d 391 (1980).

When a written agreement of the parties specifies that a specific amount of alimony is to be paid and that payments are terminable only by the death or remarriage of the recipient, the district court may not terminate alimony payments unless those conditions are met. Benedict v. Benedict, 206 Neb. 284, 292 N.W.2d 565 (1980).

A party to a property settlement agreement entered into pursuant to this section may not as a matter of right withdraw therefrom prior to approval or disapproval of the agreement by the trial court. Sebesta v. Sebesta, 202 Neb. 624, 277 N.W.2d 49 (1979).

Property settlement agreements are governed by this section and they are favored in the law and will not be set aside unless unconscionable. Paxton v. Paxton, 201 Neb. 545, 270 N.W.2d 900 (1978).

2. Constitutionality

A married person's interest in the marital status is not a property right, the state has plenary powers with regard to it, and Nebraska divorce laws are not unconstitutional. Buchholz v. Buchholz, 197 Neb. 180, 248 N.W.2d 21 (1976).

3. Conscionability

Pursuant to this section, the court has an independent duty to evaluate the terms of an agreement and ensure that they are not unconscionable before incorporating them into a decree. Marcovitz v. Rogers, 276 Neb. 199, 752 N.W.2d 605 (2008).

An agreement between husband and wife, if executed to control the disposition of the marital assets of the parties during a later dissolution action, is a written property settlement within this section, and is binding on the court unless the agreement is found to be unconscionable. Written property settlement found to be unconscionable. Dobesh v. Dobesh, 216 Neb. 196, 342 N.W.2d 669 (1984).

The trial judge may request evidence on the issue of the conscionability of a proposed settlement but is not required to do so. Buker v. Buker, 205 Neb. 571, 288 N.W.2d 732 (1980).

The term "unconscionable" as used in this statute has been interpreted as meaning "manifestly unfair or inequitable." Paxton v. Paxton, 201 Neb. 545, 270 N.W.2d 900 (1978).

Terms of settlement agreement were unconscionable or "manifestly unfair or inequitable" where from total assets of $450,000 wife would receive only life estate in residence, auto, and alimony of $12,100. Weber v. Weber, 200 Neb. 659, 265 N.W.2d 436 (1978).

Voluntary property settlement agreement held binding on both the court and parties in the absence of unconscionable terms. Prochazka v. Prochazka, 198 Neb. 525, 253 N.W.2d 407 (1977).

4. Pension and similar benefits

Although the actual appreciation or increase in value of a state employee's pension occurred during the marriage, such increase was not due to the efforts or contribution of marital funds by the parties during the marriage, but, rather, was guaranteed prior to the marriage by operation of section 84-1301(17). Therefore, such increase was not marital property. Coufal v. Coufal, 291 Neb. 378, 866 N.W.2d 74 (2015).

In order to determine what portion of a party's retirement account is nonmarital property in a divorce, the court examines to what extent the appreciation in the separate premarital portion of the retirement account was caused by the funds, property, or efforts of either spouse. Coufal v. Coufal, 291 Neb. 378, 866 N.W.2d 74 (2015).

Pursuant to subsection (8) of this section, retirement plans earned during the marriage are to be included in the division of the marital estate. Sitz v. Sitz, 275 Neb. 832, 749 N.W.2d 470 (2008).

Although this section requires that any pension plans, retirement plans, annuities, and other deferred compensation benefits owned by either party be included as part of the marital estate, the plain language of this section does not require that such assets be valued at the time of dissolution. The expression "at the time of dissolution" in subsection (8) of this section qualifies the date at which the marital estate is divided but does not provide that pension-type property must be valued on such date. Hosack v. Hosack, 267 Neb. 934, 678 N.W.2d 746 (2004).

Subsection (8) of this section requires the inclusion of retirement benefits in the marital estate, and such benefits include a future nondisability military pension. Longo v. Longo, 266 Neb. 171, 663 N.W.2d 604 (2003).

Although subsection (8) of this section requires that any pension plans, retirement plans, annuities, and other deferred compensation benefits owned by either party be included as part of the marital estate, the plain language of this section does not require that such included assets be valued at the time of dissolution. The expression "at the time of dissolution" in subsection (8) of this section qualifies the date at which the marital estate is divided but does not provide that pension-type property must be valued on such date. The pension-type property may be valued as of another date that is rationally related to the property. Tyma v. Tyma, 263 Neb. 873, 644 N.W.2d 139 (2002).

A trial court, in the exercise of its broad jurisdiction with regard to approval and enforcement of property settlement agreements under this section, has the power to approve and incorporate into a consent decree a conscionable term in the parties' agreement to divide pension benefits earned by a spouse after the termination of the marriage, even though the trial court has no statutory power to order such a division in a contested case. Hoshor v. Hoshor, 254 Neb. 743, 580 N.W.2d 516 (1998).

Per subsection (8) of this section, in a marriage dissolution, the marital estate includes only that portion of pensions earned during the marriage.

Priest v. Priest, 251 Neb. 76, 554 N.W.2d 792 (1996).

Any pension benefits may be considered as marital property, and thus divisible in a dissolution of marriage action, whether or not the pension is vested. Ray v. Ray, 222 Neb. 324, 383 N.W.2d 752 (1986).

In dissolution proceedings the trial court has broad discretion in valuing and dividing pension rights between the parties. Sonntag v. Sonntag, 219 Neb. 583, 365 N.W.2d 411 (1985).

This section requires the court to include any pension and retirement plans in the marital estate. It does not require a pension to be divided between the parties, nor does it require any specific method of valuation. The trial court retains broad discretion in valuing pension rights and dividing such rights between the parties. Rockwood v. Rockwood, 219 Neb. 21, 360 N.W.2d 497 (1985).

As a result of the Uniformed Services Former Spouses Protection Act, nondisability military pensions need no longer be treated differently than nonmilitary pensions. Taylor v. Taylor, 217 Neb. 409, 348 N.W.2d 887 (1984).

Based on the facts of this case, the wife was awarded one-half of the value of property in pension and profit-sharing trusts maintained by her husband's employer. The trial court retains broad discretion in valuing pension rights and in dividing such rights between the parties. Kullbom v. Kullbom, 209 Neb. 145, 306 N.W.2d 844 (1981).

Deferred compensation, including pension plans, retirement plans, and annuities, is property for purposes of determining the marital estate under subsection (8) of this section. Wiech v. Wiech, 23 Neb. App. 370, 871 N.W.2d 570 (2015).

Pursuant to subsection (8) of this section, for purposes of property division, the marital estate includes any pension and retirement plans owned by either party. Ging v. Ging, 18 Neb. App. 145, 775 N.W.2d 479 (2009).

Pursuant to subsection (8) of this section, early retirement incentives that result from employment during the marriage are included in the marital estate. Simon v. Simon, 17 Neb. App. 834, 770 N.W.2d 683 (2009).

A disability pension is a marital asset. John v. John, 1 Neb. App. 947, 511 N.W.2d 544 (1993).

Pension plans shall be included as a part of the marital estate for purposes of the division of property at the time of dissolution; the value of the plan should be determined at the time of the decree. Polly v. Polly, 1 Neb. App. 121, 487 N.W.2d 558 (1992).

5. Miscellaneous

An increase in value in the separate property of a spouse, not attributable in any manner to any contribution of funds, property, or effort by either of

the spouses, constitutes separate property. Coufal v. Coufal, 291 Neb. 378, 866 N.W.2d 74 (2015).

In deciding the allocation of a single asset, the division of which is reserved to the court by the parties, a court should not order a distribution of the asset that is inconsistent with a voluntary stipulation entered into by the parties and approved by the court dividing the remainder of the parties' assets. Shearer v. Shearer, 270 Neb. 178, 700 N.W.2d 580 (2005).

The marital estate includes property accumulated and acquired during the marriage through the joint efforts of the parties; with some exceptions, the marital estate does not include property acquired by one of the parties through gift or inheritance. The marital estate includes that portion of a pension which is earned during the marriage. Reichert v. Reichert, 246 Neb. 31, 516 N.W.2d 600 (1994).

Although section 42-364 does not permit a district court in a dissolution action to order child support beyond the age of majority, the district court has the authority to enforce the terms of an approved settlement, which may include an agreement to support a child beyond the age of majority. Zetterman v. Zetterman, 245 Neb. 255, 512 N.W.2d 622 (1994).

In view of evidence concerning the health of the parties, the trial court abused its discretion by precluding modification of alimony awarded in decree of dissolution under subsection (7) of this section. Dinovo v. Dinovo, 238 Neb. 285, 470 N.W.2d 174 (1991).

Alimony provisions may be modified, even if based upon property settlement agreements, unless the parties or the court provide otherwise in writing. Euler v. Euler, 207 Neb. 4, 295 N.W.2d 397 (1980).

Where the decree expressly precludes modification, the award is such a definite and final adjustment of mutual rights and obligations as to be capable of a present vesting and to constitute an absolute judgment. Van Pelt v. Van Pelt, 206 Neb. 350, 292 N.W.2d 917 (1980).

In absence of agreement, court must divide property fairly under circumstances of marriage. Cozette v. Cozette, 196 Neb. 780, 246 N.W.2d 473 (1976).

In an action for dissolution of marriage, agreements between husband and wife, not made in connection with separation or dissolution of marriage, are not binding on the court. Snyder v. Snyder, 196 Neb. 383, 243 N.W.2d 159 (1976).

Except for terms concerning the custody or support of minor children, the decree may expressly preclude or limit modification of terms set forth in the decree. Haug v. Haug, 195 Neb. 377, 238 N.W.2d 455 (1976).

Alimony may be ordered in addition to a property settlement. Magruder v. Magruder, 190 Neb. 573, 209 N.W.2d 585 (1973).

In a dissolution of marriage proceeding, if the parties fail to agree on a property settlement, pursuant to subsection (8) of this section, the court

shall order an equitable division of the marital estate. Ging v. Ging, 18 Neb. App. 145, 775 N.W.2d 479 (2009).

A civil contempt order enforcing a settlement agreement is not a final, appealable order where the order does not contain both a finding of contempt and a noncontingent order of sanction. Hammond v. Hammond, 3 Neb. App. 536, 529 N.W.2d 542 (1995).

42-367. Temporary allowance; costs; payment.

In every action for dissolution of marriage or legal separation, the court may require the husband to pay any sum necessary to enable the wife to maintain the action during its pendency. When dissolution of marriage or a legal separation is decreed, the court may decree costs against either party and award execution for the same, or it may direct such costs to be paid out of any property sequestered, or in the power of the court, or in the hands of a receiver.

Source: Laws 1972, LB 820, § 21.

Annotations

Fees for appraising the family residence and for an expert witness at trial are costs assessable under this section. Lockwood v. Lockwood, 205 Neb. 818, 290 N.W.2d 636 (1980).

Adultery of party will not as a matter of law prevent an award of attorney's fees nor affect the payment of costs. Lockard v. Lockard, 193 Neb. 400, 227 N.W.2d 581 (1975).

Awards of attorney's fees and costs hereunder are discretionary. Sullivan v. Sullivan, 192 Neb. 841, 224 N.W.2d 542 (1975).

A court may direct costs against either party in an action for dissolution of marriage. Barth v. Barth, 22 Neb. App. 241, 851 N.W.2d 104 (2014).

42-368. Decree of separation; support order; modification; revocation.

When a legal separation is decreed, the court may order payment of such support by one party to the other as may be reasonable, having regard for the circumstances of the parties and the ability of the supported party to engage in gainful employment without interfering with the interests of any minor children in the custody of such party. Orders for support may be modified or revoked for good cause shown upon notice and hearing, except as to amounts accrued prior to date of service of motion to modify, to which date modification may be retroactive. Orders for child support in cases in which a party has applied for services under Title IV-D

of the Social Security Act, as amended, shall be reviewed as provided in sections 43-512.12 to 43-512.18.

Source: Laws 1972, LB 820, § 22; Laws 1991, LB 715, § 2; Laws 1993, LB 523, § 2.

Annotations

The statutory prohibition against modifying a decree at a later time to provide for alimony when not allowed in the original decree applies to a dissolution of marriage, not to a decree of legal separation. Pendleton v. Pendleton, 242 Neb. 675, 496 N.W.2d 499 (1993).

42-369. Support or alimony; presumption; items includable; payments; disbursement; enforcement; health care coverage.

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

(2)(a) If the party against whom an order, decree, or judgment for child support is entered or the custodial party has health care coverage available to him or her through an employer, organization, or other health care coverage entity which may extend to cover any children affected by the order, decree, or judgment and the health care coverage is accessible to the children and is available to the responsible party at reasonable cost, the court shall require health care coverage to be provided. Health care coverage is accessible if the covered children can obtain services from a plan provider with reasonable effort by the custodial party. When the administrative agency, court, or other tribunal determines that the only health care coverage option available through the noncustodial party is a plan that limits service coverage to providers within a defined geographic area, the administrative

agency, court, or other tribunal shall determine whether the child lives within the plan's service area. If the child does not live within the plan's service area, the administrative agency, court, or other tribunal shall determine whether the plan has a reciprocal agreement that permits the child to receive coverage at no greater cost than if the child resided in the plan's service area. The administrative agency, court, or other tribunal shall also determine if primary care is available within thirty minutes or thirty miles of the child's residence. For the purpose of determining the accessibility of health care coverage, the administrative agency, court, or other tribunal may determine and include in an order that longer travel times are permissible if residents, in part or all of the service area, customarily travel distances farther than thirty minutes or thirty miles. If primary care services are not available within these constraints, the health care coverage is presumed inaccessible. If health care coverage is not available or is inaccessible and one or more of the parties are receiving Title IV-D services, then cash medical support shall be ordered. Cash medical support or the cost of health care coverage is considered reasonable in cost if the cost to the party responsible for providing medical support does not exceed three percent of his or her gross income. In applying the three-percent standard, the cost is the cost of adding the children to existing health care coverage or the difference between self-only and family health care coverage. Cash medical support payments shall not be ordered if, at the time that the order is issued or modified, the responsible party's income is or such expense would reduce the responsible party's net income below the basic subsistence limitation provided in Nebraska Court Rule section 4-218. If such rule does not describe a basic subsistence limitation, the responsible party's net income shall not be reduced below nine hundred three dollars net monthly income for one person or below the poverty guidelines updated annually in the Federal Register by the United States Department of Health and Human Services under the authority of 42 U.S.C. 9902(2).

(b) For purposes of this section:

(i) Health care coverage has the same meaning as in section 44-3,144; and

(ii) Cash medical support means an amount ordered to be paid toward the cost of health care coverage provided by a public entity or by another parent through employment or otherwise or for other medical costs not covered by insurance or other health care coverage.

(3) A support order, decree, or judgment may include the providing of necessary shelter, food, clothing, care, medical support as defined in section 43-512, medical attention, expenses of confinement, education expenses, funeral expenses, and any other expense the court may deem reasonable and necessary.

(4) Orders, decrees, and judgments for temporary or permanent support or alimony shall be filed with the clerk of the district court and have the force and

effect of judgments when entered. The clerk and the State Disbursement Unit shall disburse all payments received as directed by the court and as provided in sections 42-358.02 and 43-512.07. Records shall be kept of all funds received and disbursed by the clerk and the unit and shall be open to inspection by the parties and their attorneys.

(5) Unless otherwise specified by the court, an equal and proportionate share of any child support awarded shall be presumed to be payable on behalf of each child subject to the order, decree, or judgment for purposes of an assignment under section 43-512.07.

Source: Laws 1972, LB 820, § 23; Laws 1983, LB 371, § 11; Laws 1991, LB 457, § 4; Laws 1993, LB 435, § 1; Laws 2000, LB 972, § 15; Laws 2007, LB554, § 35; Laws 2009, LB288, § 6; Laws 2018, LB702, § 1.

Effective Date: July 19, 2018

Cross References

Income Withholding for Child Support Act, see section 43-1701.

Annotations

Under subsection (4) of this section, alimony judgments are liens, and if the judgments precede a mortgage and are recorded, they will have priority over that mortgage. McCook Nat. Bank v. Myers, 243 Neb. 853, 503 N.W.2d 200 (1993).

Subsection (4) of this section applied in a situation where the decree is silent with respect to accrued, unpaid temporary child support. Dartmann v. Dartmann, 14 Neb. App. 864, 717 N.W.2d 519 (2006).

Pursuant to subsection (2) of this section, in a divorce case, a judge may not order both parties to provide health insurance for the child or children, but must direct which party shall provide such insurance. Ward v. Ward, 7 Neb. App. 821, 585 N.W.2d 551 (1998).

Expenses incurred in obtaining medical care for a child, including allowances for mileage and meals, may be included in a support order if the court finds such expenses are reasonable and necessary. The expenses cannot be applied retroactively to the application for modification of the order for support. Hoover v. Hoover, 2 Neb. App. 239, 508 N.W.2d 316 (1993).

42-370. Contempt proceedings; attorney's fees; costs.

Nothing in sections 42-347 to 42-381 shall prohibit a party from initiating contempt proceedings. Costs, including a reasonable attorney's fee, may be taxed against a party found to be in contempt.

Source: Laws 1972, LB 820, § 24; Laws 1997, LB 229, § 18.

Annotations

In a civil contempt proceeding relating to an item in a divorce decree, costs, including a reasonable attorney fee, may be assessed against a contemnor. Locke v. Volkmer, 8 Neb. App. 797, 601 N.W.2d 807 (1999).

42-371. Judgments and orders; liens; release; subordination; procedure; time limitation on lien; security; attachment; priority.

Under the Uniform Interstate Family Support Act and sections 42-347 to 42-381, 43-290, 43-512 to 43-512.10, and 43-1401 to 43-1418:

(1) All judgments and orders for payment of money shall be liens, as in other actions, upon real property and any personal property registered with any county office and may be enforced or collected by execution and the means authorized for collection of money judgments;

(2) The judgment creditor may execute a partial or total release of the judgment or a document subordinating the lien of the judgment to any other lien, generally or on specific real or personal property.

Release of a judgment for child support or spousal support or subordination of a lien of a judgment for child support or spousal support may, if all such payments are current and not delinquent or in arrears, be released or subordinated by a release or subordination document executed by the judgment creditor, and such document shall be sufficient to remove or subordinate the lien. A properly executed, notarized release or subordination document explicitly reciting that all child support payments or spousal support payments are current is prima facie evidence that such payments are in fact current. For purposes of this section, any delinquency or arrearage of support payments shall be determined as provided in subsection (2) of section 42-358.02;

(3) If a judgment creditor refuses to execute a release of the judgment or subordination of a lien as provided in subdivision (2) of this section or the support payments are not current, the person desiring such release or subordination may file an application for the relief desired in the court which rendered the original judgment. A copy of the application and a notice of hearing shall be served on the judgment creditor either personally or by registered or certified mail no later than

ten days before the date of hearing. If the court finds that the release or subordination is not requested for the purpose of avoiding payment and that the release or subordination will not unduly reduce the security, the court may issue an order releasing real or personal property from the judgment lien or issue an order subordinating the judgment lien. As a condition for such release or subordination, the court may require the posting of a bond with the clerk in an amount fixed by the court, guaranteeing payment of the judgment. If the court orders a release or subordination, the court may order a judgment creditor who, without a good faith reason, refused to execute a release or subordination to pay the judgment debtor's court costs and attorney's fees involved with the application brought under this subdivision. A showing that all support payments are current shall be evidence that the judgment creditor did not have a good faith reason to refuse to execute such release or subordination. For purposes of this section, a current certified copy of support order payment history from the Title IV-D Division of the Department of Health and Human Services setting forth evidence that all support payments are current is prima facie evidence that such payments are in fact current and is valid for thirty days after the date of certification;

(4) Full faith and credit shall be accorded to a lien arising by operation of law against real and personal property for amounts overdue relating to a support order owed by a judgment debtor or obligor who resides or owns property in this state when another state agency, party, or other entity seeking to enforce such lien complies with the procedural rules relating to the filing of the lien in this state. The state agency, party, or other entity seeking to enforce such lien shall send a certified copy of the support order with all modifications, the notice of lien prescribed by 42 U.S.C. 652(a)(11) and 42 U.S.C. 654(9)(E), and the appropriate fee to the clerk of the district court in the jurisdiction within this state in which the lien is sought. Upon receiving the appropriate documents and fee, the clerk of the district court shall accept the documents filed and such acceptance shall constitute entry of the foreign support order for purposes of this section only. Entry of a lien arising in another state pursuant to this section shall result in such lien being afforded the same treatment as liens arising in this state. The filing process required by this section shall not be construed as requiring an application, complaint, answer, and hearing as might be required for the filing or registration of foreign judgments under the Nebraska Uniform Enforcement of Foreign Judgments Act or the Uniform Interstate Family Support Act;

(5) Support order judgments shall cease to be liens on real or registered personal property ten years from the date (a) the youngest child becomes of age or dies or (b) the most recent execution was issued to collect the judgment, whichever is later, and such lien shall not be reinstated;

(6) Alimony and property settlement award judgments, if not covered by subdivision (5) of this section, shall cease to be a lien on real or registered personal property ten years from the date (a) the judgment was entered, (b) the most recent

payment was made, or (c) the most recent execution was issued to collect the judgment, whichever is latest, and such lien shall not be reinstated;

(7) The court may in any case, upon application or its own motion, after notice and hearing, order a person required to make payments to post sufficient security, bond, or other guarantee with the clerk to insure payment of both current and any delinquent amounts. Upon failure to comply with the order, the court may also appoint a receiver to take charge of the debtor's property to insure payment. Any bond, security, or other guarantee paid in cash may, when the court deems it appropriate, be applied either to current payments or to reduce any accumulated arrearage;

(8)(a) The lien of a mortgage or deed of trust which secures a loan, the proceeds of which are used to purchase real property, and (b) any lien given priority pursuant to a subordination document under this section shall attach prior to any lien authorized by this section. Any mortgage or deed of trust which secures the refinancing, renewal, or extension of a real property purchase money mortgage or deed of trust shall have the same lien priority with respect to any lien authorized by this section as the original real property purchase money mortgage or deed of trust to the extent that the amount of the loan refinanced, renewed, or extended does not exceed the amount used to pay the principal and interest on the existing real property purchase money mortgage or deed of trust, plus the costs of the refinancing, renewal, or extension; and

(9) Any lien authorized by this section against personal property registered with any county consisting of a motor vehicle or mobile home shall attach upon notation of the lien against the motor vehicle or mobile home certificate of title and shall have its priority established pursuant to the terms of section 60-164 or a subordination document executed under this section.

Source: Laws 1972, LB 820, § 25; Laws 1975, LB 212, § 2; Laws 1980, LB 622, § 3; Laws 1985, Second Spec. Sess., LB 7, § 19; Laws 1986, LB 600, § 9; Laws 1991, LB 715, § 3; Laws 1993, LB 500, § 52; Laws 1993, LB 523, § 3; Laws 1994, LB 1224, § 47; Laws 1997, LB 229, § 19; Laws 1999, LB 594, § 7; Laws 2004, LB 1207, § 29; Laws 2005, LB 276, § 100; Laws 2007, LB554, § 36; Laws 2008, LB1014, § 35; Laws 2011, LB673, § 1.

Cross References

Nebraska Uniform Enforcement of Foreign Judgments Act, see section 25-1587.01.
Uniform Interstate Family Support Act, see section 42-701.

Annotations

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DEPARTMENT OF FOREIGN AFFAIRS
Office of Legal Affairs

21 MAR 2019

JONATHAN A. HIPE
Signing Officer

1. Applicability of section

2. Authority of court

3. Lien

4. Miscellaneous

1. Applicability of section

This section is applicable to monetary property settlement judgments. Lacey v. Lacey, 215 Neb. 162, 337 N.W.2d 740 (1983).

This section refers to judgment creditors for support in cases of legal separation, judgment creditors for temporary or permanent support payments or alimony, judgment creditors for child support, and judgment creditors for alimony. Grosvenor v. Grosvenor, 206 Neb. 395, 293 N.W.2d 96 (1980).

In the absence of any evidence that a person ordered to pay child support was materially prejudiced by delay in assertion of claim for child support, remarriage of the parties did not operate to prohibit the party for whose benefit child support was ordered following the first divorce from instituting action following the second divorce to collect arrearages for child support due between date of the first divorce and subsequent remarriage. Scheibel v. Scheibel, 204 Neb. 653, 284 N.W.2d 572 (1979).

2. Authority of court

Under subsection (6) of this section, a court has discretion to require reasonable security for an obligor's current or delinquent support obligations when compelling circumstances require it. Davis v. Davis, 275 Neb. 944, 750 N.W.2d 696 (2008).

An order entered pursuant to subsection (5) of this section, requiring a person to post sufficient security, is a somewhat extraordinary and drastic remedy, and such order should be invoked only when compelling circumstances require it. Klinginsmith v. Wichmann, 252 Neb. 889, 567 N.W.2d 172 (1997).

Child support payments are a vested property right of the payee as each accrues, and a court, therefore, may not forgive or modify past-due child support, but may modify the amount of future payments. Berg v. Berg, 238 Neb. 527, 471 N.W.2d 435 (1991).

This section gives to a court which has entered a judgment for property division payable in installments, authority to release or subordinate the judgment under the conditions prescribed in the statute. Grosvenor v. Grosvenor, 206 Neb. 395, 293 N.W.2d 96 (1980).

An order requiring security to be given and appointing a receiver are somewhat extraordinary and drastic measures and such an order should be made only when it appears to the court that such an order is necessary to

assure the payment of alimony and child support as decreed. Casselman v. Casselman, 204 Neb. 565, 284 N.W.2d 7 (1979).

It is not the court's prerogative to determine what method or means should be used in placing security for child support payment. Casselman v. Casselman, 204 Neb. 565, 284 N.W.2d 7 (1979).

3. Lien

Under this section, all orders and judgments for child support in the specified proceedings operate as statutory liens. Such liens attach from the date of the judgment to the obligor's real property and any personal property registered with any county officer, for arrears and as security for future obligations. Fox v. Whitbeck, 286 Neb. 134, 835 N.W.2d 638 (2013).

Child support judgments do not become dormant by lapse of time, and the fact that a child support judgment ceases to be a lien by operation of subsection (5) of this section does not extinguish the judgment itself or cause it to become dormant. Fox v. Whitbeck, 280 Neb. 75, 783 N.W.2d 774 (2010).

Alimony judgments are liens, and if the judgments precede a mortgage and are recorded, they will have priority over that mortgage. McCook Nat. Bank v. Myers, 243 Neb. 853, 503 N.W.2d 200 (1993).

A judgment is not a lien upon the judgment debtor's equitable interest in real estate until the commencement of the creditor's bill to subject it to payment of the judgment or until execution is levied upon the interest of a judgment debtor who is in possession of the real estate in which he has the equitable interest. Action Realty Co., Inc. v. Miller, 191 Neb. 381, 215 N.W.2d 629 (1974).

Pursuant to subsection (2) of this section, the cessation of a lien under this section does not render a child support judgment dormant. Freis v. Harvey, 5 Neb. App. 679, 563 N.W.2d 363 (1997).

4. Miscellaneous

An income withholding notice issued by the Nebraska Department of Health and Human Services pursuant to the Income Withholding for Child Support Act is not an "execution" within the meaning of subsection (5) of this section. Fox v. Whitbeck, 280 Neb. 75, 783 N.W.2d 774 (2010).

Fees awarded under this section are the property of the client, not the attorney, and the client may execute a release of the judgment awarding fees. Barber v. Barber, 207 Neb. 101, 296 N.W.2d 463 (1980).

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

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

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

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

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

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

Annotations

The enactment of this section in 1997 delineating the circumstances for terminating child support obligations is not tantamount to a material change in circumstances justifying modification of a child support award. Reinsch v. Reinsch, 259 Neb. 564, 611 N.W.2d 86 (2000).

The filing of a deficient application under this section will not trigger a duty on the part of the obligee to file a corresponding objection. Cain v. Cain, 16 Neb. App. 117, 741 N.W.2d 448 (2007).

This section permits the district court, under specified circumstances, to enter a summary order of termination of child support in the absence of an objection by the obligee. Cain v. Cain, 16 Neb. App. 117, 741 N.W.2d 448 (2007).

It is the public policy and statutory law of this state that child support obligations should be paid until the child reaches the age of 19. Reinsch v. Reinsch, 8 Neb. App. 852, 602 N.W.2d 261 (1999).

42-372. Decree; appeals.

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

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

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

Annotations

1. Modification or vacation of decree

2. Miscellaneous

1. Modification or vacation of decree

Modification of a dissolution decree during the 6-month interlocutory period pursuant to this section can be made only upon good cause shown after notice to all interested parties and hearing. McAllister v. McAllister, 228 Neb. 314, 422 N.W.2d 345 (1988); Neujahr v. Neujahr, 218 Neb. 585, 357 N.W.2d 219 (1984); Norris v. Norris, 2 Neb. App. 570, 512 N.W.2d 407 (1994).

Upon a motion containing an allegation of fact which, if true, constitutes good cause to set aside or modify a decree dissolving a marriage, a court must grant an evidentiary hearing on the motion to set aside or modify the dissolution decree. Younkin v. Younkin, 221 Neb. 134, 375 N.W.2d 894 (1985).

During the six-month period following a dissolution of marriage decree, the action is still pending, and the court can at any time, for good reason, vacate or modify it. During the entire pendency of a dissolution of marriage

decree, the marital relation continues. Choat v. Choat, 218 Neb. 875, 359 N.W.2d 810 (1984).

Property settlement agreement entered into by parties to a dissolution of marriage may be vacated or modified if one of the spouses withheld information from the court, thus preventing the court from carrying out its function of approving or disapproving the agreement. Colson v. Colson, 215 Neb. 452, 339 N.W.2d 280 (1983).

Section 42-372, R.R.S.1943, Reissue 1978, allows a modification within the six months before the decree is final to provide for alimony where none was awarded in the final decree. Section 42-365, R.R.S.1943, Reissue 1978, is limited in its application to those situations in which, except for this statute, the court could not otherwise modify or vacate the decree. Howard v. Howard, 207 Neb. 468, 299 N.W.2d 442 (1980).

Where a party to a divorce action, represented by counsel, voluntarily executes a property settlement agreement which is approved by the court and incorporated in a divorce decree from which no appeal is taken ordinarily the decree will not be vacated or modified as to property provisions in absence of fraud or gross inequity. Klabunde v. Klabunde, 194 Neb. 681, 234 N.W.2d 837 (1975).

The power of the district court to modify or vacate a decree of marriage dissolution hereunder within six months of the entry of the decree does not exist after appellant has suffered an involuntary dismissal of appeal. Dewey v. Dewey, 193 Neb. 236, 226 N.W.2d 751 (1975), 192 Neb. 676, 223 N.W.2d 826 (1974).

Proceedings to modify a divorce decree during the 6-month period following a dissolution of marriage decree may continue and be finally decided after the 6-month period, so long as the original request was filed within the 6-month period. Novak v. Novak, 2 Neb. App. 21, 508 N.W.2d 283 (1993).

2. Miscellaneous

Under former law, in Nebraska, a divorce becomes final six months after it is entered; during this six-month waiting period, the matrimonial tie between the parties is not dissolved. Watts v. Watts, 250 Neb. 38, 547 N.W.2d 466 (1996).

In an alienation of affections case, evidence regarding the defendant's income during the six-month period following the plaintiff's divorce decree was relevant and admissible under the circumstances of this case. Vacek v. Ames, 221 Neb. 333, 377 N.W.2d 86 (1985).

A motion authorized by this section, when appealed to this court, is not subject to review de novo on the record but, rather, is limited to an appeal of the action for dissolution itself. The granting or denying of a motion to set aside a decree of dissolution is within the sound discretion of the trial court, and any actions taken with respect thereto by that court will not be disturbed on appeal absent an abuse of discretion. Puetz v. Puetz, 211 Neb. 674, 319 N.W.2d 761 (1982).

The control of a divorce decree during the six-month period pending finality is within the sound judicial discretion of the trial court. Miller v. Miller, 190 Neb. 816, 212 N.W.2d 646 (1973).

Statute postpones dissolution until the decree becomes final; during six-month waiting period parties remain legally married. Under former law, wife was lawful spouse at time of death of insured and as his widow was entitled to the proceeds of insurance policy. Prudential Ins. Co. of America v. Dulek, 504 F.Supp. 1015 (D. Neb. 1980).

42-372.01. Decree; when final.

(1) Except for purposes of appeal as prescribed in section 42-372, for purposes of remarriage as prescribed in subsection (2) of this section, and for purposes of continuation of health insurance coverage as prescribed in subsection (3) of this section, a decree dissolving a marriage becomes final and operative thirty days after the decree is entered or on the date of death of one of the parties to the dissolution, whichever occurs first. If the decree becomes final and operative upon the date of death of one of the parties to the dissolution, the decree shall be treated as if it became final and operative the date it was entered.

(2) For purposes of remarriage other than remarriage between the parties, a decree dissolving a marriage becomes final and operative six months after the decree is entered or on the date of death of one of the parties to the dissolution, whichever occurs first. If the decree becomes final and operative upon the date of death of one of the parties to the dissolution, the decree shall be treated as if it became final and operative the date it was entered.

(3) For purposes of continuation of health insurance coverage, a decree dissolving a marriage becomes final and operative six months after the decree is entered.

(4) A decree dissolving a marriage rendered prior to September 9, 1995, which is not final and operative becomes operative pursuant to the provisions of section 42-372 as such section existed immediately preceding September 9, 1995.

Source: Laws 1995, LB 544, § 2; Laws 1997, LB 434, § 1; Laws 2000, LB 921, § 34.

42-372.02. Decree; assignment of real estate; affidavit and certificate; filing.

(1) When a decree of dissolution of marriage assigns real estate to either party, the party to whom the real estate is assigned may (a) prepare and file with the clerk of the district court an affidavit identifying the real estate by legal description and

affirmatively identifying the person entitled to the real estate and (b) prepare for signature and seal by the clerk one or more certificates in a form substantially similar to the following:

CERTIFICATE OF DISSOLUTION OF MARRIAGE

....., Clerk of the District Court of ..... County, Nebraska, certifies that in Case No. ....., in such Court, entitled ..... vs. ....., the Court entered its decree of dissolution of marriage in which the interest of ..... in the following described real estate in ..... County, Nebraska:

.....

.....

.....

.....

has been assigned to ..... .

Dated:

.....

(SEAL)

Clerk of the District Court

.....

County, Nebraska.

(2) A certificate may include more than one parcel of real estate, but there shall be separate certificates for each party to whom real estate is assigned and separate certificates for each county in which real estate is located. The certificate or certificates shall be delivered by the clerk to the person applying for the same, and such person shall be responsible for recording the certificate or certificates with the register of deeds in the appropriate county or counties as provided in section 76-248.01.

Source: Laws 2005, LB 361, § 23; Laws 2018, LB193, § 77.
Operative Date: July 19, 2018

42-372.03. Legal separation decree; application to set aside decree.

A legal separation decree shall provide that in case of a reconciliation at any time thereafter, the parties may apply to set aside the decree. Upon such application, the court shall set aside the decree and make such orders as are just and reasonable under the circumstances.

Source: Laws 2007, LB132, § 1.

42-373. Annulments; procedure.

Actions for annulment of a marriage shall be brought in the same manner as actions for dissolution of marriage and shall be subject to all applicable provisions of sections 42-347 to 42-381 pertaining to dissolution of marriage, except that the only residence requirement shall be that the plaintiff is an actual resident of the county in which the complaint is filed.

Source: Laws 1972, LB 820, § 27; Laws 1997, LB 229, § 20; Laws 2004, LB 1207, § 30.

42-374. Annulment; conditions.

A marriage may be annulled for any of the following causes:

(1) The marriage between the parties is prohibited by law;

(2) Either party is impotent at the time of marriage;

(3) Either party had a spouse living at the time of marriage; or

(4) Force or fraud.

Source: Laws 1972, LB 820, § 28; Laws 1989, LB 23, § 2; Laws 2013, LB23, § 9.

Cross References

Marriages:
When void, see section 42-103.
When voidable, see section 42-118.

Annotations

An annulment will be granted only when one or more of the grounds enumerated herein is present. Guggenmos v. Guggenmos, 218 Neb. 746, 359 N.W.2d 87 (1984).

42-375. Annulments; persons under disability; who may bring action; denial, when.

Annulment actions on behalf of persons under disability may be brought by a parent or adult next friend. An annulment may not be decreed if the marriage is

found to be voidable and the parties freely cohabited after the ground for annulment has terminated or become known to the innocent party.

Source: Laws 1972, LB 820, § 29.

42-376. Doubted marriage; procedure.

When the validity of a marriage is doubted, either party may file a complaint and the court shall decree it annulled or affirmed according to the proof. Notice shall be given the other party as in the case of a complaint for dissolution of marriage.

Source: Laws 1972, LB 820, § 30; Laws 2004, LB 1207, § 31.

42-377. Legitimacy of children.

Children born to the parties, or to the wife, in a marriage relationship which may be dissolved or annulled pursuant to sections 42-347 to 42-381 shall be legitimate unless otherwise decreed by the court, and in every case the legitimacy of all children conceived before the commencement of the suit shall be presumed until the contrary is shown.

Source: Laws 1972, LB 820, § 31; Laws 1997, LB 229, § 21.

Annotations

The presumption favoring legitimacy of children may only be rebutted by clear and convincing evidence beyond the testimony of husband or wife denying child's legitimacy. Perkins v. Perkins, 198 Neb. 401, 253 N.W.2d 42 (1977).

Presumed legitimacy of children born in wedlock may not be rebutted by the testimony or declaration of a parent. Ford v. Ford, 191 Neb. 548, 216 N.W.2d 176 (1974).

This section does not create an irrebuttable presumption of legitimacy in the case of children conceived before the commencement of the dissolution action. Cavanaugh v. deBaudiniere, 1 Neb. App. 204, 493 N.W.2d 197 (1992).

42-378. Nullity of marriage; procedure; costs.

When the court finds that a party entered into the contract of marriage in good faith supposing the other to be capable of contracting, and the marriage is declared

a nullity, such fact shall be entered in the decree and the court may order such innocent party compensated as in the case of dissolution of marriage, including an award for costs and attorney fees.

Source: Laws 1972, LB 820, § 32.

Annotations

This section is not applicable and does not provide a legal basis for property division and award of alimony when the parties' marriage is valid during its duration and never void or voidable. Manker v. Manker, 263 Neb. 944, 644 N.W.2d 522 (2002).

This section applies when one or both of the parties are innocent. A party claiming good faith under this section cannot close his or her eyes to suspicious circumstances; however, attending a divorce hearing does not trigger a duty to inquire as to the date on which the divorce will become final. Under this section, good faith means an honest and reasonable belief that the marriage was valid at the time of the ceremony. Whether a party acted in good faith depends on the facts and circumstances of the case. Good faith is presumed; the burden of proof rests squarely on the party charging bad faith. Good faith may result either from an error of fact or from an error of law. Hicklin v. Hicklin, 244 Neb. 895, 509 N.W.2d 627 (1994).

This section protects a party who has entered into the contract of marriage in good faith supposing the other party to be capable of marrying and the marriage is declared a nullity. Randall v. Randall, 216 Neb. 541, 345 N.W.2d 319 (1984).

42-379. Repealed. Laws 1997, LB 229, § 46.

42-380. Restoration of former name; procedure.

(1) When a pleading is filed pursuant to section 42-353 or pursuant to an action for annulment as authorized by section 42-373, either the plaintiff or the defendant may include a request to restore his or her former name. The court shall grant such request except for good cause shown. The mere fact that a parent and child may have different surnames following a dissolution of marriage or annulment shall not be sufficient to constitute good cause. The decree of dissolution or declaration of annulment shall specifically provide for the name change, giving both the old name and the name as it will be after the decree or declaration. A change of name granted pursuant to this section shall become effective on the same date that the decree of dissolution or declaration of annulment, as the case may be, is entered. The requirements of sections 25-21,270 to 25-21,273 shall not apply to this section.

(2) A decree of dissolution or declaration of annulment entered before August 25, 1989, in an action in which a request for name restoration was not included or granted shall not hinder or prevent the petitioner or respondent from effecting a common-law name change.

Source: Laws 1989, LB 401, § 1; Laws 2004, LB 1207, § 32.

42-381. Minor child; rights of parents.

In any final decree or decree of modification in an action for dissolution of marriage, declaration concerning the validity of a marriage, legal separation, or declaration of paternity, regardless of the determination of the court relating to the custody of a minor child, (1) each parent shall continue to have full and equal access to the education and medical records of his or her child unless the court orders to the contrary and (2) either parent may make emergency decisions affecting the health or safety of his or her child while the child is in the physical custody of such parent.

Source: Laws 1993, LB 500, § 58.

42-382. Repealed. Laws 1999, LB 1, § 1.

42-383. Repealed. Laws 2002, LB 1062, § 72.

42-384. Repealed. Laws 2002, LB 1062, § 72.

42-385. Repealed. Laws 2002, LB 1062, § 72.

42-386. Repealed. Laws 2002, LB 1062, § 72.

42-401. Repealed. Laws 1999, LB 8, § 4.

42-402. Children; when deemed legitimate.

Whenever any man and woman, either of whom is whole or in part of Indian blood, shall have cohabited together as husband and wife according to the customs and manners of Indian life, the issue of such cohabitation shall be taken and deemed to be the legitimate issue of such persons so living together, notwithstanding the fact that the father and mother may have been divorced or separated according to Indian customs, or otherwise, and married to other persons, according to Indian custom, or otherwise.

Source: Laws 1913, c. 68, § 2, p. 201; R.S.1913, § 1608; C.S.1922, § 1557; C.S.1929, § 42-402; R.S.1943, § 42-402.