

**IN THE DISTRICT COURT OF HOLT COUNTY, NEBRASKA**

**DAVID PETERSON,**  
Petitioner,

Case No. CI98-65

vs.

**DECREE**

**SONIA K. FREAR,**  
Respondent.

**DATE OF HEARING:** May 26, 1999.

**DATE OF DECISION:** June 30, 1999.

**APPEARANCES:**

For petitioner: James D. Gotschall with petitioner.  
For respondent: Thurman Gay with respondent.

**SUBJECT OF ORDER:** decision on the merits following trial to the court in equity.

**FINDINGS:** The court finds and concludes that:

1. The court has jurisdiction of the parties and the subject matter.  
2. This case litigates the custody of Torrey T. Frear, born June 21, 1993. The child was born out-of-wedlock to the petitioner and the respondent. The petitioner initially denied paternity. Paternity was adjudicated in Case No. 19795 in this court. The only relief requested or obtained in the former action was a determination of paternity and an order requiring the petitioner to pay child support. Custody was not litigated in the former action.

3. The decision in *State ex rel. Laughlin v. Hugelmann*, 219 Neb. 254, 361 N.W.2d 581 (1985), states several principles applicable to this case:

a. The traditional presumption granting custody of illegitimate children to the mother in all cases has been abandoned. *Id.* (citing *Cox v. Hendricks*, 208 Neb. 23, 302 N.W.2d 35 (1981)).

b. Where it is determined that an individual is the natural parent, even though one may initially deny paternity, and thereafter establishes a familial relationship with the child, both emotional and financial, the question of which parent should have custody of the child should be determined on the basis of the best interests of the child. *State ex rel. Laughlin v. Hugelmann, supra.*

c. No presumption as to custody exists in such case. *Id.*

d. The rule preventing a change of custody except upon a showing of a material change in circumstances has no application in this case.

(1) There has been no previous determination of custody by the court. *Id.*

(2) The initial order determining paternity did not address the issue of custody, and therefore it cannot be said that the court is modifying an earlier custody order. *Id.*

(3) No evidence regarding the best interests of the child was ever presented to the court when paternity was determined. *Id.*

e. The court is not limited to consideration of events and circumstances occurring after the paternity judgment. The court may consider all facts and circumstances, including those existing prior to and at the time of the paternity decree. *Id.*

f. This court therefore proceeds to determine the custody of the child based solely upon the best interests of the child without regard to the previous paternity decree. Similarly, the court disregards the temporary grant of custody to the petitioner.

4. In determining with which of the natural parents the child should remain, the standards set out in NEB. REV. STAT. § 42-364 should be applied. *Cox v. Hendricks, supra.*

5. Section 42-364(1) specifies that “[c]ustody and time spent with each parent shall be determined on the basis of the best interests of the minor child with the objective of maintaining the ongoing involvement of both parents in the minor child’s life.” NEB. REV. STAT. § 42-364(1) (Reissue 1998). Subsection 2 specifies the following factors to be considered:

(a) The relationship of the minor child to each parent prior to the commencement of the action or any subsequent hearing;

(b) The desires and wishes of the minor child if of an age of comprehension regardless of chronological age, when such desires and wishes are based on sound reasoning;

(c) The general health, welfare, and social behavior of the minor child; and

(d) Credible evidence of abuse inflicted on any family or household member.

For purposes of this subdivision, abuse and family or household member shall have the meanings prescribed in section 42-903.

NEB. REV. STAT. § 42-364(2) (Reissue 1998). Subsection 3 directs that the court “shall not give preference to either parent based on the sex of the parent and no presumption shall exist that either parent is more fit or suitable than the other.” NEB. REV. STAT. § 42-364(3) (Reissue 1998).

4. In addition to the statutory factors, the Nebraska Supreme Court has identified additional factors to be considered, including:

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, 877, 464 N.W.2d 189 (1991).

5. In addition, the Nebraska Supreme Court has also considered:

A. The definiteness of a proposed child care plan. *Christensen v. Christensen*, 191 Neb. 355, 215 N.W.2d 111 (1974).

B. Which parent is the primary caretaker. *Applegate v. Applegate*, 236 Neb. 418, 461 N.W.2d 419 (1990).

C. The amount of time spent with baby-sitters. *Ritter v. Ritter*, 234 Neb. 203, 450 N.W.2d 204 (1990).

D. Which parent can devote the most time to the child. *Ritter v. Ritter, supra*.

E. Which parent shows the most concern for the child's education. *Trimble v. Trimble*, 218 Neb. 188, 352 N.W.2d 599 (1984).

F. The closeness of the relationship between the parent and child. *Brooke v. Brooke*, 234 Neb. 968, 453 N.W.2d 438 (1990).

G. The emotional impact on the child. *Sikes v. Sikes*, 205 Neb. 441, 288 N.W.2d 43 (1980).

H. Frustration of the non-custodial parent's visitation. *Clark v. Clark*, 228 Neb. 440, 422 N.W.2d 793 (1988).

6. The court has considered each of the factors identified by the Nebraska Supreme Court. Both parents have positive and negative considerations. It is an extremely close case. The petitioner has engaged in morally questionable behavior. The respondent's recurring troubles with her mental health have caused some upheaval in the care of the child. None of the factors renders either parent unfit or provides a clear and definite reason to award custody to the other parent. Both parents obviously love the child and desire to maintain his or her relationship with the child. In the end, the relative success of the child with the

petitioner, including the improved behavior of the child and absence of recurrent behavioral problems, persuades the court that the best interests of the child favor placement with the petitioner.

7. There is a continuing question in the court's mind as to how much of this improvement is attributable to the petitioner, or how much to the influence and effect of the substantial time the child spends with the petitioner's mother. The child's grandmother clearly constitutes a positive influence in the child's life. Any change decreasing the influence of the grandmother in the child's life could well be detrimental to the child's welfare.

8. Similarly, a failure of the petitioner to address those concerns regarding his lifestyle identified at trial could be detrimental to the child's welfare. Further, evidence of failure to encourage and foster the child's relationship with his mother might well constitute a material change in circumstances. The specific visitation schedule ordered by the court is a minimum, and should not be viewed by the petitioner as the sole amount of allowable contact between the respondent and the child.

**ORDER:** IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that:

1. **CHILDREN:**

a. There is no entry concerning any minor child affected by this action in the Nebraska Child Custody Jurisdiction Act Registry of the Court, and this Court has jurisdiction of the minor child of the parties to this action, as follows:

Torrey T. Frear, born June 21, 1993.

b. The petitioner is awarded the care, custody and control of the minor child of the parties, subject to specific rights of visitation and correspondence in the respondent as set forth in Appendix "C" attached and incorporated by reference.

c. Appendix "A," Supplemental Order for Custody, etc., attached is incorporated into this Decree, and the parties are directed to comply therewith.

2. **CHILD SUPPORT:**

a. The respondent is ordered to pay child support to the court clerk for distribution to the petitioner at the rate of \$50.00 per month. Such payments shall commence on July 1, 1999, and continue in a like amount on the first day of each month thereafter until the child reaches majority under

Nebraska law (age 19), becomes emancipated, becomes self-supporting, marries, or dies, or until the further order of the Court.

b. Delinquent child support installments shall bear simple interest from thirty (30) days after date of delinquency until paid at the rate of 5.879% per annum.

c. The child support amount has been determined pursuant to the Nebraska Child Support Guidelines, and the findings of the parties' incomes and calculations under the guidelines used in determining the amount of support are set forth on Appendix "B" attached hereto.

3. **WITHHOLDING & ENFORCEMENT (MANDATORY):**

a. The respondent's income shall be subject to income withholding, which shall be implemented pursuant to the Income Withholding for Child Support Act. Within thirty (30) days after the date of entry of decree, such party shall accurately prepare and sign a Notice to Withhold Income (Form DC-005), and deliver the notice to such party's current employer and provide a copy of such notice to the court clerk. Within thirty (30) days after any change of employment, a new Notice to Withhold Income shall be prepared, signed, and delivered, and a copy provided to the court clerk in the same manner.

b. In the event that such party fails to pay any child, medical, or spousal support payments, as such failure is certified each month by the District Court Clerk in cases where court-ordered support is delinquent in an amount equal to the support due and payable for a one-month period of time, such party may be required to appear before this Court on a date to be determined by the Court and show cause why such payment was not made. In the event such party fails to pay and appear as so ordered, a warrant shall be issued for such party's arrest.

4. **PAYMENTS:** All payments of child support ordered in this decree shall be paid to the Clerk of the District Court of Holt County, Nebraska, for disbursement to the person entitled to receive the same. NO CREDIT MAY BE ALLOWED FOR ANY PAYMENT NOT PAID THROUGH THE CLERK OF THIS COURT.

5. **REPORTS:** Each party shall be required to furnish the Clerk of the District Court of Holt County, Nebraska, in writing, with such party's address (including specific street address or other physical location, in addition to mailing address), telephone number, and social security number, the name and address of such party's 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 that the Court shall deem relevant until any judgment for child support herein made is paid in full. Each party shall also be required to advise the Clerk of any changes in such information between the time of entry of this Decree and payment of the judgment in full, within ten (10) days after the effective date of such change. Failure to comply with the provisions of this section shall be punishable by contempt.

6. **JUDGMENT:** Judgment is hereby entered against respondent and in favor of petitioner for child support as above set forth. Each party shall bear their own respective costs and attorney's fees.

Entered: June 30, 1999.

If checked, the Court Clerk shall:

- : Mail a copy of this order to all counsel of record and to any pro se parties.  
Done on \_\_\_\_\_, 19 \_\_\_\_ by \_\_\_\_.
- : Enter judgment on the judgment record.  
Done on \_\_\_\_\_, 19 \_\_\_\_ by \_\_\_\_.
- : Mail postcard/notice required by § 25-1301.01 within 3 days.  
Done on \_\_\_\_\_, 19 \_\_\_\_ by \_\_\_\_.
- : Note the decision on the trial docket as: 6/30/99 Signed "Decree" entered; judgment entered accordingly.  
Done on \_\_\_\_\_, 19 \_\_\_\_ by \_\_\_\_.

Mailed to:

BY THE COURT:

\_\_\_\_\_  
William B. Cassel  
District Judge

# SUPPLEMENTAL ORDER FOR CUSTODY, ETC.

Except as otherwise provided by any approved Parenting Plan, the provisions relating to custody, alimony, support, visitation and conduct of the parties, are subject to the following terms and conditions:

1. **Care and Supervision:** The party who has custody of the children, hereinafter referred to as the Custodian, shall:

- a. provide the children with: (1) regular and nutritious food; (2) clean and appropriate clothing; (3) sanitary and reasonably private living and sleeping quarters; (4) appropriate medical examinations and treatments; and, (5) guidance and counsel in worldly and spiritual matters;
- b. train the children to obey and respect their teachers and the law;
- c. require the children to attend all regular sessions of school until graduation unless excused for medical reasons or by the school or by the Court;
- d. personally supervise and control the conduct and activities of the children except when they are at school, or in known and usual recreational activities, or in the immediate care of another competent person;
- e. not engage in, or permit in the presence of the children, any excessive drinking, immoral conduct, obscenities, violence, or disrespect for law and order;
- f. advise persons entitled to visitation of: (1) all school or police disciplinary contacts; (2) all medical contacts or reports; and, (3) all other important developments in the children's lives and activities;
- g. make emergency decisions affecting the health or safety of the child except during periods of visitation with the other parent, and shall communicate any such decisions to the person entitled to visitation as soon as reasonably practicable under the circumstances.

Each parent shall continue to have full and equal access to the education and medical records of the children unless the court orders to the contrary.

2. **Control of Visitation:** Unless otherwise provided, the person entitled to visitation may:

- a. take the children to such reasonable places for such reasonable activities as such person may determine;
- b. correspond with the children and the Custodian shall not censor such correspondence;
- c. telephone each child for not to exceed 15 minutes between 7:00 P.M. and 9:00 P.M. on Wednesdays and Sundays, and at such other times as the parties may agree and the Custodian shall not participate in such calls;
- d. while the child is visiting with such person, make emergency decisions affecting the health or safety of the child, and shall communicate any decisions to the Custodian as soon as reasonably practicable under the circumstances.

In connection with visitation, the Custodian shall:

- e. have the children ready and available promptly for all visits;
- f. if advised in advance, provide the children with such special and additional clothing as may be appropriate for the planned activities;
- g. in the event a child is invited or desires to participate in other activities which may interfere with a visit, not encourage, permit, or consent thereto without previous approval of the person whose visitation will be interfered with, and will not deprecate the denial of such approval;
- h. not reduce or deny visitation for failure of support.

3. **Interference:** Neither parent will intrude upon the privacy of the other; nor falsely make or imply mean or nasty or derogatory or deprecatory statements about the other to anyone; nor prevent or restrict or in any way interfere with the other's rights granted by this Order.

4. **Injunction:** The Petitioner and Respondent and their agents and servants, and each of them, are enjoined and restrained from doing, attempting to do, or threatening to do, any act of injuring, maltreating, vilifying or molesting the adverse party, or any of the children or violating any of the terms of this decree or of Appendix "A."

5. **Contempt:** Willful violation of any of the orders or directives set forth above will be considered contempt of court. Punishment for contempt of court may be from one dollar to five hundred dollars or from one hour to six months in jail.

**CHILD SUPPORT GUIDELINES WORKSHEETS 1 (Basic), 4 (Number of Children), & 5 (Deviations) (1999)**

1 = # of Children	# in custody >	0	MOTHER	COMBINED	FATHER	1
<b>INCOME:</b>						
1a/b	Last Two Years Schedule C/F income	0.00	0.00		0.00	0.00
2a/b	Last Two Years Depreciation claimed	0.00	0.00		0.00	0.00
3	MONTHLY S. E. INCOME $((1a+1b+2a+2b)/24)$		0.00		0.00	
4	MONTHLY SALARY INCOME		613.71		1,549.17	
5	MONTHLY VALUE of Fringe Benefits		0.00		0.00	
6	<b>MONTHLY INCOME ALL SOURCES (sum L3-L5)</b>		613.71		1,549.17	
<b>DEDUCTIONS:</b>						
7	Filing Status (1=Single;2=HH)	1				2
8	No. of Exemptions	1				2
9	Annual Gross Inc $((L1a+1b)/2)+(L4x12)$	7,364.50				18,590.00
10	Standard Ded. (S:\$4300;HH:\$6350)	4,300.00				6,350.00
11	Exemptions (\$2750 each)	2,750.00				5,500.00
12	Fed Taxable Inc. (L9-L10-L11)	314.50				6,740.00
13	Annual Fed Income Tax (from table)	47.18				1,011.00
14	Child Credit (\$500/oh in parent's custody)	0.00				500.00
15	Federal Income Taxes $((L13-L14)/12)$		3.93		42.58	
16	St Taxable Inc (L9-L10)	3,064.50				12,240.00
17	State Tax Before Credits (from table)	83.43				389.94
18	State Exemption Credit (L8 x \$89)	89.00				178.00
19	Annual State Income Tax (L17 - L18)	0.00				211.94
20	State Income Taxes (L19 /12)		0.00		17.66	
21	FICA/Medicare: 7.65% Sal; 15.3% SE		46.95		118.51	
22	Child(ren)'s Health Insurance Premiums		0.00		0.00	
23	Mandatory Retirement		0.00		0.00	
24	Child Support Previously Ordered for Other Children		0.00		0.00	
25	<b>TOTAL DEDUCTIONS (sum L15 + L20 to L24)</b>		50.88		178.76	
26	<b>MONTHLY NET INC Bef Othr Chldrn Dedtn (L6 - L25)</b>		562.83		1,370.41	
27	Deduction for Children Not Subject of Order		0.00		0.00	
28	<b>MONTHLY NET INCOME (L26-L27)</b>		562.83	1,933.24	1,370.41	
29	<b>Percentage of Combined Income</b>		29%		71%	
<b>MONTHLY SUPPORT, from table</b>			(rounded)	(unrounded)	(rounded)	
30	One Child		134.00	460.98	327.00	
31	Two Children		NA	NA	NA	
32	Three Children		NA	NA	NA	
33	Four Children		NA	NA	NA	
34	Five Children		NA	NA	NA	
35	Six Children		NA	NA	NA	
36	<b>GUIDELINE R LIMITATION (rounded down):</b>		50.00		683.00	
<b>DEVIATION (Specify):</b>						
37			+/-	0.00	+/-	0.00
<b>MONTHLY SUPPORT NET OF DEVIATIONS:</b>						
38	One Child		50.00		327.00	
39	Two Children		NA		NA	
40	Three Children		NA		NA	
41	Four Children		NA		NA	
42	Five Children		NA		NA	
43	Six Children		NA		NA	
	F.C.D.	Single	Head H.	S.F.A.F.C.	Single	Head H.
	15.0%	20,150	24,500	2.51%	2,400	2,300
	20.0%	32,450	39,150	3.49%	11,000	24,000
	25.0%	130,250	144,400	5.01%	28,500	26,000
	30.0%	232,150	232,150	6.88%	60,000	60,000
	35.0%	302,000	302,000			

## APPENDIX "C"

### STANDARD VISITATION IN THE EIGHTH JUDICIAL DISTRICT

Except as otherwise provided by any approved Parenting Plan in this case, reasonable visitation rights of the non-custodial parent shall include but not be limited to the following:

A. **WEEKEND VISITATION:** Weekend visitation shall be every other weekend from Friday to Sunday, beginning on the second Friday following the date of this order, or if a schedule has been established, on the next date that would be provided by that schedule.

B. **HOLIDAY VISITATION:** In even numbered years, the non-custodial parent shall have the children on the following holidays that are numbered with an even number, and visitation shall be reversed for odd numbered years:

1. Easter: This holiday shall be from the day school is dismissed for Easter vacation to the day before school resumes after that holiday.

2. Memorial Day: This holiday shall be from the Friday before the nationally-recognized Memorial Day to Memorial Day.

3. Fourth of July: The day before the Fourth of July and the Fourth of July, but if the day falls on Friday through Monday, then it shall include the weekend and the day that the offices of the State of Nebraska are closed in honor of that day.

4. Labor Day: This holiday shall be from the Friday before Labor Day through Labor Day.

5. Thanksgiving: This holiday shall be from the day school is dismissed for Thanksgiving to the day before school resumes after that holiday.

6. Christmas: This holiday shall be from the day school is dismissed before Christmas to December 27 of each year.

7. New Year's: This holiday shall be from December 27 of each year to the day before school resumes after New Year's.

C. **SUMMER VISITATION:** The non-custodial parent shall have extended summer visitation consisting of a six-week continuous period that begins on the seventh Friday next preceding the date school is to commence, and ends on Friday six weeks later. During this period, the other parent shall have visitation every other weekend, commencing two weeks after the summer vacation begins.

D. **MOTHER'S AND FATHER'S DAY:** If the celebrating parent desires, the children shall spend Mother's Day with their mother, and Father's Day with their father. This visit shall start at 8 a.m. of the day and end at 8 p.m. of that day.

E. **GENERAL PROVISIONS:** Unless otherwise provided or agreed:

1. Time: All visitation shall begin and end at \_\_\_\_\_ p.m. (6:00 p.m. if left blank) on the day this order states as the start or end of a visitation period, as the case may be.
2. School's Commencement and End: School shall be deemed to start and end on the day the school attended by the children starts and ends, but if children do not attend school, the start and end of the public grade school in the community where the children live shall control.
3. Transportation: Except for weekend visitations during the extended summer visitation, the non-custodial parent shall be responsible for providing transportation for the children at the commencement and at the end of any visitation period. Driving may be done by any responsible adult who is related to the parties by blood or marriage.
4. Waiver: A parent entitled to visitation may waive the same by giving the other party three day's notice by telephone, or by agreement. Failure to exercise visitation without giving notice of waiver shall constitute a violation of this order.
5. Modification: As long as the parties agree, and continue to agree, they may modify this visitation schedule as they desire.

F. **APPEARANCE AND DAY-TO-DAY RULES:** The rules laid down by the custodial parent on matters concerning personal appearance (hair styles, etc.), and day-to-day rules, such as curfew and bedtime, shall also be enforced by the non-custodial parent as nearly as possible. The custodial parent shall supply clothing, including diapers, sufficient for each visitation.