

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

**THE STATE OF NEBRASKA o/b/o [H.],  
THE STATE OF NEBRASKA o/b/o  
SHELLY M. [H.], and THE STATE OF  
NEBRASKA in its own right,**

Petitioner,

vs.

**DEAN W. BLAKE,**

Respondent.

Case No. CI00-62

**JUDGMENT AND DECREE  
OF PATERNITY**

**DATE OF TRIAL:** June 27, 2001.

**DATE OF RENDITION:** June 27, 2001.

**DATE OF ENTRY:** Date of filing by court clerk.

ON June 27, 2001, this matter came on for trial. David M. Streich, Brown County Attorney, appeared for the petitioner State of Nebraska. The petitioner, Shelly M. [H.], appeared personally without counsel. Rodney J. Palmer appeared for the respondent with the respondent. A trial was had to the Court, and the matter was taken under advisement.

NOW, effective upon the date of filing of this decree by the court clerk (the date of "entry" of decree), the Court, being fully advised in the premises, hereby finds, orders, adjudges and decrees as follows:

1. **JURISDICTION:** The Court has jurisdiction of the parties and the subject matter of this action.
2. **JURISDICTION ACT REGISTRY:** 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 said minor child.
3. **PATERNITY:** Pursuant to the stipulation of the parties, Dean W. Blake is hereby legally and judicially established and declared to be the father of [H.], born July 1, 2000, in O'Neill, Holt County, Nebraska.

4. **NO CREDIT:** Credit shall **NOT BE ALLOWED** for any payments required to be paid to the Clerk of the District Court or to the State Disbursement Unit and which are not paid to the proper officer. All references to the court clerk or Clerk of the District Court shall mean the Clerk of the District Court of Brown County, Nebraska.
5. **PAYMENTS:**
  - A. All payments of attorneys' fees and/or costs ordered in this decree shall be paid to the Clerk of the District Court for disbursement to the person entitled to receive the same.
  - B. Until the State Disbursement Unit becomes operative, all payments of child support and/or medical support ordered in this decree shall be paid to the Clerk of the District Court for disbursement to the person entitled to receive the same. When the State Disbursement Unit becomes operative, all payments of child support and/or medical support ordered in this decree shall be paid to the State Disbursement Unit for disbursement to the person entitled to receive the same.
6. **COSTS:** The respondent shall pay the costs of this action taxed at \$89.00 within 180 days of the entry of this decree. Pursuant to the stipulation, each party shall pay such party's own attorneys' fees.
7. **MEDICAL REIMBURSEMENT:** Pursuant to the stipulation, the State of Nebraska waives reimbursement for birth-related expenses incurred.
8. **CHILD SUPPORT:** The respondent is ordered to pay child support as follows:
  - A. Retroactive child support of \$5,172.00, with interest on the unpaid balance at the rate of 5.442% per annum from date of entry until paid, which amounts shall be payable at the rate of \$100.00 per month commencing on July 1, 2001, and a like installment on the first day of each month thereafter until paid in full.
  - B. At the rate of \$431.00 per month commencing on July 1, 2001, and continuing in a like amount on the first day of each month thereafter until the further order of the Court.
  - C. Payments shall be applied to current support, delinquent support, and interest in the manner provided by law.

- D. Such amounts shall be disbursed to Shelly M. [H.], the mother of the child, until further order, except as otherwise assigned by operation of law.
- E. Child support payments shall terminate when such child reaches majority under Nebraska law (age 19), becomes emancipated, becomes self-supporting, marries, or dies, or upon the further order of the Court.
- F. The child support amount has been determined pursuant to the Nebraska Child Support Guidelines, and the findings of the parents' incomes and calculations under the guidelines used in determining the amount of support are set forth on Appendix "B" attached hereto.
- G. While the respondent anticipates that his income may be reduced by an impending change of route assignment, the effect of such change cannot be reliably quantified. This court therefore determines that such impending change is not a circumstance which is contemplated at the entry of this order.
- (1) A party seeking to modify a child support order must show a material change of circumstances which occurred subsequent to the entry of the original decree or a previous modification which was not contemplated when the prior order was entered. *Noonan v. Noonan*, 261 Neb. 552, \_\_\_ N.W.2d \_\_\_ (2001).
  - (2) To hold otherwise, i.e. to fail to hold that the impending change is not contemplated at the entry of this decree, would place the respondent in an impossible position: he cannot now quantify the financial effect to any reasonable degree of certainty, and thus cannot obtain consideration of the circumstance now; and to hold that he should have done so because it was known, and thus "contemplated," would prevent the court from considering the reduction if it ever occurs.
  - (3) To resolve that unfair situation, the court expressly determines that the suggested financial effects of a route change are not now "contemplated," thereby precluding future defense of a modification proceeding by any such claim.

H. Delinquent child support installments shall bear simple interest at the judgment rate of 5.442% per annum from thirty (30) days after date of delinquency until paid.

9. **RETROACTIVE SUPPORT:**

A. The petitioner clearly requested retroactive support in the petition.

B. The Nebraska Supreme Court recognizes that the Legislature intended to provide children born out-of-wedlock child support retroactively to the date of birth. *Willers v. Willers*, 255 Neb. 769, 587 N.W.2d 390 (1998); *State on behalf of Joseph F. v. Rial*, 251 Neb. 1, 554 N.W.2d 769 (1996); *Sylvis v. Walling*, 248 Neb. 168, 532 N.W.2d 312 (1995); *State on behalf of S.M. v. Oglesby*, 244 Neb. 880, 510 N.W.2d 53 (1994); *State on behalf of Matchett v. Dunkle*, 244 Neb. 639, 508 N.W.2d 580 (1993).

C. The respondent resists retroactive support by testimony that he offered an unspecified amount of support to petitioner Shelly M. [H.] on two occasions after the child's birth and that she declined each time. [H.] denies that any support was offered. The testimony appears to assert a defense of estoppel or laches.

(1) The first problem is that neither defense was pleaded in the respondent's answer. The purpose of pleadings is to frame the issues upon which a cause is to be tried, and the issues in a given case will be limited to those which are pled. *Alegent Health Bergan Mercy Med. Ctr. v. Haworth*, 260 Neb. 63, 615 N.W.2d 460 (2000).

(2) Even if properly before the court, the defense of laches relies upon unreasonable delay. The child was born on July 1, 2000. The action commenced on December 4, 2000. That comes nowhere near the delay which might lead to application of the defense of laches. Further, *Willers v. Willers, supra*, suggests that laches cannot waive the right of the child to support.

(3) Similarly, the reasoning in *Willers v. Willers, supra*, logically leads to the conclusion that the mother's conduct cannot defeat the right of the child

to support. And the evidence does not support equitable estoppel even if it is a viable defense. The evidence clearly does not include any representations or statements by the mother that she would never take child support. At most, she declined an unspecific offer on two occasions. [H.] denied any such offers. Both witnesses were generally credible, which leads the court to conclude that such “offers” were very general indeed, and mostly in the mind of the respondent. That can hardly give rise to any inference of future intention. Moreover, there is absolutely no evidence of any reasonable reliance or change of position by the respondent.

10. **INCOME TAX EXEMPTION:**

- A. The petitioner, Shelly M. [H.], shall retain the dependency exemption purposes for federal and state income taxes relating to the minor child.
- B. In *Prochaska v. Prochaska*, 6 Neb. App. 302, 573 N.W.2d 777 (1998), the Nebraska Court of Appeals implied that the issue of income tax exemptions must be raised by the pleadings. As noted above, the issues in a given case will be limited to those which are pled. *Alegent Health Bergan Mercy Med. Ctr. v. Haworth, supra*. Here, the respondent did not plead the issue of income tax exemptions. Of course, as the tax exemptions follow the custodial parent in the absence of court order, the petitioner had no need to plead the issue to retain the exemptions. This court is persuaded that the pleading requirement is the better approach and constitutes a prerequisite to consideration of the issue.
- C. However, the Nebraska Supreme Court recently reiterated in *Kalkowski v. Kalkowski*, 258 Neb. 1035, 607 N.W.2d 517 (2000), that a tax dependency exemption is nearly identical in nature to an award of child support. This suggests that the tax exemption is subsumed within the support issue raised by the petition. Although the Court of Appeals noted in *Prochaska* that the issue was not raised by the pleadings, the court did not expressly decide the issue

on that basis. In the interest of efficiency, this court proceeds to consider the merits of the income tax exemption.

- (1) The child support determined by this Decree sets forth an income for the petitioner under the guidelines, even though the petitioner is presently unemployed. In other words, the petitioner's income figure is based on earning capacity. As so calculated, the award of the exemption to the petitioner generates some benefit to her, but not as much as would be realized by the respondent if allocated to him.
- (2) However, the child support amount under the guidelines is substantially affected by the allocation of the exemption. The allocation of the exemption to the petitioner increases the respondent's calculated income tax, which is a deduction from income under the guidelines, thereby reducing the respondent's net income and substantially reducing his monthly child support obligation.
- (3) Though not absolutely comparable because of slight differences in the respondent's gross income and the addition of a deduction for the child's medical insurance premium, the court's calculation produces a support amount \$38.00 per month less than the respondent's calculation. This difference largely arises from the allocation of the exemption to the petitioner. While the petitioner realizes a benefit from the allocated exemption, the respondent realizes a partial benefit in the reduced child support.

11. **INCOME WITHHOLDING:** The respondent's income shall be subject to income withholding, which shall be implemented pursuant to the Income Withholding for Child Support Act.

12. **IDENTIFYING NUMBERS:** The identifying numbers for the parties are:

- A. Child: SSN [deleted]
- B. Mother: SSN [deleted]
- C. Father: SSN [deleted]

13. **PAYMENT OF SUPPORT:** 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 prior to the date the State Disbursement Unit becomes operative (and/or by the State Disbursement Unit after the date that it becomes operative), 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.
14. **REPORTS:** The respondent and the mother of the child shall each be required to furnish the Clerk of this Court, 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, medical support, attorneys fees, and/or costs, herein made are 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.
15. **HEALTH INSURANCE:**
  - A. The respondent shall obtain the health insurance available to the minor child through the respondent's employment, shall timely pay the additional premiums required to keep such insurance in force, and shall continue to do so until the obligation for support hereunder terminates.
  - B. The respondent shall takes all steps necessary to coordinate benefits between the insurance to be provided through respondent's employment for the minor child, and any medicaid, Kids' Connection, or other publicly assisted insurance

program which may cover those expenses not covered through the respondent's insurance by co-payments or deductible.

- C. The health insurance policy information necessary to comply with the reporting requirement hereinafter set forth shall include, at a minimum, the following: (1) insurance company name and address; (2) policy number (for group policy, both group number and individual identifying number); (3) policy holder name (for group policy, both group name and individual name); (4) policy holder's social security number; and, (5) name, address, and telephone number of any person or entity (such as an employer) with which claims are to be filed or reported.
- D. If the person having actual physical custody of the minor child, or the State of Nebraska as petitioner herein, files a written request with the Clerk, the party required to provide insurance shall file with the Court, at least annually on or before January 1 of each year, a certificate of the insurance company documenting that the required health insurance is currently in effect, or a certificate of respondent that the respondent does not have any health insurance available to him or to the minor child as of that date.
- E. The party required to provide insurance shall fully cooperate with any health care provider to facilitate availability of prompt medical care, attention, and treatment to the minor child.
- F. The failure to follow any of these requirements shall constitute contempt of court to the same extent as failure to pay child support.

16. **CUSTODY AND VISITATION:**

- A. Shelly M. [H.] is awarded the custody of the minor child.
- B. Except to the extent of any conflict with the express terms of this Decree, Appendix "A" is attached hereto and incorporated herein, and the parents are directed to read and become familiar therewith and follow the same in their relationship with the minor child and each other concerning the child.
- C. Pursuant to the parties stipulation, for six months, commencing on the date of entry of this Decree, the respondent shall be entitled to supervised visitation

with the minor child, consisting of every other Sunday afternoon from 12:00 noon to 6:00 p.m., the first Sunday for such visitation occurring on July 8, 2001. As stipulated, supervision shall be provided by Ronnelle Porter, or by any preacher of the gospel authorized by the usages of the church to which he or she belongs as such minister, or by the spouse of any such minister. The designation of ministers or spouses of ministers as supervisors of visitation is made pursuant to the voluntary agreement of the child's parents, and is not imposed by determination of this court.

D. Commencing six months from the date of entry of this decree, the respondent shall be entitled to rights of reasonable visitation and correspondence with the minor child.

IT IS THEREFORE ORDERED that the parties to this action shall fully comply in accordance with the above findings and orders.

Signed at Ainsworth, Nebraska, on June 27, 2001.  
DEEMED ENTERED upon the date of filing by the court clerk.

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 \_\_\_\_\_, 20\_\_\_\_ by \_\_\_\_\_.
- : Enter judgment on the judgment record.  
Done on \_\_\_\_\_, 20\_\_\_\_ by \_\_\_\_\_.
- : Mail postcard/notice required by § 25-1301.01 within 3 days.  
Done on \_\_\_\_\_, 20\_\_\_\_ by \_\_\_\_\_.
- : Note the decision on the trial docket as: [date of filing] Signed "Judgment and Decree of Paternity" entered.  
Done on \_\_\_\_\_, 20\_\_\_\_ by \_\_\_\_\_.

Mailed to:

BY THE COURT:

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