

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

**HELEN MARY HEESE,**  
Petitioner,

vs.

**WAYNE LAVERNE HEESE,**  
Respondent.

Case No. CI99-132

**ORDER DECLINING TO  
APPOINT COUNSEL**

**SUBJECT OF ORDER:** Declination to appoint counsel on court’s own motion.

**ORDER:** After examination of the files, the court finds, determines, and orders:

1. There have been no formal filings by either party with regard to this matter, and no hearings have been held. This matter is considered only upon the internal procedures of the court clerk’s office. The issue presented is whether the court should, on its own motion pursuant to § 42-358(3), appoint counsel to enforce a delinquency of alimony owing to the petitioner by the respondent.

2. In this case, the file shows that the petitioner was initially granted child custody, and the respondent ordered to pay child support and alimony to the petitioner. Since the date of the decree, all children which were subject to the decree have attained the age of majority. There is no unpaid child support or alimony attributable to a time period during which any child had not reached the age of majority. The sole delinquency relates to alimony accruing after the termination of child support for all children.

3. Section 42-358(3) requires such appointment only for “court-ordered child support or spousal support . . . .” Section 42-347(4) defines “spousal support” to mean “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.”

4. Because no children remain subject to any obligation for support, as a matter of law, there can no longer be any “child” and former spouse living in the same household, regardless of the actual place of residence of the adult child for whom such child support was ordered. In other words, that person is now legally an adult and cannot be characterized as a “child” within the meaning of that section.

5. The principal issue is whether the defining conditions are finally and forever determined as of the date of issuance of the decree, or whether the court looks to the situation existing at the present time.

At least tentatively, the court concludes that the latter is appropriate.

6. The language used suggests a legislative rationale. The statute grants or denies “spousal support” characterization depending upon the alimony recipient’s burden of providing direct child care and support in a common household. At the time of the initial decree, if child custody was awarded to the alimony-paying spouse and the child was therefore not residing with the alimony-receiving spouse, the alimony received would not be characterized as “spousal support.” If the alimony recipient was initially awarded custody but the custody was later changed as to all children, such that all children resided with the alimony-paying spouse, the court doubts that alimony accruing thereafter would be considered as “spousal support.” To do so would be wholly inconsistent with the evident principle underlying the definition. The same rationale logically results in termination of the characterization when the support obligation for all children has terminated and no minor children are residing with the alimony recipient.

7. The court is cognizant that these conclusions are reached without the benefit of argument or analysis by either party, and without any hearing being held. In so doing, the court specifically disclaims any final determination and preserves the issues for reconsideration upon formal motion with proper notice to the opposing party and opportunity for hearing by both parties. In the absence of such motion, notice, and opportunity for hearing, the court’s conclusion and reasoning can be no more than tentative and interlocutory.

8. The court records this order only so that the clerk has a written basis for explanation to any inquiring party why no appointment of counsel has occurred.

9. No further order appointing counsel or denying appointment of counsel shall issue except upon formal motion after notice to the opposing party and opportunity for hearing. Nothing contained in this order shall purport to prejudge any issue which might be asserted by any such motion. Nothing contained in this order shall be construed as encouragement or discouragement to any party regarding any formal motion or other procedure available to such party.

10. None of these tentative conclusions affects the existence of the alimony judgment or the obligation of the respondent to pay alimony. This order merely addresses, in a purely tentative fashion, the means of enforcement of such judgment.

**IT IS SO ORDERED.**

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

If checked, the Court Clerk shall:

BY THE COURT:

- : Mail a copy of this order to all counsel of record and to any pro se parties.  
Done on \_\_\_\_\_, 20\_\_ by \_\_\_\_.
- 9 Enter judgment on the judgment record.  
Done on \_\_\_\_\_, 20\_\_ by \_\_\_\_.
- 9 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 "Order Declining to Appoint Counsel" entered.  
Done on \_\_\_\_\_, 20\_\_ by \_\_\_\_.

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William B. Cassel  
District Judge

Mailed to: