

LEGISLATURE OF NEBRASKA
NINETY-NINTH LEGISLATURE
FIRST SESSION

LEGISLATIVE BILL 322

Introduced by Schimek, 27; Aguilar, 35; Bourne, 8; Combs, 32;
Connealy, 16; Howard, 9; Johnson, 37; Kruse, 13; Dw.
Pedersen, 39; Price, 26; Synowiecki, 7; Thompson, 14

Read first time January 11, 2005

Committee: Judiciary

A BILL

1 FOR AN ACT relating to domestic relations; to amend sections
2 42-347, 42-364, 43-2,113, and 43-512.15, Reissue Revised
3 Statutes of Nebraska; to define terms; to change and
4 provide provisions relating to child custody and
5 visitation determinations and modifications; to harmonize
6 provisions; to provide a duty for the Revisor of
7 Statutes; and to repeal the original sections.
8 Be it enacted by the people of the State of Nebraska,

1 Section 1. Section 42-347, Reissue Revised Statutes of
2 Nebraska, is amended to read:

3 42-347. For purposes of sections 42-347 to 42-381 and
4 sections 3 to 6 of this act: ~~, unless the context otherwise~~
5 ~~requires:~~

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

12 (2) Batterer intervention program means a program that is
13 part of a community strategy to hold offenders accountable,
14 challenge their beliefs of entitlement to use abuse, and teach
15 skills that will facilitate changes in their behavior. Anger
16 management classes, anger control classes, couples counseling,
17 marriage enhancement seminars, stress management therapy,
18 psychotherapy, mediation with the non-abusive parent, or similar
19 programs or interventions are not a substitute for a batterer
20 intervention program;

21 (3) Dissolution of marriage shall mean means the
22 termination of a marriage by decree of a court of competent
23 jurisdiction upon a finding that the marriage is irretrievably
24 broken. The term dissolution of marriage ~~shall be considered is~~
25 synonymous with divorce, and whenever the term divorce appears in
26 the statutes it shall mean dissolution of marriage pursuant to
27 sections 42-347 to 42-381 and sections 3 to 6 of this act;

28 (4) Domestic abuse includes an act of abuse as defined in

1 section 42-903 and the existence of a pattern or history of acts,
2 including but not limited to one or more of the following acts:
3 Threats of physical violence or sexual violence, stalking,
4 harassment, mental cruelty, emotional abuse, abuse of children,
5 intimidation, isolation, economic abuse, coercion, or cruel
6 mistreatment or neglect of an animal, as defined in section
7 28-1008, against any current or past intimate partner;

8 (5) Intimate partner has the same meaning as in section
9 28-323;

10 (6) Joint legal custody means shared authority and
11 responsibility of the parents for making fundamental decisions
12 regarding the child's welfare, including choices regarding
13 education and health;

14 (7) Joint physical custody means shared authority and
15 responsibility of the parents regarding the child's place of
16 residence and the exertion of continuous physical custody by both
17 parents over the child for significant periods of time;

18 ~~(3)~~ (8) Legal separation shall mean means a decree of a
19 court of competent jurisdiction providing that two persons who have
20 been legally married shall thereafter live separate and apart and
21 providing for any necessary adjustment of property, support, and
22 custody rights between the parties but not dissolving the marriage;

23 ~~(4)~~ (9) Spousal support, when used in the context of
24 income withholding or any provisions of law which might lead to
25 income withholding, shall mean means alimony or maintenance support
26 for a spouse or former spouse when ordered as a part of an order,
27 decree, or judgment which provides for child support and the child
28 and spouse or former spouse are living in the same household;

1 ~~(5)~~ (10) State Disbursement Unit has the same meaning as
2 in section 43-3341; and

3 ~~(6)~~ (11) Support order has the same meaning as in section
4 43-1717.

5 Sec. 2. Section 42-364, Reissue Revised Statutes of
6 Nebraska, is amended to read:

7 42-364. (1) When dissolution of a marriage or legal
8 separation is decreed, the court may include a parenting plan
9 developed under the Parenting Act, if a parenting plan has been so
10 developed, and such orders in relation to any minor child and the
11 child's maintenance as are justified, including placing the minor
12 child in the custody of the court or third parties or terminating
13 parental rights pursuant to this section if the best interests of
14 the minor child require such orders. Custody and ~~time spent with~~
15 ~~each parent~~ visitation shall be determined in accordance with
16 sections 3 to 6 of this act on the basis of the best interests of
17 the minor child with the objective of maintaining the ongoing
18 involvement of both parents in the minor child's life. The custody
19 determinations of the court shall include both the determination of
20 legal custody of the child and the determination of physical
21 custody of the child as separate and independent issues. A decree
22 of dissolution of a marriage or legal separation shall include the
23 social security number of each party.

24 (2) ~~In determining custody arrangements and the time to~~
25 ~~be spent with each parent,~~ the court shall consider the best
26 interests of the minor child which shall include, but not be
27 limited to:

28 ~~(a) The relationship of the minor child to each parent~~

1 prior to the commencement of the action or any subsequent hearing,

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

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

7 (d) Credible evidence of abuse inflicted on any family or
8 household member. For purposes of this subdivision, abuse and
9 family or household member shall have the meanings prescribed in
10 section 42-903.

11 (3) In determining custody arrangements and the time to
12 be spent with each parent, the court shall not give preference to
13 either parent based on the sex of the parent and no presumption
14 shall exist that either parent is more fit or suitable than the
15 other.

16 (4) Regardless of the custody determination of the court,
17 (a) each parent shall continue to have full and equal access to the
18 education and medical records of his or her child unless the court
19 orders to the contrary and (b) either parent may make emergency
20 decisions affecting the health or safety of his or her child while
21 the child is in the physical custody of such parent pursuant to a
22 visitation order entered by the court.

23 (5) After a hearing in open court, the court may place
24 the custody of a minor child with both parents on a shared or joint
25 custody basis when both parents agree to such an arrangement. In
26 that event, each parent shall have equal rights to make decisions
27 in the best interests of the minor child in his or her custody.
28 The court may place a minor child in joint custody after conducting

1 a hearing in open court and specifically finding that joint custody
2 is in the best interests of the minor child regardless of any
3 parental agreement or consent.

4 ~~(6)~~ In determining the amount of child support to be paid
5 by a parent, the court shall consider the earning capacity of each
6 parent and the guidelines provided by the Supreme Court pursuant to
7 section 42-364.16 for the establishment of child support
8 obligations. Upon application, hearing, and presentation of
9 evidence of an abusive disregard of the use of child support money
10 paid by ~~one party to the other~~ the obligor to the obligee, the
11 court may require the ~~party receiving such payment~~ obligee to file
12 a verified report with the court, as often as the court requires,
13 stating the manner in which such money is used. Child support paid
14 to the ~~party having custody of the minor child~~ obligee shall be the
15 property of such ~~party~~ obligee except as provided in section
16 43-512.07. The clerk of the district court shall maintain a
17 record, separate from all other judgment dockets, of all decrees
18 and orders in which the payment of child support or spousal support
19 has been ordered, whether ordered by a district court, county
20 court, separate juvenile court, or county court sitting as a
21 juvenile court. Orders for child support in cases in which a party
22 has applied for services under Title IV-D of the federal Social
23 Security Act, as amended, shall be reviewed as provided in sections
24 43-512.12 to 43-512.18.

25 ~~(7)~~ (3) Whenever termination of parental rights is placed
26 in issue by the pleadings or evidence, the court shall transfer
27 jurisdiction to a juvenile court established pursuant to the
28 Nebraska Juvenile Code unless a showing is made that the county

1 court or district court is a more appropriate forum. In making
2 such determination, the court may consider such factors as cost to
3 the parties, undue delay, congestion of dockets, and relative
4 resources available for investigative and supervisory assistance.
5 A determination that the county court or district court is a more
6 appropriate forum shall not be a final order for the purpose of
7 enabling an appeal. If no such transfer is made, the court shall
8 appoint an attorney as guardian ad litem to protect the interests
9 of any minor child. The court may terminate the parental rights of
10 one or both parents after notice and hearing when the court finds
11 such action to be in the best interests of the minor child and it
12 appears by the evidence that one or more of the following
13 conditions exist:

14 (a) The minor child has been abandoned by one or both
15 parents;

16 (b) One parent has or both parents have substantially and
17 continuously or repeatedly neglected the minor child and refused to
18 give such minor child necessary parental care and protection;

19 (c) One parent is or both parents are unfit by reason of
20 debauchery, habitual use of intoxicating liquor or narcotic drugs,
21 illegal possession or sale of illegal substances, or repeated lewd
22 and lascivious behavior, which conduct is found by the court to be
23 seriously detrimental to the health, morals, or well-being of the
24 minor child; or

25 (d) One parent is or both parents are unable to discharge
26 parental responsibilities because of mental illness or mental
27 deficiency and there are reasonable grounds to believe that such
28 condition will continue for a prolonged indeterminate period.

1 ~~(8)~~ (4) Whenever termination of parental rights is placed
 2 in issue, the court shall inform a parent who does not have legal
 3 counsel of the parent's right to retain counsel and of the parent's
 4 right to retain legal counsel at county expense if such parent is
 5 unable to afford legal counsel. If such parent is unable to afford
 6 legal counsel and requests the court to appoint legal counsel, the
 7 court shall immediately appoint an attorney to represent the parent
 8 in the termination proceedings. The court shall order the county
 9 to pay the attorney's fees and all reasonable expenses incurred by
 10 the attorney in protecting the rights of the parent. At such
 11 hearing, the guardian ad litem shall take all action necessary to
 12 protect the interests of the minor child. The court shall fix the
 13 fees and expenses of the guardian ad litem and tax the same as
 14 costs but may order the county to pay on finding the responsible
 15 party indigent and unable to pay.

16 ~~(9)~~ Modification proceedings relating to support,
 17 custody, visitation, or removal of children from the jurisdiction
 18 of the court shall be commenced by filing a complaint to modify.
 19 Modification of a parenting plan is governed by the Parenting Act.
 20 Proceedings to modify a parenting plan shall be commenced by filing
 21 a complaint to modify. Service of process and other procedure
 22 shall comply with the requirements for a dissolution action.

23 Sec. 3. (1) When determining the physical and legal
 24 custody and visitation arrangements of a minor child, the court
 25 shall consider the best interests of the minor child. Best
 26 interest factors include, but are not limited to:

27 (a) The relationship of the minor child to each parent
 28 prior to the commencement of the dissolution or legal separation

1 action or any subsequent hearing;

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

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

7 (d) Credible evidence of domestic abuse inflicted on an
8 intimate partner. If the court finds credible evidence of domestic
9 abuse, the court shall consider the primary best interest factor
10 for the child to be the safety and well-being of the child and the
11 parent who is the victim of domestic abuse.

12 (2) No person shall be granted physical or legal custody
13 of, or unsupervised visitation with, a child if the person is
14 required to be registered as a sex offender under the Sex Offender
15 Registration Act and the victim was a minor or if the person has
16 been convicted of child abuse under section 28-707, unless the
17 court finds that there is no significant risk to the child and
18 states its reasons in writing or on the record.

19 (3) No person shall be granted custody of, or visitation
20 with, a child if the person has been convicted of sexual assault
21 under section 28-319, 28-320, or 28-320.01 and the child was
22 conceived as a result of that violation.

23 (4) In determining physical and legal custody and
24 visitation arrangements of a minor child, the court shall not give
25 preference to either parent based on the sex of the parent and no
26 presumption shall exist that either parent is more fit or suitable
27 than the other, except when a finding of an abusive parent is made
28 by the court under section 4 of this act.

1 (5) Regardless of the physical and legal custody
2 determination of the court:

3 (a) Each parent shall continue to have full and equal
4 access to the education and medical records of his or her child
5 unless the court orders to the contrary;

6 (b) Either parent may make emergency decisions affecting
7 the health or safety of his or her child while the child is with
8 such parent; and

9 (c) Whether or not visitation is allowed, the court may
10 order the address of the child and the parent who is a victim of
11 domestic abuse to be kept confidential pursuant to the Address
12 Confidentiality Act.

13 (6) A decree ordering joint legal custody or joint
14 physical custody may include a parenting plan developed pursuant to
15 the Parenting Act. Joint legal custody or joint physical custody
16 may only be awarded when the following requirements are satisfied:

17 (a) The parents agree to the arrangement through
18 testimony or verification; and

19 (b) A hearing is held to determine that a joint legal
20 custody or joint physical custody arrangement serves the best
21 interests of the child.

22 Sec. 4. (1) The Legislature finds that: Domestic abuse
23 is a serious and widespread problem and can have a negative ongoing
24 impact on children. It is not in the best interests of a minor
25 child to be placed in the sole or joint custody of an abusive
26 parent. A rebuttable presumption against granting any form of
27 custody to an abusive parent can help keep children safe and lessen
28 future negative impact on children.

1 (2) In making a determination that a parent is an abusive
2 parent, the court shall consider credible evidence of domestic
3 abuse.

4 (3) In every child custody proceeding, a determination by
5 the court that a parent is an abusive parent:

6 (a) Raises a rebuttable presumption that it is
7 detrimental to the child and that it is not in the best interests
8 of the child to be placed in sole legal custody, sole physical
9 custody, joint legal custody, or joint physical custody with the
10 abusive parent;

11 (b) Raises a rebuttable presumption that it is in the
12 best interests of the child to reside with the parent who is not
13 abusive in the location of that parent's choice, whether within or
14 outside of the state; and

15 (c) Requires clear and convincing evidence to rebut the
16 presumption that it is not in the best interests of the child to be
17 placed in custody with the abusive parent.

18 (4) In every proceeding in which the court makes a
19 finding that a parent is an abusive parent, the court shall set
20 forth the specific facts in writing or on the record regarding why
21 and how the presumptions were triggered and why and how the
22 presumptions were or were not rebutted.

23 (5) If the court finds that both parents are abusive
24 parents, the court shall determine the predominant aggressor as
25 defined in section 29-439. The presumption against custody shall
26 apply to the predominant aggressor.

27 (6) In considering if the presumptions have been rebutted
28 by clear and convincing evidence, the court shall consider, but is

1 not limited to, the following:

2 (a) Whether the abusive parent has committed any further
3 acts of domestic abuse;

4 (b) Whether the abusive parent is on probation or parole,
5 whether the abusive parent is restrained by a protection order, and
6 whether the abusive parent has complied with the terms and
7 conditions of probation, parole, or a protection order; or

8 (c) Whether the abusive parent has completed a batterer
9 intervention program.

10 (7) If a parent who is a domestic abuse victim is absent
11 or relocates because of an act of domestic abuse by the other
12 parent, the absence or relocation is not a factor that weighs
13 against the parent who is a victim in determining custody or
14 visitation.

15 (8) The court shall provide the parent who is a victim
16 with written information about available community resources
17 related to domestic abuse.

18 (9) The court shall not order a parent who is a domestic
19 abuse victim and his or her abuser to jointly attend counseling,
20 mediation, or other programs designed to repair the relationship or
21 parenting or life skills classes.

22 Sec. 5. A court may award visitation to an abusive
23 parent only if the court finds adequate provisions can be made for
24 the safety of the child and the parent who is a victim of domestic
25 abuse. In an order granting visitation to an abusive parent, a
26 court may:

27 (1) Order an exchange of a child to occur in a protected
28 setting;

1 (2) Order the visitation to be supervised by another
2 person or agency. The court shall establish conditions for the
3 safety of the child or children and the parent who is a victim of
4 domestic abuse to be followed during visitation;

5 (3) Order the abusive parent to attend and complete a
6 batterer intervention program. A victim shall not be compelled to
7 participate in any aspect of a batterer's intervention program;

8 (4) Order the abusive parent to abstain from possession
9 or consumption of alcohol or controlled substances during
10 visitation;

11 (5) Order the abusive parent to pay a fee to defray the
12 costs of supervised visitation;

13 (6) Prohibit overnight visitation;

14 (7) Require a bond from the abusive parent for the return
15 and safety of the child;

16 (8) Impose any other condition upon the abusive parent
17 that is deemed necessary to provide for the safety of the child,
18 the parent who is a victim of domestic abuse, and other family or
19 household members; or

20 (9) Require the abusive parent to submit documentation of
21 attendance and completion to the court of any court-ordered program
22 within the time period determined by the court. This documentation
23 shall become part of the court file.

24 Sec. 6. (1) Modification proceedings relating to
25 support, custody, visitation, or removal of children from the
26 jurisdiction of the court shall be commenced by filing a complaint
27 to modify. Modification of a parenting plan is governed by the
28 Parenting Act. Proceedings to modify a parenting plan shall be

1 commenced by filing a complaint to modify. Service of process and
2 other procedures shall comply with the requirements for a
3 dissolution action.

4 (2) In every proceeding for modification of an order for
5 physical and legal custody and visitation arrangements of a minor
6 child, the finding that a parent has become an abusive parent since
7 the last custody or visitation determination constitutes a factor
8 in the court's determination of a material change of circumstances.
9 A parent's violation of any laws in subsection (2) or (3) of
10 section 3 of this act also constitutes a factor in the court's
11 determination of a material change of circumstances.

12 Sec. 7. Section 43-2,113, Reissue Revised Statutes of
13 Nebraska, is amended to read:

14 43-2,113. (1) In counties where a separate juvenile
15 court is established, the county board of the county shall provide
16 suitable rooms and offices for the accommodation of the judge of
17 the separate juvenile court and the officers and employees
18 appointed by such judge or by the probation administrator pursuant
19 to subsection (4) of section 29-2253. Such separate juvenile court
20 and the judge, officers, and employees of such court shall have the
21 same and exclusive jurisdiction, powers, and duties that are
22 prescribed in the Nebraska Juvenile Code, concurrent jurisdiction
23 under section 83-223, and such other jurisdiction, powers, and
24 duties as specifically provided by law.

25 (2) A juvenile court created in a separate juvenile court
26 judicial district or a county court sitting as a juvenile court in
27 all other counties shall have and exercise jurisdiction within such
28 juvenile court judicial district or county court judicial district

1 with the county court and district court in all matters arising
2 under Chapter 42, article 3, when the care, support, custody, or
3 control of minor children under the age of eighteen years is
4 involved. Such cases shall be filed in the county court and
5 district court and may, with the consent of the juvenile judge, be
6 transferred to the docket of the separate juvenile court or county
7 court.

8 (3) All orders issued by a separate juvenile court or a
9 county court which provide for child support or spousal support as
10 defined in section 42-347 shall be governed by sections 42-347 to
11 42-381 and 43-290 and sections 3 to 6 of this act relating to such
12 support. Certified copies of such orders shall be filed by the
13 clerk of the separate juvenile or county court with the clerk of
14 the district court who shall maintain a record as provided in
15 subsection ~~(6)~~ (2) of section 42-364. There shall be no fee
16 charged for the filing of such certified copies.

17 Sec. 8. Section 43-512.15, Reissue Revised Statutes of
18 Nebraska, is amended to read:

19 43-512.15. (1) The county attorney or authorized
20 attorney, upon referral from the Department of Health and Human
21 Services, shall file a complaint to modify a child support order
22 unless the attorney determines in the exercise of independent
23 professional judgment that:

24 (a) The variation from the Supreme Court child support
25 guidelines pursuant to section 42-364.16 is based on material
26 misrepresentation of fact concerning any financial information
27 submitted to the attorney;

28 (b) The variation from the guidelines is due to a

1 voluntary reduction in net monthly income; or

2 (c) When the amount of the order is considered with all
3 the other undisputed facts in the case, no variation from the
4 criteria set forth in subdivisions (1) and (2) of section 43-512.12
5 exists.

6 (2) The proceedings to modify a child support order shall
7 comply with section 42-364 and section 6 of this act, and the
8 county attorney or authorized attorney shall represent the state in
9 the proceedings.

10 (3) After a complaint to modify a child support order is
11 filed, any party may choose to be represented personally by private
12 counsel. Any party who retains private counsel shall so notify the
13 county attorney or authorized attorney in writing.

14 Sec. 9. The Revisor of Statutes shall assign sections 3
15 to 6 of this act within sections 42-347 to 42-381 and references to
16 sections 42-347 to 42-381 or 42-347 to 42-380 shall be deemed to
17 include sections 3 to 6 of this act.

18 Sec. 10. Original sections 42-347, 42-364, 43-2,113, and
19 43-512.15, Reissue Revised Statutes of Nebraska, are repealed.