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five of the seven members of the tribal council in the tribal meeting room at the Tribe's headquarters, along with the tribal council's vote on resolution No. 08-74, strongly suggest that the action of the chairman and the vice chairman, both members of the tribal council, were, on these facts, essentially the action of the tribal council itself. Unlike those cases wherein the agent was a party removed from the principal by time, place, and/or organizational structure, the agent and the principal in this case, if not actually one and the same, are very nearly one and the same.

We conclude that based upon these undisputed facts, the chairman and vice chairman had the requisite authority to waive the Tribe's sovereign immunity. The Tribe's first assignment of error is without merit.

The remainder of the opinion shall remain unmodified.

FORMER OPINION MODIFIED.

MOTION FOR REHEARING OVERRULED.

WRIGHT, J., not participating.

CESAR C., APPELLANT AND CROSS-APPELLEE, V.
ALICIA L., APPELLEE AND CROSS-APPELLANT.

800 N.W.2d 249

Filed July 22, 2011. No. S-10-924.

1. **Paternity: Appeal and Error.** In a filiation proceeding, questions concerning child custody determinations are reviewed on appeal de novo on the record to determine whether there has been an abuse of discretion by the trial court, whose judgment will be upheld in the absence of an abuse of discretion. In such de novo review, when the evidence is in conflict, the appellate court considers, and may give weight to, the fact that the trial court heard and observed the witnesses and accepted one version of the facts rather than another.
2. **Judgments: Statutes: Appeal and Error.** Statutory interpretation is a matter of law in connection with which an appellate court has an obligation to reach an independent, correct conclusion irrespective of the determination made by the trial court.
3. **Appeal and Error.** Although an appellate court ordinarily considers only those errors assigned and discussed in the briefs, the appellate court may, at its option, notice plain error.

4. ____. Plain error is error plainly evident from the record and of such a nature that to leave it uncorrected would result in damage to the integrity, reputation, or fairness of the judicial process.
5. **Paternity: Words and Phrases.** The provision in Neb. Rev. Stat. § 43-1409 (Reissue 2008) that the acknowledgment of paternity is a "legal finding" means that it legally establishes paternity in the person named in the acknowledgment as the father.

Appeal from the District Court for Dawson County: JAMES E. DOYLE IV, Judge. Reversed and remanded for further proceedings.

Jeffrey M. Wightman and Jesus A. Tena, Jr., of Wightman & Wightman, for appellant.

Bradley D. Holbrook and David H. Kalisek, of Jacobsen, Orr, Nelson, Lindstrom & Holbrook, P.C., L.L.O., for appellee.

HEAVICAN, C.J., CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

MILLER-LERMAN, J.

NATURE OF CASE

The district court for Dawson County awarded Alicia L. custody of Jaime C. based on its application of the parental preference doctrine. Cesar C. appeals and assigns various errors, and Alicia cross-appeals. We conclude that the district court erred when it failed to give proper legal effect to a notarized acknowledgment of paternity signed by Cesar and Alicia at the time of Jaime's birth. In the absence of a successful challenge directed at the acknowledgment, the acknowledgment had the effect of establishing that Cesar was the legal father of Jaime and matters of custody and child support should have been considered within this legal framework. We therefore reverse the decision of the district court and remand the cause for further proceedings.

STATEMENT OF FACTS

Cesar and Alicia lived together and had an intimate relationship between 2004 and 2006. During that time, Alicia became pregnant. Cesar and Alicia are not married.

Alicia gave birth to Jaime in 2006, and Cesar was present at the birth. On the day after Jaime's birth, Cesar and Alicia both signed a form provided by the Nebraska Department of Health and Human Services titled "Acknowledgement of Paternity," in which both Cesar and Alicia acknowledged that Cesar was Jaime's biological father. Their signatures were notarized. Cesar was named as the father on the birth certificate.

When Alicia and Jaime left the hospital, they returned to a home Cesar and Alicia had rented in Lexington, Nebraska. Shortly thereafter, Alicia learned that there was an outstanding federal warrant for her arrest for conspiracy to deliver methamphetamine. Without notifying Cesar, Alicia fled Lexington and left Jaime with Cesar. Alicia was arrested in Colorado on October 5, 2006, and was later convicted and sentenced to imprisonment in a federal facility in Texas. She was in federal custody until August 2008, when she was released to a halfway house in Omaha, Nebraska, where she lived until she moved into a house in February 2009. After arriving in Omaha, Alicia resumed contact with Cesar and Jaime, who for the last 2 years had been living together in Lexington. The relationship between Cesar and Alicia did not resume.

On June 8, 2009, Cesar filed a complaint in the district court for Dawson County to establish paternity, custody, and child support with respect to Jaime. Cesar asserted that at all times, Jaime had been in his physical care, custody, and control and that they had lived in Lexington Jaime's entire life. Cesar sought an order declaring him to be Jaime's father, granting him custody of Jaime, and ordering Alicia to pay child support. Cesar also filed a motion for temporary custody; in an affidavit in support of the motion, he asserted that on June 7, Alicia had taken Jaime to Omaha without Cesar's knowledge or consent. The court granted Cesar's motion for temporary custody of Jaime.

Although on June 9, 2009, Alicia filed a separate action in the district court for Douglas County in which she asserted that Cesar was Jaime's father, she answered Cesar's complaint in this case with a countercomplaint for custody and child support in which she asserted that Cesar was "potentially" Jaime's

father. In a separate motion, Alicia asserted that it was possible that Cesar was not Jaime's biological father and she requested that the court order Cesar to submit to genetic testing to determine paternity. The court granted the request. After the genetic testing excluded Cesar as being Jaime's biological father, Alicia filed a motion for summary judgment and motions to, inter alia, grant her temporary custody of Jaime and vacate the order directing her to pay child support.

Cesar filed a motion for leave to file an amended complaint which alleged that immediately after Jaime's birth, he asked Alicia whether he was Jaime's father; that Alicia told Cesar that he was Jaime's father; and that at no time since, until the present action, had Alicia indicated to Cesar that he was not Jaime's father. Cesar also alleged that Alicia was unfit to have custody of Jaime for various reasons including, inter alia, her involvement with drugs, her conviction "for one or more federal felonies," and her abandonment of Jaime. Cesar further alleged that he was an "'equitable parent'" to Jaime, that Alicia should be equitably estopped from denying his paternity, and that he had acted in loco parentis to Jaime.

The district court granted Cesar leave to file the amended complaint. The court overruled Alicia's motion for summary judgment and other motions after it determined that there were genuine issues of material fact relating to the claims raised by Cesar in his amended complaint and that there was legal authority to support Cesar's claims that he had the rights of a parent. Alicia answered Cesar's amended complaint by alleging, inter alia, that Cesar was unfit to have custody of Jaime.

At a final hearing on all pending matters in this case, Cesar offered into evidence the notarized acknowledgment of paternity signed by Cesar and Alicia at Jaime's birth. Without objection by Alicia, the court received the acknowledgment into evidence. Following the hearing, the court entered an order on August 19, 2010, ruling on both parties' various claims. The court first determined that Cesar had proved by clear and convincing evidence each of the elements of equitable estoppel. In making such determination, the court found as an incidental matter that the acknowledgment of paternity had been signed;

however, the court did not consider the legal effect of the acknowledgment. The court concluded that Cesar could use the doctrine of equitable estoppel to prevent Alicia from terminating the relationship between Cesar and Jaime.

In its order, the court noted that genetic testing excluded Cesar as being Jaime's biological father. The court therefore applied the parental preference doctrine and concluded that Alicia, as the biological parent of Jaime, had the superior right to custody unless such custody would be detrimental to Jaime's welfare. The court found that Cesar failed to establish that Alicia was unfit to parent Jaime or that she had forfeited her parental rights by substantial, continuous, and repeated neglect of Jaime. The court awarded custody of Jaime to Alicia.

Despite its conclusion that Cesar had not rebutted the presumption of custody in Alicia, the court found that Cesar had established that his relationship with Jaime was protected by the in loco parentis doctrine and that therefore, Cesar was entitled to parenting time with Jaime. The court found that Cesar should have "extensive and liberal parenting time" with Jaime and set forth a parenting plan to provide such time. Finally, the court determined that because Cesar stood in loco parentis to Jaime, he had an obligation to support Jaime; the court therefore ordered Cesar to pay monthly child support.

Cesar filed a motion for a new trial or to reconsider or modify the August 19, 2010, order. The court granted a new trial limited to a specific evidentiary issue. Cesar noted that at the prior hearing, the court did not explicitly rule on Alicia's offering into evidence the results of the genetic testing that excluded Cesar as Jaime's biological father. When Alicia again offered the evidence at the new trial, Cesar objected. Cesar argued that based on equitable estoppel, Alicia should not be allowed to present evidence that he was not Jaime's biological father. The court overruled Cesar's objection, stating that equitable estoppel did not prevent admission of the evidence. In an order entered September 16, the court concluded that admission of the evidence did not change the findings and conclusions it had reached in its August 19 order.

Cesar appeals the August 19 and September 16, 2010, orders. Alicia cross-appeals.

ASSIGNMENTS OF ERROR

In his appeal, Cesar claims that the district court erred when it (1) found that Alicia was not equitably estopped from offering the results of genetic testing to establish that Cesar was not Jaime's biological father, (2) found that Alicia was not unfit to have custody of Jaime, and (3) did not order Alicia to pay child support.

In her cross-appeal, Alicia claims that the district court erred when it concluded that Cesar had established the elements of equitable estoppel by clear and convincing evidence.

STANDARDS OF REVIEW

[1] In a filiation proceeding, questions concerning child custody determinations are reviewed on appeal de novo on the record to determine whether there has been an abuse of discretion by the trial court, whose judgment will be upheld in the absence of an abuse of discretion. In such de novo review, when the evidence is in conflict, the appellate court considers, and may give weight to, the fact that the trial court heard and observed the witnesses and accepted one version of the facts rather than another. *State on behalf of Pathammavong v. Pathammavong*, 268 Neb. 1, 679 N.W.2d 749 (2004).

[2] Statutory interpretation is a matter of law in connection with which an appellate court has an obligation to reach an independent, correct conclusion irrespective of the determination made by the trial court. *State ex rel. Wagner v. Gilbane Bldg. Co.*, 280 Neb. 223, 786 N.W.2d 330 (2010).

ANALYSIS

Before considering the assigned errors, we note plain error which requires reversal: to wit, the district court failed to give proper legal effect to the signed and notarized acknowledgment of paternity. Because such error resolves the appeal, we need not consider the errors assigned by Cesar or those assigned by Alicia in her cross-appeal. Instead, we reverse the August 19 and September 16, 2010, orders of the district court which encompassed the court's rulings on custody and the admission of genetic testing, and remand the cause for further proceedings consistent with this opinion.

[3,4] Although an appellate court ordinarily considers only those errors assigned and discussed in the briefs, the appellate court may, at its option, notice plain error. *In re Interest of Brandon M.*, 273 Neb. 47, 727 N.W.2d 230 (2007). Plain error is error plainly evident from the record and of such a nature that to leave it uncorrected would result in damage to the integrity, reputation, or fairness of the judicial process. *In re Interest of Markice M.*, 275 Neb. 908, 750 N.W.2d 345 (2008). We note plain error in the district court's failure to give proper legal effect to the notarized acknowledgment of paternity signed by Cesar and Alicia at Jaime's birth, and we determine that to leave the error uncorrected would result in damage to the integrity, reputation, or fairness of the judicial process, because the error affected Cesar's legal relationship to Jaime and beyond doubt affected the court's decisions with respect to evidentiary matters and custody.

At Jaime's birth, Cesar and Alicia executed a notarized acknowledgment of paternity in which they asserted that Cesar was Jaime's biological father. Cesar offered the notarized acknowledgment into evidence at the hearing in this case, and the court received the evidence without objection by Alicia. The court noted in its August 19, 2010, order that the acknowledgment was signed. However, the court failed to give proper legal effect to the signed, unchallenged acknowledgment. As explained below, the proper legal effect of a signed, unchallenged acknowledgment of paternity is a finding that the individual who signed as the father is in fact the legal father.

With regard to the legal effect of a notarized acknowledgment of paternity, Neb. Rev. Stat. § 43-1409 (Reissue 2008) provides as follows:

> The signing of a notarized acknowledgment, whether under section 43-1408.01 or otherwise, by the alleged father shall create a rebuttable presumption of paternity as against the alleged father. The signed, notarized acknowledgment is subject to the right of any signatory to rescind the acknowledgment within the earlier of (1) sixty days or (2) the date of an administrative or judicial proceeding relating to the child, including a proceeding to establish a support order in which the signatory is a party. *After the*

> *rescission period a signed, notarized acknowledgment is considered a legal finding* which may be challenged only on the basis of fraud, duress, or material mistake of fact with the burden of proof upon the challenger, and the legal responsibilities, including the child support obligation, of any signatory arising from the acknowledgment shall not be suspended during the challenge, except for good cause shown. Such a signed and notarized acknowledgment or a certified copy or certified reproduction thereof shall be admissible in evidence in any proceeding to establish support.

(Emphasis supplied.)

[5] We also note that Neb. Rev. Stat. § 43-1402 (Reissue 2008), regarding the liability of parents to support a child, refers to the "father of a child whose paternity is established either by judicial proceeding or by acknowledgment as hereinafter provided." Section 43-1402 therefore contemplates that paternity may be established by acknowledgment and that establishment of paternity by acknowledgment is the equivalent of establishment of paternity by a judicial proceeding. Reading these statutes together, we interpret the provision in § 43-1409 that the acknowledgment is a "legal finding" to mean that it legally establishes paternity in the person named in the acknowledgment as the father.

For completeness, we further note that Neb. Rev. Stat. § 43-1412.01 (Reissue 2008) provides in part as follows:

> An individual may file a complaint for relief and the court may set aside a final judgment, court order, administrative order, obligation to pay child support, or any other legal determination of paternity if a scientifically reliable genetic test performed in accordance with sections 43-1401 to 43-1418 establishes the exclusion of the individual named as a father in the legal determination. . . . A court shall not grant relief from determination of paternity if the individual named as father (1) completed a notarized acknowledgment of paternity pursuant to section 43-1408.01, (2) adopted the child, or (3) knew that the child was conceived through artificial insemination.

The provision in § 43-1412.01 that a court shall not grant relief if the father completed a notarized acknowledgment provides further support for the conclusion that an acknowledgment legally establishes paternity and grants the individual named as father the legal status of a parent to the child regardless of genetic factors.

Finally, we note that under § 43-1409, any signatory has a right to rescind the acknowledgment within the earlier of 60 days or the date of a legal proceeding related to the child. There is no indication in this case that either party rescinded the acknowledgment within the statutory rescission period, and no proceeding relating to the child was noted during the rescission period. Thus, the acknowledgment remained in full force and effect.

Prior to 1994, § 43-1409 (Reissue 1993) read as follows:

> A person may state in writing that he is the father of a child or perform acts, such as furnishing of support, which reasonably indicate that he considers himself to be the father of such child, and in such case he shall be considered to have acknowledged the paternity of such child. A child whose parents marry is legitimate.

This court applied the pre-1994 version of § 43-1409 in *State on behalf of J.R. v. Mendoza*, 240 Neb. 149, 163-64, 481 N.W.2d 165, 174 (1992), and held that "in a filiation proceeding for support of a child born out of wedlock, evidence of the performance of acts described in § 43-1409 is not conclusive on the trier of fact, but constitutes relevant evidence of a biological relationship." In reaching such conclusion, this court noted that "some state legislatures do distinguish between a formal written acknowledgment of paternity and informal acknowledgment through the performance of certain acts, according only the former the conclusive effect of a judgment," and this court concluded that "[i]n the absence of such a distinction between formal and informal acknowledgments in the Nebraska statutes, we do not think the Legislature intended to give either form of acknowledgment conclusive effect." 240 Neb. at 162, 481 N.W.2d at 173-74.

The pre-1994 version considered in *State on behalf of J.R. v. Mendoza, supra*, was replaced. Section 43-1409 as it now

exists resulted from legislative amendments in 1994 and 1997 and now gives conclusive effect to a notarized acknowledgment of paternity. In 1994, the statute was amended by deleting the entire statute and replacing it with the current first and last sentences. See § 43-1409 (Cum. Supp. 1996). The middle sentences of the current version of § 43-1409, which version includes provisions relating to rescission of the acknowledgment and designating the acknowledgment as a "legal finding" after the rescission period, were added as part of 1997 Neb. Laws, L.B. 752. See § 43-1409 (Reissue 1998). The stated purpose of L.B. 752 was to comply with federal requirements relating to child support enforcement. Introducer's Statement of Intent, 95th Leg., 1st Sess. (Feb. 26, 1997), and Floor Debate, 1st Sess. 67 (Feb. 26, 1997). See, also, Jeffrey A. Parness & Zachary Townsend, *For Those Not John Edwards: More and Better Paternity Acknowledgments at Birth*, 40 U. Balt. L. Rev. 53 (2010) (regarding federal mandates on voluntary paternity acknowledgments as condition of receiving federal aid).

The current version of § 43-1409 recognizes only a formal written and notarized acknowledgment, and by designating such acknowledgment as a "legal finding" after the rescission period, the Legislature indicated that under the current version, as contrasted with the version at issue in *State on behalf of J.R. v. Mendoza, supra*, an acknowledgment has the conclusive effect of a judgment finding paternity.

In the present case, at the time Cesar initiated the current proceedings, the notarized acknowledgment signed by Cesar and Alicia legally established Cesar's paternity as to Jaime. A judicial proceeding was not needed to establish Cesar's paternity. The legal finding of paternity that is implicit in the acknowledgment is made explicit by the terms of §§ 43-1402 and 43-1409. Upon finding that the notarized acknowledgment of paternity had been signed, the court should have treated Cesar's paternity as having been legally established and treated this action as one solely to determine issues of custody and support as between two legal parents, and not one to establish paternity.

In her answer, Alicia questioned Cesar's status as Jaime's father by alleging that another man might be the biological

father and requested the court to order Cesar to submit to genetic testing. However, under the statutory scheme, before Alicia could challenge paternity and subject Cesar to genetic testing, she needed to overcome the acknowledgment that she and Cesar had both signed which established that Cesar was Jaime's legal father.

Section 43-1409 provides that an acknowledgment that has become a legal finding of paternity "may be challenged only on the basis of fraud, duress, or material mistake of fact with the burden of proof upon the challenger." Under § 43-1409, Alicia had the burden to prove fraud, duress, or material mistake of fact with regard to the execution of the acknowledgment. Alicia made no allegation of fraud, duress, or material mistake and therefore did not properly challenge the acknowledgment under § 43-1409. The acknowledgment remained a legal finding, and Cesar had the legal status as father. Because such legal status had been established and the acknowledgment was unchallenged, the results of genetic testing were not relevant to any issue properly raised in the case and the district court should not have ordered or considered genetic testing. See § 43-1412.01.

Courts in other states have similarly found that an acknowledgment has the effect of a judgment and can only be challenged on the bases stated in the statutes. In *Matter of Gendron*, 157 N.H. 314, 318, 950 A.2d 151, 154 (2008), the New Hampshire Supreme Court applied Massachusetts law similar to Nebraska statutes and concluded that under the Massachusetts provisions, an acknowledgment signed by a child's mother and the purported father established paternity and had "the same force and effect as a Massachusetts court judgment of paternity." The court concluded that the trial court erred when it ordered genetic testing upon the mother's request, because "the acknowledgment established the father as the child's legal father." *Id.* at 321, 950 A.2d at 156. The court reasoned that "the unchallenged acknowledgement established the father's paternity, thus dispensing with the need for additional proof of paternity. Therefore, genetic marker testing was irrelevant to determining the father's request for custody." *Id.* at 320, 950 A.2d at 155. The court noted a case in which a father who had

acknowledged paternity was not allowed to rebut his paternity by blood tests, and the court reasoned that "[a]lthough it is the mother who is attempting to disprove the father's paternity in this instance, the mother has proffered, and we see, no reason for reaching a different result. Whether the mother or father is the petitioner, the paramount interests are certainty and finality." *Id*. at 320, 950 A.2d at 156.

In *In re Parentage of G.E.M.*, 382 Ill. App. 3d 1102, 1110, 890 N.E.2d 944, 954-55, 322 Ill. Dec. 25, 35-36 (2008), the Illinois Court of Appeals stated that an acknowledgment of parentage, signed by the mother and the purported father and certified by a hospital representative, was an "admission of paternity [that] operated as conclusively as a judicial determination based on evidence or a judgment establishing paternity" under Illinois law. The court cited an Illinois Supreme Court case in which that court held that a man who had acknowledged paternity could challenge the voluntariness of the acknowledgment if he could show that it was procured by fraud, duress, or material mistake of fact, but that

> "it would be unreasonable to allow a man in this position to undo his voluntary acknowledgment years later on the basis of DNA test results, when his paternity was based not on a mere marital presumption that he was the child's father but on the conscious decision to accept the legal responsibility of being the child's father."

382 Ill. App. 3d at 1111, 890 N.E.2d at 955-56, 322 Ill. Dec. at 36-37, quoting *People ex rel. Dept. of Public Aid v. Smith*, 212 Ill. 2d 389, 818 N.E.2d 1204, 289 Ill. Dec. 1 (2004). The court of appeals in *In re Parentage of G.E.M.* noted that the voluntary acknowledgment was not rescinded or challenged based on fraud, duress, or mistake and that therefore, the mother could not extinguish the status of father conferred by the acknowledgment. The court stated:

> The permanent consequences of voluntary acknowledgments of parentage extend to both the mother who gives birth and the man who knowingly assumes the role of father. By voluntarily acknowledging paternity, both mother and [named father] accepted the legal consequences

> of the statutory presumption of paternity and waived their option to request DNA testing.

Id. at 1116, 890 N.E.2d at 959, 322 Ill. Dec. at 40. The court stated that "[i]n spite of mother's change of heart, statutory procedures control whether an acknowledgment of paternity may be rescinded or whether the presumption arising from the acknowledgment remains in full force and effect." *Id*. at 1110, 890 N.E.2d at 955, 322 Ill. Dec. at 36. The court noted "a strong judicial policy favoring the finality and stability of judgments" and found such principles "particularly poignant in the context of parentage determinations that become part of a child's personal history and sense of self." *Id*. at 1118, 890 N.E.2d at 961, 322 Ill. Dec. at 42.

In *In re Paternity of H.H.*, 879 N.E.2d 1175, 1178 (Ind. App. 2008), the Indiana Court of Appeals concluded that "once a mother has signed a paternity affidavit, she may not use the paternity statutes to deprive the legal father of his rights, even if he is not the biological father." The court reasoned that "a woman always has the information necessary to question paternity prior to signing the affidavit. A man, however, could easily sign an affidavit without awareness of the questionable nature of his paternity." *Id*. The court noted that the legal father was "the only father [the child] has ever known . . . was there when she was born, [and] has provided for her financially and emotionally since her birth," and the court concluded that "[c]hanging his legal status at this late date is not in the best interests of" the child, the legal father, or the State. *Id*.

We agree with these authorities that not only do the applicable statutes require that an unchallenged acknowledgment have the effect of making the acknowledged father the legal father but that the best interests of the child are ordinarily served by certain parentage determinations and continuity in the child's life.

The court in this case committed plain error when it failed to give proper legal effect to the acknowledgment. Such failure resulted in the court's ordering Cesar to submit to genetic testing, which led to a determination that Cesar was not Jaime's biological father, which in turn led the court to apply

the parental preference doctrine and conclude that Alicia had a superior right to custody of Jaime. If the court had given proper legal effect to the acknowledgment, the court would have viewed both Cesar and Alicia as legal parents to Jaime, and the issues in this case would have, and should have, been considered within this legal framework. The orders of August 19 and September 16, 2010, are reversed. Because our finding of plain error resolves this appeal, we need not consider the assignments of error raised by the parties.

CONCLUSION

We conclude that the district court erred when it failed to give proper legal effect to the acknowledgment of paternity that was signed by Cesar and Alicia and notarized at the time of Jaime's birth, named Cesar as Jaime's father, and was not challenged by Alicia. The acknowledgment established Cesar as Jaime's legal father. See § 43-1409. We reverse the August 19 and September 16, 2010, orders regarding custody and other issues, and remand the cause to the district court for further proceedings. In the absence of a challenge to the acknowledgment, the court should consider the issues raised in this proceeding regarding custody and support within the framework that under the applicable statutes, Cesar is legally Jaime's father.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

HEAVICAN, C.J., not participating in the decision.

WRIGHT, J., not participating.