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BUCKLEY C. DETERDING, APPELLANT, V. TERESA A. DETERDING, APPELLEE.

797 N.W.2d 33

Filed April 26, 2011. No. A-10-301.

1. **Appeal and Error.** 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.
2. **Divorce: Minors: Stipulations.** Parties in a proceeding to dissolve a marriage cannot control the disposition of matters pertaining to minor children by agreement.
3. **Divorce: Child Support.** The Nebraska dissolution statutes do not impose a duty upon any individual other than a parent to pay for the support of minor children.
4. **Parent and Child: Child Support.** A person other than a parent may be responsible for supporting a minor child if the person has assumed, in loco parentis, the obligations incident to a parental relationship.
5. **Parent and Child: Words and Phrases.** A person standing in loco parentis to a child is one who has put himself or herself in the situation of a lawful parent by assuming the obligations incident to the parental relationship, without going through the formalities necessary to a legal adoption, and the rights, duties, and liabilities of such person are the same as those of the lawful parent.
6. **Child Support.** The paramount concern and question in determining child support is the best interests of the child.
7. **Divorce: Child Support: Appeal and Error.** A court commits plain error in failing to award child support on behalf of a minor child without receiving any evidence concerning the circumstances surrounding a child's birth or the child's relationship with the parties prior to the dissolution proceedings.

Appeal from the District Court for Lincoln County: JOHN P. MURPHY, Judge. Reversed and remanded for further proceedings.

R. Bradley Dawson, of Lindemeier, Gillett, Dawson & Troshynski, for appellant.

On brief, Michael E. Piccolo, P.C., L.L.O., for appellee.

INBODY, Chief Judge, and IRWIN and SIEVERS, Judges.

IRWIN, Judge.

I. INTRODUCTION

Buckley C. Deterding appeals from a decree of dissolution entered by the district court. In the decree, the district court dissolved Buckley's marriage to Teresa A. Deterding, divided

a portion of the parties' marital assets and debts, and ordered Buckley to pay alimony to Teresa. The district court also found that, pursuant to genetic testing, a child born to Teresa during the marriage is not Buckley's biological child. The child was conceived through artificial insemination. The court indicated that because the child was not Buckley's biological child, no child support would be ordered.

On appeal, Buckley asserts that the district court erred in ordering him to pay alimony to Teresa. Neither of the parties raises the issue of the district court's failure to award child support on behalf of the minor child.

Upon our de novo review of the record, we conclude that the district court committed plain error in failing to award child support on behalf of the minor child without receiving any evidence concerning the circumstances surrounding the child's birth or the child's relationship with Buckley prior to the dissolution proceedings. We reverse, and remand for further proceedings where the parties should provide evidence concerning the minor child and her best interests. Because we reverse, and remand on this basis, we decline to address Buckley's assertion regarding the alimony award.

Both parties waived oral argument. As such, this case was submitted without oral argument pursuant to Neb. Ct. R. App. P. § 2-111(E)(6) (rev. 2008).

II. BACKGROUND

Buckley and Teresa were married on March 30, 1994. They were unable to conceive a child naturally, so Teresa was artificially inseminated. In November 2003, Teresa gave birth to a child. Genetic testing proves that the child is not Buckley's biological child.

On January 20, 2009, more than 5 years after the child's birth, Buckley filed a complaint for dissolution of the parties' marriage. The complaint alleged, among other things, that "there are no minor children of the parties." Buckley indicated that Teresa gave birth to a child during the marriage, but that this child is not his biological child. Buckley sought "a decree of the Court determining that [the child] is not his child and that he owes no duty of support to said child."

On September 18, 2009, trial was held. Prior to the submission of evidence, Buckley's counsel informed the court that the primary issue to be resolved was whether alimony should be awarded to Teresa. Counsel indicated, "We have a child that was born during the period of the marriage, but everybody here knows that it's not the child of [Buckley]."

During the trial, Teresa testified that Buckley is not the child's biological father and that, as a result, it was her understanding he did not have a legal obligation to support the child. She also indicated that she wished to move forward and support the child on her own. Teresa then testified about her monthly income and expenses. Teresa testified that she was requesting alimony so that she would be able to afford to care for the child and provide the child with health insurance.

Conspicuous by its absence is the evidence about the child. For example, neither of the parties offered any evidence about the circumstances surrounding the child's conception and birth. They did not provide any evidence about the child's life during the nearly 6 years that had passed from the time she was born. There was no evidence about Buckley's involvement or lack of involvement in the child's life for the nearly 6 years after her birth and prior to the time of trial. In short, there is no evidence about Buckley's association, relationship, or connection with the child in any way, shape, or manner.

In the decree of dissolution, the district court found that the child is not the minor child of Buckley and "no support shall be ordered at this time." The court awarded Teresa $500 per month in alimony for a period of 84 months.

Buckley appeals here.

III. ASSIGNMENT OF ERROR

On appeal, Buckley asserts that the district court erred in ordering him to pay to Teresa $500 per month in alimony for a period of 84 months.

IV. ANALYSIS

On appeal, neither Buckley nor Teresa complains of the district court's failure to award child support on behalf of the minor child. However, we conclude that the district court's

failure to award child support without receiving any evidence concerning the circumstances surrounding the child's birth or her relationship with Buckley prior to the dissolution proceedings amounts to plain error. We reverse, and remand for further proceedings.

[1] 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. *Krumwiede v. Krumwiede*, 258 Neb. 785, 606 N.W.2d 778 (2000). 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); *In re Interest of Mainor T. & Estela T.*, 267 Neb. 232, 674 N.W.2d 442 (2004).

It is clear from the record that although the child was born during the parties' marriage, she is not Buckley's biological child. Genetic testing completed on Buckley and the child specifically indicates that Buckley cannot be the biological father of the child. Buckley and Teresa appear to have reached an agreement that because Buckley is not the child's biological father, he does not have a duty to support her. We disagree with the parties' generalized assumption about Buckley's duty to support the child.

[2] First, we note that we are not bound by the parties' agreement regarding child custody and alimony. Parties in a proceeding to dissolve a marriage cannot control the disposition of matters pertaining to minor children by agreement. *Weinand v. Weinand*, 260 Neb. 146, 616 N.W.2d 1 (2000).

Second, we recognize that because the child was conceived through artificial insemination, this is not a situation where the child has a readily identifiable biological father who is responsible for her care and support. Rather, the only father in the child's life is Buckley.

There is evidence in the record which indicates that the parties tried to have a child together naturally, but were unable to do so. This evidence suggests that both Buckley and Teresa wanted a child and agreed to certain fertility treatments and Teresa's artificial insemination. Unfortunately, because the

parties did not offer any evidence concerning the circumstances surrounding Teresa's conceiving and giving birth to the child, we have no idea whether both Buckley and Teresa consented to the artificial insemination.

If Buckley consented to Teresa's being artificially inseminated, he made a decision to bring a child into the world, and he should not be permitted to abandon his responsibility to that child simply because he is not the biological father. Both the Legislature and the Nebraska Supreme Court have recognized that there are situations where a person who is not a biological parent may still have a responsibility to support a child.

In Neb. Rev. Stat. § 43-1412.01 (Reissue 2008), the Legislature established the procedure for setting aside a legal determination of paternity. The statute provides:

> 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 . . . establishes the exclusion of the individual named as a father in the legal determination.

However, § 43-1412.01 also provides, "A court shall not grant relief from determination of paternity if the individual named as father . . . knew that the child was conceived through artificial insemination." This statutory language suggests that if Buckley knew and consented to Teresa's being artificially inseminated, he has some responsibility to support the child even if he is not her biological parent.

[3,4] The Nebraska dissolution statutes do not impose a duty upon any individual other than a parent to pay for the support of minor children. See Neb. Rev. Stat. § 42-364 (Supp. 2009). However, the term "parent" is not specifically defined in the statutes. See *Weinand v. Weinand, supra*. Assuming, without deciding, that Buckley would not be considered a "parent" pursuant to § 42-364, he still may be responsible for supporting the child if he has assumed, in loco parentis, the obligations incident to a parental relationship. See *Weinand v. Weinand, supra*.

[5] The Nebraska Supreme Court has held that a person standing in loco parentis to a child is one who has put himself or herself in the situation of a lawful parent by assuming the obligations incident to the parental relationship, without going through the formalities necessary to a legal adoption, and the rights, duties, and liabilities of such person are the same as those of the lawful parent. *Weinand v. Weinand, supra*; *Hickenbottom v. Hickenbottom*, 239 Neb. 579, 477 N.W.2d 8 (1991). The Parenting Act, Neb. Rev. Stat. § 43-2920 et seq. (Reissue 2008), provides guidance regarding the rights, duties, and liabilities that the Legislature considers important in parental functioning. Section 43-2922 states, in pertinent part:

> For Purposes of the Parenting Act:
>
> . . . .
>
> (17) Parenting functions means those aspects of the relationship in which a parent or person in the parenting role makes . . . fundamental functions necessary for the care and development of a child. Parenting functions include, but are not limited to:
>
> (a) Maintaining a safe, stable, consistent, and nurturing relationship with the child;
>
> (b) Attending to the ongoing developmental needs of the child, including feeding, clothing, physical care and grooming, health and medical needs, emotional stability, supervision, and appropriate conflict resolution skills and engaging in other activities appropriate to the healthy development of the child within the social and economic circumstances of the family;
>
> (c) Attending to adequate education for the child, including remedial or other special education essential to the best interests of the child;
>
> . . . .
>
> (f) Assisting the child in developing skills to maintain safe, positive, and appropriate interpersonal relationships; and
>
> (g) Exercising appropriate support for social, academic, athletic, or other special interests and abilities of the

child within the social and economic circumstances of the family.

In this case, neither party offered any evidence to demonstrate the role Buckley played in the child's life prior to Buckley's filing the complaint for dissolution of marriage. The evidence does demonstrate that the child was 5 years old at the time of the filing. The amount of time that passed between the child's birth and the dissolution proceedings suggests that she had some type of relationship with Buckley and that he provided some care and support for her.

Because there is no specific evidence concerning the relationship between Buckley and the child, we are unable to determine whether Buckley has assumed, in loco parentis, the obligations incident to a parental relationship with the child and whether he may be responsible for supporting her. We do find, however, that the district court erred in failing to award child support simply because Buckley is not the child's biological father.

[6] The paramount concern and question in determining child support is the best interests of the child. See, *Gangwish v. Gangwish*, 267 Neb. 901, 678 N.W.2d 503 (2004); *Claborn v. Claborn*, 267 Neb. 201, 673 N.W.2d 533 (2004); *Gase v. Gase*, 266 Neb. 975, 671 N.W.2d 223 (2003); *Peter v. Peter*, 262 Neb. 1017, 637 N.W.2d 865 (2002). It is impossible to make a determination regarding a child's best interests without receiving any evidence about the child or the relationship between the parents and the child.

We reverse, and remand for further proceedings where the parties should present evidence regarding the circumstances surrounding the child's conception and birth and regarding Buckley's relationship with the child for the first 6 years of her life. Because we reverse, and remand on this basis, we decline to address Buckley's assertion regarding the alimony award.

V. CONCLUSION

[7] We conclude that the district court committed plain error in failing to award child support on behalf of the child without receiving any evidence concerning the circumstances

surrounding her birth or her relationship with Buckley prior to the dissolution proceedings. We reverse, and remand for further proceedings where the parties shall adduce relevant evidence concerning Buckley, Teresa, and the child and any other evidence necessary for a correct determination of child custody and child support. This evidence should include, but is not limited to, evidence of the circumstances surrounding the child's conception and the child's relationship with Buckley prior to the dissolution proceedings.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

RANDALL BOJANSKI AND RHONDA BOJANSKI, APPELLANTS, V. MICHAEL FOLEY AND JOHN WYVILL, APPELLEES.

798 N.W.2d 134

Filed April 26, 2011. No. A-10-572.

1. **Motions to Dismiss: Pleadings.** To prevail against a motion to dismiss for failure to state a claim, a plaintiff must allege sufficient facts, accepted as true, to state a claim to relief that is plausible on its face. In cases in which a plaintiff does not or cannot allege specific facts showing a necessary element, the factual allegations, taken as true, are nonetheless plausible if they suggest the existence of the element and raise a reasonable expectation that discovery will reveal evidence of the element or claim.
2. **Constitutional Law: Legislature: Immunity.** The Nebraska Constitution, article V, § 22, provides for a waiver of sovereign immunity: The State may sue and be sued, and the Legislature shall provide by law in what manner and in what courts suits shall be brought.
3. **Tort Claims Act.** The State Tort Claims Act shall not apply to any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights.
4. **Political Subdivisions Tort Claims Act.** The requirements of the Political Subdivisions Tort Claims Act apply where an individual is sued in his or her individual capacity, but is performing within the scope of employment.
5. **Political Subdivisions Tort Claims Act: Tort Claims Act.** The provisions in the Political Subdivisions Tort Claims Act should be construed in harmony with similar provisions in the State Tort Claims Act.
6. **Tort Claims Act: Immunity: Waiver: Public Officers and Employees.** While a state employee or officer may be allegedly sued individually, if he or she is acting