

LEGISLATIVE BILL 1015

Approved by the Governor March 22, 1974

Introduced by Judiciary Committee, Luedtke, 28, Chmn.;
Fellman, 4; Barnett, 26; Stull, 49;
Richendifer, 16; Carpenter, 48; Chambers, 11

AN ACT to amend sections 42-354, 42-357, 42-363, 42-364,
and 42-365, Revised Statutes Supplement, 1972,
relating to divorce and alimony; to change the
answer date; to clarify provisions; to provide
a sixty-day period before hearing; to provide
standards for the custody and support of
children; to provide alimony considerations;
to provide wage withholding under prescribed
procedures; and to repeal the original
sections.

Be it enacted by the people of the State of Nebraska,

Section 1. That section 42-354, Revised Statutes
Supplement, 1972, be amended to read as follows:

42-354. A responsive pleading, if any, shall be
filed and served upon the petitioner ~~within--thirty--days
of-the-date-of-service-upon-the-respondent on or before
the third Monday after the return day of the summons of
service by publication.~~

Sec. 2. That section 42-357, Revised Statutes
Supplement, 1972, be amended to read as follows:

42-357. The court may order either party to pay
to the clerk a sum of money for the temporary support and
maintenance of the other party and minor children if any
are affected by the action, and to enable such party to
prosecute or defend the action. The court may make such
order after service of process and claim for temporary
allowances is made in the petition or by motion by the
petitioner or by the respondent in a responsive pleading;
but no such order shall be entered ~~until~~ before three
~~clear~~ days after notice of hearing has been served on the
other party or notice waived. During the pendency of any
proceeding under sections 42-347 to 42-379 after the
petition is filed, upon application of either party the
court may issue ex parte orders (1) restraining any
person from transferring, encumbering, hypothecating,
concealing, or in any way disposing of real or personal
property except in the usual course of business or for
the necessities of life, and the party against whom such
order is directed shall upon order of the court account
for all unusual expenditures made after such order is

served upon him; (2) enjoining any party from molesting or disturbing the peace of the other party; and (3) determining the temporary custody of any minor children of the marriage; Provided, ex parte orders issued pursuant to subdivision (1) of this section shall remain in force for no more than ten days or until a hearing is held thereon, whichever is earlier. After motion, notice to the ~~party's attorney party~~, and hearing, the court may order either party excluded from the family dwelling of the other upon a showing that physical or emotional harm would otherwise result.

Sec. 3. That section 42-363, Revised Statutes Supplement, 1972, be amended to read as follows:

42-363. No suit for divorce shall be heard or tried until sixty days after perfection of service of process, at which time the suit may be heard or tried and a decree may be entered. No decree dissolving a marriage shall be granted become final in any proceeding before six months shall have elapsed after such decree shall be entered, except for purposes of appeal. ~~service of process or after the last day of publication of notice or after the date that a voluntary appearance is filed with the clerk or after proceedings in the conciliation court are completed, but the court may waive the waiting period if it shall determine that conciliation efforts have failed.~~

Sec. 4. That section 42-364, Revised Statutes Supplement, 1972, be amended to read as follows:

42-364. When dissolution of a marriage or legal separation is decreed, the court may include such orders in relation to any minor children and their maintenance as shall be justified, including placing the minor children in court custody if their welfare so requires. Custody and visitation of minor children shall be determined on the basis of their best interests. Subsequent changes may be made by the court when required after notice and hearing.

(1) In determining with which of the parents the children, or any of them, shall remain, the court shall consider the best interests of the children, which shall include, but not be limited to:

(a) The relationship of the children to each parent prior to the commencement of the action or any subsequent hearing;

(b) The desires and wishes of the children if of an age of comprehension regardless of their chronological

age, when such desires and wishes are based on sound reasoning; and

(c) The general health, welfare, and social behavior of the children.

(2) In determining with which of the parents the children, or any of them, shall remain, the court shall not give preference to either parent based on the sex of the parent and no presumption shall exist that either parent is more fit to have custody of the children than the other.

(3) In determining the amount of child support to be paid by a parent, the court shall consider the earning capacity of each parent. Upon application, hearing, and presentation of evidence of an abusive disregard of the use of child support money paid by one party to the other, the court may require the party receiving such payment to file a verified report with the court as often as the court shall require stating the manner in which such money is used. The clerk of the district, county, or separate juvenile court shall maintain a record, separate from all other judgment dockets, of all decrees in which the payment of child support has been ordered.

Sec. 5. That section 42-365, Revised Statutes Supplement, 1972, be amended to read as follows:

42-365. When dissolution of a marriage is decreed, the court may order payment of such alimony by one party to the other and division of property as may be reasonable, having regard for the circumstances of the parties, duration of the marriage, a history of the contributions to the marriage by each party, including contributions to the care and education of the children, and interruption of personal careers or educational opportunities, and the ability of the supported party to engage in gainful employment without interfering with the interests of any minor children in the custody of such party. Reasonable security for payment may be required by the court. ~~Except as to~~ Unless amounts have accrued prior to the date of service of process or a petition to modify, orders for alimony may be modified or revoked for good cause shown, but ~~where~~ when alimony is not allowed in the original decree dissolving a marriage, such decree may not be modified to award alimony. Except as otherwise agreed by the parties in writing or by order of the court, alimony orders shall terminate upon the death of either party or the remarriage of the recipient.

Sec. 6. In any proceeding when a district court, county court, or separate juvenile court has

ordered, temporarily or permanently, a parent, referred to as parent-employee in sections 6 to 17 of this act, to pay any amount for the support of a minor child, that court may, following application, hearing, and findings, as required by sections 7 to 17 of this act, order the employer of such parent:

(1) To withhold, from the parent-employee's nonexempt, disposable earnings presently due and to be due in the future, such amounts as shall reduce and satisfy the parent-employee's previous arrearage in child support payments arising from the parent-employee's failure to comply fully with an order previously entered to pay child support, the parent-employee's obligation to pay child support as ordered by the court as such obligation accrues in the future, and, when necessary, the attorney's fee awarded in such proceeding;

(2) To pay to the parent-employee, on his or her regularly-scheduled pay day such earnings then due which are not ordered withheld;

(3) To deduct from the sums so withheld an amount set by the court, but not to exceed five dollars in any calendar month, as compensation for the employer's reasonable cost incurred in complying with such order;

(4) To remit at least once each calendar month such sums withheld, less the deduction as allowed by the court pursuant to subdivision (3) of this section, to the clerk of the court entering such order;

(5) To refrain from dismissing, demoting, disciplining, and in any way penalizing the parent-employee on account of the proceeding to collect child support, on account of any order or orders entered by the court in such proceeding, and on account of employer compliance with such order or orders; and

(6) To notify in writing the clerk of the court entering such order of the termination of the employment of such parent-employee and the name and address of the parent-employee's new employer, if known, and to provide such written notification within thirty days after the termination of employment.

Sec. 7. Any person having a direct interest in the welfare of the child may file an application, with the court that has previously ordered a parent to pay any amount for the support of a minor child, requesting the court to hold a hearing on such application and to enter an order as allowed by the provisions of section 6 of this act. Such persons having a direct interest in the

welfare of a child include a parent or legal guardian of the child, a person having custody of the child pursuant to an order of a court of competent jurisdiction, a county attorney, or a deputy or assistant county attorney, and an employee of a county welfare office. No court, even if it has custody of a minor child, may initiate such an application.

Sec. 8. Upon the filing of an application to withhold and transmit earnings, the court shall set a date, time, and place for a hearing thereon, which hearing shall be set not more than three weeks later than the date such application is filed. The applicant shall then cause to be served on the employer a copy of the application, a notice of hearing and interrogatories to be completed and returned by the employer to the court no later than three days prior to the hearing, which interrogatories when completed shall show whether the parent-employee is an employee of the employer, whether such parent-employee performs work or provides services or makes sales for the employer in Nebraska, the present length of employment of the parent-employee with the employer, the present pay period for such parent-employee, the average earnings for such parent-employee per pay period, the average disposable earnings for such parent-employee per pay period, and the name and address of the person, office or division of the employer responsible for the preparation of the parent-employee's earnings payments. The applicant shall also cause to be served on the parent-employee a copy of the application and a notice of hearing.

Sec. 9. Service upon an employer of the documents required by the provisions of section 8 of this act shall be made in the manner allowed by law for service of summons upon a defendant in a civil action commenced in any district court in the state. Service upon a parent-employee shall be made by mailing, by certified mail, return receipt requested, the documents required by section 8 of this act, addressed to such parent-employee at his last-known residence, whether it be in the state or in another state, or at his place of employment.

Sec. 10. The court that entered the order requiring the parent to pay any amount for the support of a minor child and in which the application to withhold and transmit earnings is filed shall have jurisdiction of any employer who transacts any business in the state or contracts to supply services or things in the state and of the parent-employee and all the parent-employee's earnings if the parent-employee be a resident of the state, and, if the parent-employee not be a resident of

the state, of those earnings of the parent-employee arising from the performance of work, the providing of services, or the sale of goods or services for the employer by the parent-employee in the state. Such court has jurisdiction regardless of where in the state the employer transacts business or contracts to supply services or things, or where the parent-employee resides or performs work, provides services, or sells goods and services. A failure of service, as required by the provisions of sections 8 and 9 of this act, upon the parent-employee shall not affect the court's jurisdiction of the earnings and of the employer.

Sec. 11. The court may enter an order as allowed by section 6 of this act at the hearing on the application for such order, if it finds that it has jurisdiction of the employer and the earnings of the parent-employee, that the parent-employee is an employee of the employer, and that the parent-employee has not complied in full with the previous order of the court requiring such parent-employee to pay for the support of a minor child. In fixing the amount to be withheld by the employer from the parent-employee's nonexempt, disposable earnings, the court shall determine that amount of earnings which, if paid over a reasonable period, would satisfy in full the child support arrearage existing as of the time of the hearing and would satisfy each child support obligation to come due in the future as such came due and would satisfy over a reasonable period of time the attorney's fee awarded, if any, pursuant to section 12 of this act. The court may set flat amounts to be withheld, or, if the parent-employee's pay varies substantially from pay period to pay period, it may set a percentage of the nonexempt, disposable earnings to be withheld.

Sec. 12. The court may award a reasonable attorney's fee to the applicant for the services of the applicant's attorney in obtaining the order to withhold and transmit earnings. Such fee shall be reasonably related to the time spent by the attorney in obtaining such order and not to the amounts collected or to be collected pursuant to such order. If the court awards an attorney's fee, it shall provide that such fee shall be paid from that portion of the amounts withheld and transmitted to the clerk of the court which the court designates as the attorney fee award.

Sec. 13. Exempt from any order to withhold and transmit earnings entered pursuant to sections 6 to 17 of this act is the portion of the disposable earnings of the parent-employee for each work week subject to such order equaling thirty times the federal minimum hourly wage

prescribed by section 206 (a) (1) of Title 29 of the United States Code in effect at the time earnings are payable.

Sec. 14. Any order to withhold and transmit earnings shall have priority over any attachment, execution, garnishment, or wage assignment, unless otherwise ordered by the court.

Sec. 15. An order to withhold and transmit earnings shall dissolve without any court action thirty days after the parent-employee ceases employment with the employer. An order to withhold and transmit earnings shall be revoked by the court upon application when the parent-employee is not in arrears of any court-ordered child support as of the date of the application. An order to withhold and transmit earnings may be modified or revoked by the court upon application and for good cause shown. All applications to revoke or modify shall be served upon the employer and all persons having an interest in the order to withhold and transmit earnings, by United States certified mail, return receipt requested, addressed to the last-known addresses of such persons.

Sec. 16. For the purposes of sections 6 to 17 of this act, unless the context otherwise requires:

(1) Earnings shall mean compensation paid or payable for personal services, whether denominated as wages, salary, commission, bonus, or otherwise, and includes periodic payments pursuant to a pension or retirement program;

(2) Disposable earnings shall mean that part of the earnings of any individual remaining after the deduction from those earnings of any amounts required by law to be withheld, excepting the amounts required to be deducted and withheld pursuant to this act or those provisions allowing garnishment, attachment, or execution;

(3) Employer shall mean any person, partnership, firm, corporation, association, political subdivision, or department of the state in possession of earnings;

(4) Work week shall mean any seven consecutive days during which the parent-employee performs work, provides services, or sells goods or services for the employer; and

(5) Pay period shall mean that regular interval of time, whether it be daily, weekly, biweekly,

semi-monthly, monthly, or some other regular interval, for which the employer pays earnings to the parent-employee.

Sec. 17. Any employer failing to make answer truthfully and completely to the interrogatories propounded pursuant to section 8 of this act may be punished by the court for civil contempt. The court shall first afford such employer a reasonable opportunity to purge itself of such contempt. Any employer who shall fail or refuse to deliver earnings pursuant to an order to withhold and transmit earnings, when such employer has had in its possession such earnings, shall be personally liable for the amount of such earnings which the employer failed or refused to deliver, together with costs, interest, and reasonable attorney's fees. Any employer who fails to notify in writing the clerk of the court entering an order to withhold and transmit earnings of the termination of the parent-employee and the name and address of the parent-employee's new employer, if known, within thirty days after the termination of employment, may be punished by the court for civil contempt. Any employer who dismisses, demotes, disciplines, or in any way penalizes a parent-employee on account of any proceeding to collect child support, on account of any order or orders entered by the court in such proceeding, or on account of the employer's compliance with such order or orders, shall be liable to the parent-employee for all damages, together with costs, interest thereon, and a reasonable attorney's fee, resulting from the employer's action and may be enjoined by any court of competent jurisdiction from continuing such action. Any proceeding to punish an employer for contempt, to hold the employer liable for earnings not withheld and transmitted, to hold the employer liable for actions taken against the parent-employee, or to enjoin the employer from continuing such actions, must be commenced within ninety days after the employer's act or failure to act upon which such proceeding is based.

Sec. 18. That original sections 42-354, 42-357, 42-363, 42-364, and 42-365, Revised Statutes Supplement, 1972, are repealed.