

NEBRASKA SUPREME COURT

Erin W. v. Charissa W.

297 Neb. 143 (2017) · No. S-16-958 · Decided July 7, 2017

SUMMARY

The Nebraska Supreme Court affirmed a dissolution decree awarding joint legal and physical custody after the district court denied the mother's requests for court-ordered genetic testing. The court held that the statutory presumption of legitimacy was not rebutted by the mother's uncorroborated testimony and photographs, and that the district court did not abuse its discretion in denying testing or awarding joint custody.

CASE DETAILS

COURT	Nebraska Supreme Court
WRITING FOR THE COURT	Stacy, J.; Heavican, C.J.; Wright, J.; Miller-Lerman, J.; Cassel, J.; Kelch, J.; Funke, J.
JURISDICTION	Nebraska
DECIDED	July 7, 2017
DOCKET	S-16-958
DISPOSITION	affirmed
PROCEDURAL POSTURE	Charissa W. appealed a decree dissolving the parties' marriage after the district court denied her motions for court-ordered genetic testing, found that she had not rebutted the presumption that Erin W. was the child's father, and awarded the parties joint legal and physical custody.
STANDARD OF REVIEW	In a dissolution action, custody, child support, property division, alimony, and attorney-fee determinations are reviewed de novo on the record, but are initially entrusted to the trial court's discretion and normally will be affirmed absent an abuse of discretion. When evidence conflicts, the appellate court may give weight to the trial judge's opportunity to hear and observe the witnesses.
PRECEDENTIAL VALUE	published opinion
PARTIES	Charissa W. v. Erin W.

TOPICS

paternity

presumptions

child custody

appellate procedure

standard of review

PRACTICE AREAS

family law

paternity

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QUESTIONS PRESENTED

1. Whether the district court abused its discretion by denying Charissa's motions for court-ordered genetic testing.
2. Whether Charissa rebutted the statutory presumption of legitimacy and Erin's paternity with competent, clear, satisfactory, and convincing evidence.
3. Whether the district court abused its discretion by awarding the parties joint legal and physical custody.

HOLDINGS

1. The district court did not abuse its discretion in denying Charissa's motions for genetic testing because the motions were not based on an applicable statutory provision or discovery rule, and Neb. Rev. Stat. § 43-1412.01 presupposes an existing final judgment or other legal determination of paternity.
2. Charissa did not rebut the statutory presumption that Erin was the child's father because her uncorroborated testimony and photographs were not competent or sufficiently convincing evidence to meet the clear, satisfactory, and convincing evidence standard.
3. The district court did not abuse its discretion by awarding the parties joint legal and physical custody.

KEY QUOTATIONS

“Under Nebraska common law, later embodied in § 42-377, a child born during a marriage relationship is presumed to be the husband’s child.” (148)

“The statutory presumption of legitimacy may be rebutted only by clear, satisfactory, and convincing evidence.” (149)

“An appellate court will not consider an issue on appeal that was not presented to or passed upon by the trial court.” (150)

“Our de novo review convinces us the district court correctly found that the evidence at trial was not sufficient to rebut the presumption of legitimacy.” (152)

FACTUAL BACKGROUND

Charissa and Erin married while Charissa was pregnant, and Erin was listed as the child's father on the birth certificate after both parties initially believed he was the father. After the child's appearance changed, Charissa suspected that another man, G.T., was the biological father and sought court-ordered genetic testing, but she did not seek to establish G.T. as the legal father. Erin had consistently held himself out as the father, actively parented the child, and opposed testing. The parties successfully exercised joint legal and physical custody under

a temporary order for nearly a year before the district court adopted the same arrangement in the dissolution decree.

PROCEDURAL HISTORY

The Dodge County District Court denied Charissa's motions for genetic testing during the dissolution proceeding, entered a decree finding Erin to be the child's father based on the statutory presumption of legitimacy and the trial evidence, and awarded joint legal and physical custody with an alternating five-day parenting schedule. Charissa timely appealed, and the Nebraska Supreme Court moved the case to its docket on its own motion. The Supreme Court affirmed.

DISPOSITION

affirmed

CASES CITED

- In re Guardianship & Conservatorship of Donley, 262 Neb. 282, 631 N.W.2d 839 (2001)
- Donald v. Donald, 296 Neb. 123, 892 N.W.2d 100 (2017)
- Alisha C. v. Jeremy C., 283 Neb. 340, 808 N.W.2d 875 (2012)
- Helter v. Williamson, 239 Neb. 741, 478 N.W.2d 6 (1991)
- Younkin v. Younkin, 221 Neb. 134, 375 N.W.2d 894 (1985)
- Perkins v. Perkins, 198 Neb. 401, 253 N.W.2d 42 (1977)
- State on behalf of Hopkins v. Batt, 253 Neb. 852, 573 N.W.2d 425 (1998)
- Stacy M. v. Jason M., 290 Neb. 141, 858 N.W.2d 852 (2015)
- Walsh v. State, 276 Neb. 1034, 759 N.W.2d 100 (2009)
- State on behalf of Jakai C. v. Tiffany M., 292 Neb. 68, 871 N.W.2d 230 (2015)
- Zahl v. Zahl, 273 Neb. 1043, 736 N.W.2d 365 (2007)