

Case No. A 22-925

IN THE COURT OF APPEALS OF THE STATE OF NEBRASKA

ELIZABETH A. BARNES,

Appellant,,

v.

JOSIAH W. GERRETSEN-LARGEN,

Appellee.

APPEAL FROM THE DISTRICT COURT OF

HALL COUNTY, NEBRASKA

Honorable Patrick Lee

BRIEF OF APPELLEE JOSIAH W. GERRETSEN-LARGEN

Submitted by:

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BASIS OF JURISDICTION

Appellee does not dispute the Statement of Jurisdiction as recited in the Appellant's Brief.

STATEMENT OF THE CASE

A. Nature of the Case

Appellee does not dispute the Statement of Jurisdiction as recited in the Appellant's Brief.

B. Issues Decided by the District Court

Appellee does not dispute the Statement of Jurisdiction as recited in the Appellant's Brief.

C. How the Issues Were Decided by the District Court

Appellee does not dispute the Statement of Jurisdiction as recited in the Appellant's Brief.

D. Scope of Review

Child custody determinations are matters initially entrusted to the discretion of the trial court, and although reviewed de novo on the record, the trial court's determination will normally be affirmed absent an abuse of discretion. *Windham v. Griffin*, 295 Neb. 279, 887 N.W.2d 710 (2016). citing *State on behalf of Jakai C. v. Tiffany M.*, 292 Neb. 68, 871 N.W.2d 230 (2015).

STATEMENT OF ERRORS

Appellee does not assign any errors.

PROPOSITIONS OF LAW

I.

Child custody determinations are matters initially entrusted to the discretion of the trial court, and although reviewed de novo on the record, the trial court's determination will normally be affirmed absent an abuse of discretion. *Windham v. Griffin*, 295 Neb. 279, 887 N.W.2d 710 (2016). citing *State on behalf of Jakai C. v. Tiffany M.*, 292 Neb. 68, 871 N.W.2d 230 (2015).

II.

An abuse of discretion exists when a judge, within the effective limits of authorized power, elects to act or refrains from acting, and the final outcome results in a decision which is untenable and unfairly deprives a litigant of a substantial right or a just result in matters submitted to the court. *Curtis v. Curtis*, 17 Neb.App. 230, 759 N.W.2d 269 (Neb. 2008); *McLaughlin v. McLaughlin*, 264 Neb. 232, 647 N.W.2d 577 (Neb. 2002).

III.

Custody shall be determined on the basis of the best interests of the child, as defined in the Nebraska Parenting Act. NEB.REV.STAT. § 42-364. Among the factors to be considered in determining the best interests of the child are the effect on the child of continuing or disrupting an existing relationship, attitude and stability of each parent, and the capacity to furnish physical care, education, and needs of the child. *Koch v. Koch*, 209 Neb. 896, 312 N.W.2d 294 (Neb. 1981).

IV.

When 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 the other. *Lindblad v. Lindblad*, 309 Neb. 776 (2021).

STATEMENT OF FACTS

Appellee does not generally dispute the Appellant's Statement of Facts as recited in the Appellant's Brief.

However, Appellant's Statement of the Facts does not note the importance that the Court placed on the education the minor children had been receiving in Iowa at the Iowa School for the Deaf. (T74).

Specifically, the trial court noted as follows:

“While the move from Iowa to Nebraska may have been in the best interests of the [Appellant], the Court does not believe it was in the best interests of Lincoln and Cyrus. From the evidence presented the Court believes the best interests of Lincoln and Cyrus are served by attending the Iowa School for the

Deaf. The [Appellee], in addition to testifying that the move to Iowa was, in significant part to allow Lincoln and Cyrus to go to this school, indicated attendance at this school was free. [Appellant] testified regarding the extensive services necessary at Kearney Public Schools in order for Lincoln and Cyrus to attend, as well as her inability to obtain employment based upon the extreme difficulty of providing care outside of the school. Therefore, as originally contemplated by the family, moving to a location where the entire community is a support system for Lincoln and Cyrus is in their best interest.” (T74).

SUMMARY OF THE ARGUMENT

The trial court did not abuse its discretion when awarding the primary physical custody of Lincoln and Cyrus to the Appellee. The trial court in its Decree provides reasonable and sound basis for its determination. The decision was not untenable and did not unfairly deprives either litigant of a substantial right or a just result in matters submitted to the court.

ARGUMENT

I. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN AWARDING THE APPELLEE THE PRIMARY PHYSICAL CUSTODY OF LINCOLN AND CYRUS

The trial court did not abuse its discretion when awarding the primary physical custody of Lincoln and Cyrus to the Appellee. The trial court in its Decree provides reasonable and sound basis for its determination. The decision was not untenable and did not unfairly deprives either litigant of a substantial right or a just result in matters submitted to the court.

This was a divorce action but Appellant’s primary assignment of error was the Trial Court’s decision to award the custody of Lincoln and Cyrus to the Appellee.

Child custody determinations are matters initially entrusted to the discretion of the trial court, and although reviewed de novo on the record, the trial court's determination will normally be affirmed absent an abuse of discretion. *Windham v. Griffin*, 295 Neb. 279, 887 N.W.2d 710 (2016). citing *State on behalf of Jakai C. v. Tiffany M.*, 292 Neb. 68, 871 N.W.2d 230 (2015).

An abuse of discretion exists when a judge, within the effective limits of authorized power, elects to act or refrains from acting, and the final outcome results in a decision which is untenable and unfairly deprives a litigant of a substantial right or a just result in matters submitted to the court. *Curtis v. Curtis*, 17 Neb.App. 230, 759 N.W.2d 269 (Neb. 2008); *McLaughlin v. McLaughlin*, 264 Neb. 232, 647 N.W.2d 577 (Neb. 2002).

Custody shall be determined on the basis of the best interests of the child, as defined in the Nebraska Parenting Act. NEB.REV.STAT. § 42-364. Among the factors to be considered in determining the best interests of the child are the effect on the child of continuing or disrupting an existing relationship, attitude and stability of each parent, and the capacity to furnish physical care, education, and needs of the child. *Koch v. Koch*, 209 Neb. 896, 312 N.W.2d 294 (Neb. 1981).

When 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 the other. *Lindblad v. Lindblad*, 309 Neb. 776 (2021).

In the present case, the Trial Court placed significant importance on the deafness of Cyrus and Lincoln and the services they were provided while living in the marital home in Iowa. The Trial Court noted that the family had originally moved to Iowa so that Lincoln and Cyrus could attend the Iowa School for the Deaf. The Trial Court further noted that the evidence before it was that attendance for Lincoln and Cyrus was free. The Trial Court further noted that the Appellant testified that Lincoln and Cyrus required extensive services at their school in Kearney and that the Appellant was having difficulty providing care for them outside of school.

The evidence before the Trial Court further was the Appellant still lived in the marital home in Iowa and was still able to have Lincoln and Cyrus attend the Iowa School for the Deaf.

The Court's reasoning, therefore, is sound. Lincoln and Cyrus have specific needs for their deafness. Appellant is having trouble providing for those needs in Kearney. Appellee lives in a community that will allow those services to be provided to Lincoln and Cyrus. The Trial Court, therefore, determined that it was in Lincoln and Cyrus's best interests to live primarily in that community with the Appellee. This decision was not untenable and did not unfairly deprives the

Appellant of a substantial right or a just result. Indeed, much of the Trial Court's reasoning was based on testimony elicited from the Appellant.

Appellant alleges that the Trial Court abused its discretion because it separated Simon, the oldest child, from Lincoln and Cyrus. The Trial Court did not abuse its discretion, however. Simon at the time of trial was 17 years old. The Court determined that, due to his age, it was in his best interests to remain in Kearney. Given that Simon will soon graduate from high school, the Trial Court did not abuse its discretion in placing little weight in emphasis to maintaining the children in the same household—they will be separated soon anyway due to Simon become an adult soon.

Appellant further contends that the Trial Court abused its discretion in determining that the Appellant engaged in alienation of the minor children from the Appellee. Appellee contends that the Trial Court did not abuse its discretion in making this finding. However, the determination is not relevant as the Trial Court in its Decree indicates that its primary determination is based on the services available to Lincoln and Cyrus at the Iowa School for the Deaf and not on whether their mother alienated them from their father.

Appellant contends that the Appellee abandoned the minor children following their separation. However, the evidence at trial demonstrated that the Appellee had made efforts to provide for and communicate with his minor children. These efforts were met with Appellant seeking criminal sanctions against the Appellee. Appellant took all of the steps that he could to try to provide for the minor children. Appellant took no steps to try to foster further communication and relationship between the minor children and their father, either. The Trial Court did not abuse its discretion in not reaching the same conclusions that the Appellant has regarding the minor children and his motivations.

CONCLUSION

Based on the above and foregoing, the Appellee requests that this Court affirm the decision of the Trial Court.

DATED May 8, 2023.

JOSIAH W. GERRETSEN-LARGEN,
Appellant.

By:



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CERTIFICATE

I certify that this brief complies with the word count as required by the Nebraska Court Rules of Appellate Practice §2-103. This brief was prepared using a 2020 Version of the Word Perfect Processor. This brief complies with the typeface requirements of this rule and it contains a total of 1,980 words.

DATED May 8, 2023.

By:



Mitchell C. Stehlik, # 24451

Certificate of Service

I hereby certify that on Monday, May 08, 2023 I provided a true and correct copy of this *Brief of Appellee Gerritsen-Largen* to the following:

Elizabeth A Barnes represented by Jennifer Danielle Kearney (23415) service method: Electronic Service to **courts@bradleylawoffice.com**

Signature: /s/ Mitchell C. Stehlik (24451)