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pay restitution, and the record does not establish that the court did so.

[11] On appeal, we do not endeavor to reform the trial court's order. Rather, we review the record made in the trial court for compliance with the statutory factors which control restitution orders. *State v. Wells, supra*. Having reviewed the record in this case, we find that the record does not indicate that the trial court meaningfully considered the factors mandated by § 29-2281 with respect to Mick's ability to pay $12,469.74 in restitution. Therefore, the district court erred in the restitution order, and as such, we vacate the trial court's order regarding restitution and remand this matter to the trial court for such proceedings as are consistent with this opinion and the statutory factors set forth in § 29-2281.

CONCLUSION

In conclusion, we find no merit to Mick's claims that his trial counsel was ineffective or that the district court abused its discretion by imposing sentences which are within the statutory ranges; thus, we affirm that portion of the district court's order imposing said sentences. The portion of the sentences regarding restitution is vacated, and the cause is remanded for proceedings consistent with this opinion.

AFFIRMED IN PART, SENTENCE OF RESTITUTION VACATED, AND CAUSE REMANDED WITH DIRECTIONS.

JAMES SPENCER COLLINS, APPELLEE, V. LEE MARIE COLLINS, APPELLANT, AND STATE OF NEBRASKA ON BEHALF OF MATTHEW COLLINS AND CODY COLLINS, INTERVENOR-APPELLEE.

808 N.W.2d 905

Filed February 14, 2012. No. A-11-251.

1. **Modification of Decree: Child Support: Appeal and Error.** An appellate court reviews proceedings for modification of child support de novo on the record and will affirm the judgment of the trial court absent an abuse of discretion.

2. **Judges: Words and Phrases.** A judicial abuse of discretion exists when reasons or rulings of a trial judge are clearly untenable, unfairly depriving a litigant of a substantial right and denying just results in matters submitted for disposition.
3. **Rules of the Supreme Court: Child Support.** Under the Nebraska Child Support Guidelines, if applicable, earning capacity may be considered in lieu of a parent's actual, present income and may include factors such as work history, education, occupational skills, and job opportunities.
4. **Child Support: Evidence.** In the initial determination of child support, earning capacity may be used where evidence is presented that the parent is capable of realizing such capacity through reasonable effort.
5. **Modification of Decree: Child Support: Proof.** A party seeking to modify a child support order must show a material change in circumstances which (1) occurred subsequent to the entry of the original decree or previous modification and (2) was not contemplated when the decree was entered.
6. **Modification of Decree: Child Support: Rules of the Supreme Court: Presumptions: Time.** A rebuttable presumption establishing a material change of circumstances occurs when application of the Nebraska Child Support Guidelines results in a variation by 10 percent or more, but not less than $25, upward or downward, of the current child support obligation due to financial circumstances which have lasted 3 months and can reasonably be expected to last for an additional 6 months.
7. **Modification of Decree: Child Support: Proof.** The party seeking the modification has the burden to produce sufficient proof that a material change of circumstances has occurred that warrants a modification.
8. **Modification of Decree: Child Support.** For a court to modify child support, the material change of circumstances must exist at the time of the modification trial.
9. **Child Support: Evidence.** In child support cases, the court must determine the parent's current monthly income from the most reliable evidence presented.
10. **Modification of Decree: Child Support.** Among the factors to be considered in determining whether a material change of circumstances has occurred are changes in the financial position of the parent obligated to pay support, the needs of the children for whom support is paid, good or bad faith motive of the obligated parent in sustaining a reduction in income, and whether the change is temporary or permanent.
11. **Modification of Decree.** Temporary unemployment is not a material change of circumstances.

Appeal from the District Court for Cheyenne County: DEREK C. WEIMER, Judge. Reversed.

Liam E. Gallagher for appellant.

Charlotte L. Hood-Wright, Deputy Cheyenne County Attorney, for intervenor-appellee.

No appearance for appellee.

IRWIN, CASSEL, and PIRTLE, Judges.

PER CURIAM.

INTRODUCTION

In March 2010, the district court for Cheyenne County, Nebraska, dissolved the marriage of Lee Marie Collins and James Spencer Collins and ordered Lee to pay no child support.

In December 2010, pleadings were filed seeking to modify the divorce decree to increase the amount of Lee's child support.

After a trial, the district court found that Lee had diligently but unsuccessfully sought employment. Then the district court ordered Lee's child support obligation increased from zero to an amount calculated by imputing the minimum wage as her earning capacity. The district court stated, "I am satisfied that at the time that the modification action in this case was filed . . . there was a change in the circumstances that [Lee] was facing, in that she was working at that time." Lee was not working at the time of trial.

We find the court abused its discretion both in imputing minimum wage to Lee and in finding a material change in circumstances that warranted modification of her child support obligation.

BACKGROUND

In March 2010, the district court for Cheyenne County dissolved the marriage of Lee and James and gave James residential custody of their two minor children, Matthew Collins and Cody Collins. Citing a cut in Lee's working hours to fewer than 25 per week, the district court initially ordered Lee to pay no child support.

On September 20, 2010, Lee started working at "Advanced Services Incorporated" (ASI), where she earned $10.50 per hour and worked approximately 60 hours per week.

On December 28, 2010, the State filed a motion for leave to intervene and a complaint to modify the divorce decree to increase the amount of Lee's child support. The district court issued an order allowing the State to intervene, and the motion to modify was set for trial on March 17, 2011.

By the time of trial, Lee was no longer receiving work assignments from ASI. Although ASI never officially terminated her employment, it had not given Lee a work assignment since February 12, 2011. Given this lack of work assignments, Lee sought other employment, applying for jobs in nursing, legal assistance, patient accounts, office management, data entry, food service, and housecleaning. At the time of trial, Lee had not found other employment.

At trial, the State offered two calculations for child support under the child support guidelines, the first based upon Lee's employment at ASI and the second based upon minimum-wage employment. The State argued that under either calculation, there had been a material change in circumstances such that it was appropriate to modify the award of child support. The district court agreed, stating, "I am satisfied that at the time that the modification action in this case was filed . . . there was a change in the circumstances that [Lee] was facing, in that she was working at that time." Even though Lee was not working at the time of trial, the district court imputed minimum-wage earning capacity to Lee and ordered her to pay child support in the amount of $168.29 for two children and $168.29 for one child beginning on March 1, 2011. The court declined to make the increase retroactive.

Lee timely appeals. Pursuant to authority granted to this court under Neb. Ct. R. App. P. § 2-111(B)(1) (rev. 2008), this case was ordered submitted without oral argument.

ASSIGNMENTS OF ERROR

Lee alleges, reordered and restated, that the district court abused its discretion by (1) imputing minimum-wage earning capacity to her when she had made reasonable efforts but had failed to find a minimum-wage job and (2) finding that there had been a material change in circumstances.

STANDARD OF REVIEW

[1,2] An appellate court reviews proceedings for modification of child support de novo on the record and will affirm the judgment of the trial court absent an abuse of discretion. *Rutherford v. Rutherford*, 277 Neb. 301, 761 N.W.2d 922

(2009). A judicial abuse of discretion exists when reasons or rulings of a trial judge are clearly untenable, unfairly depriving a litigant of a substantial right and denying just results in matters submitted for disposition. *Id.*

ANALYSIS

Imputing Minimum Wage.

Lee argues that the district court abused its discretion in imputing minimum-wage earning capacity to Lee when she had made reasonable efforts but had not yet succeeded in obtaining employment to replace her work for ASI. We agree with Lee that the district court abused its discretion by imputing and using Lee's earning capacity to modify the original support order. We say this because Lee presented evidence that she could not find minimum-wage employment through reasonable efforts and because the court found that the evidence showed that Lee had diligently but unsuccessfully sought employment.

[3,4] Reviewing the child support guidelines applicable to the instant case, we recall that a court is permitted to consider a parent's earning capacity when determining the amount of child support obligation. Under the child support guidelines, if applicable, earning capacity may be considered in lieu of a parent's actual, present income and may include factors such as work history, education, occupational skills, and job opportunities. Neb. Ct. R. § 4-204. In the initial determination of child support, earning capacity may be used "where evidence is presented that the parent is capable of realizing such capacity through reasonable effort." *Bandy v. Bandy*, 17 Neb. App. 97, 108, 756 N.W.2d 751, 759 (2008). Although the case before us involves the modification of child support and not the initial determination, the same principle applies—earning capacity should be used only if there is evidence that the parent can realize that capacity through reasonable efforts.

The evidence showed that Lee was unable to reach minimum-wage earning capacity by reasonable efforts. As soon as her work assignments from ASI ceased, Lee began looking for other employment, applying for at least 10 jobs per week. She applied for jobs in nursing, legal assistance,

patient accounts, office assistance, office management, data entry, housecleaning, waitressing, and food service. She looked for jobs in both Nebraska and Indiana. All in all, Lee testified at trial that she had applied for over 32 jobs between February 12, 2011, and early March 2011 and sent out 41 e-mails relating to jobs. Despite these reasonable efforts at gaining employment of any kind, Lee was unsuccessful at finding even minimum-wage employment and remained unemployed at the time of trial.

The district court acknowledged the evidence that Lee was making reasonable efforts to find employment. It admitted that she was diligent in her job search, stating, "I don't think there's any way anyone can reasonably argue to me today, based on the evidence I've received[,] that she's not diligently looking for work . . . ." Nonetheless, the district court chose to impute a minimum-wage earning capacity to her in the face of continued unemployment. Because the evidence demonstrated that Lee was unable to reach minimum-wage earning capacity by reasonable efforts, it was clearly untenable for the district court to attribute such earning capacity to her.

Material Change of Circumstances.

[5] A party seeking to modify a child support order must show a material change in circumstances which (1) occurred subsequent to the entry of the original decree or previous modification and (2) was not contemplated when the decree was entered. *Incontro v. Jacobs*, 277 Neb. 275, 761 N.W.2d 551 (2009).

[6] The Nebraska Child Support Guidelines include a provision that attempts to provide more predictability in determining the existence of a material change in circumstances. A rebuttable presumption establishing a material change of circumstances occurs when application of the child support guidelines results in a variation by 10 percent or more, but not less than $25, upward or downward, of the current child support obligation due to financial circumstances which have lasted 3 months and can reasonably be expected to last for an additional 6 months. *Grahovac v. Grahovac*, 12 Neb. App. 585, 680 N.W.2d

616 (2004) (relying on child support guideline now codified as Neb. Ct. R. § 4-217).

[7] The party seeking the modification has the burden to produce sufficient proof that a material change of circumstances has occurred that warrants a modification. *Incontro v. Jacobs, supra*.

[8] The parties ask us to decide whether the material change of circumstances must exist at the time of filing of the complaint to modify or at the time of the modification trial. We hold that the change in circumstances must exist at the time of the modification trial for two reasons. First, because the court's decision to modify child support must be based upon the evidence presented in support of the complaint to modify. Second, because the change in circumstances cannot be temporary.

[9] The change in circumstances must exist at the time of trial because the decision to modify child support must be based upon the evidence presented by the parties. The Iowa Supreme Court has specifically stated that in child support cases, "[t]he court must determine the parent's current monthly income from the most reliable evidence presented." *In re Marriage of Powell*, 474 N.W.2d 531, 534 (Iowa 1991). Because evidence is presented at a date after the filing of the complaint to modify and because the court must look at the parent's current income, it would be improper for the court to focus on anything but the most recent circumstances ascertainable from the evidence. The circumstances at the time of the complaint to modify would be less recent than the circumstances at the time of the subsequent order. Therefore, the change in circumstances justifying a modification of child support must exist at the time of trial.

[10,11] Furthermore, the change of circumstances must exist at the time of trial because such change must be more than temporary. Among the factors to be considered in determining whether a material change of circumstances has occurred are changes in the financial position of the parent obligated to pay support, the needs of the children for whom support is paid, good or bad faith motive of the obligated parent in sustaining a reduction in income, and whether the change is temporary

or permanent. *Incontro v. Jacobs, supra*. Furthermore, the Nebraska Supreme Court has specifically held that "temporary unemployment is not a material change of circumstances." *Graber v. Graber*, 220 Neb. 816, 821, 374 N.W.2d 8, 11 (1985), *disapproved on other grounds, Wagner v. Wagner*, 224 Neb. 155, 396 N.W.2d 282 (1986). Given this focus on the permanent nature of the change of circumstances, such change of circumstances should exist at the time of trial and not merely at the time of the complaint to modify.

Applying this rule to the evidence in the case before us and considering the evidence of Lee's income at the time of trial, we find that the State was unable to produce sufficient proof of a material change of circumstances. Although Lee's employment by ASI lasted for more than 3 months, given that it had effectively terminated, it could not be reasonably expected to last for an additional 6 months. Thus, the State's evidence failed to trigger the rebuttable presumption of a change of circumstances under § 4-217. Using Lee's hourly wage at ASI, her child support obligation would increase from zero to $503.80 for two children and to $344.95 for one child. But even if the rebuttable presumption had been triggered, by the time the complaint to modify was considered by the district court, Lee was able to present evidence to rebut the State's proof of her employment. Although her employment had not been terminated, Lee's testimony revealed that she was not receiving any work assignments from ASI. Furthermore, Lee was unable to find other employment despite a diligent job search. Thus, the evidence showed that Lee's current income at the time of the modification trial was zero.

When compared to Lee's original circumstances at the time of the divorce decree, her employment situation at the time of trial had not improved—it had worsened. At the time of the original divorce decree establishing child support, Lee was ordered to pay no child support because the hours at her job had been cut back to fewer than 25 per week. Therefore, the State did not establish a material change in circumstances because it could not prove that Lee was working more than 25 hours per week at the time of the modification trial. For the

district court to find a material change of circumstances despite this lack of evidence was clearly untenable.

Because we have already decided that it was an abuse of discretion for the district court to impute a minimum-wage earning capacity to Lee, it would also be an abuse of discretion for the district court to decide that there was a material change in circumstances based upon such imputation.

We further note that this is not a case in which earning capacity could be used to increase Lee's child support when circumstances otherwise would not demand such increase. Earning capacity has been used to maintain a certain level of child support when a change in circumstances would otherwise justify a downward modification. We have used earning capacity in this way when the change in circumstances was due to the parent's fault or voluntary decision to move to lower-paying employment. See, e.g., *Murphy v. Murphy*, 17 Neb. App. 279, 759 N.W.2d 710 (2008); *State on behalf of Longnecker v. Longnecker*, 11 Neb. App. 773, 660 N.W.2d 554 (2003), *superseded by statute on other grounds as stated in Hopkins v. Stauffer*, 18 Neb. App. 116, 775 N.W.2d 462 (2009). The Nebraska Supreme Court has similarly refused to modify a parent's child support obligation when "[the parent's] income decreased due to his own personal wishes, and not as a result of unfavorable or adverse conditions in the economy, his health, or other circumstances that would affect [the parent's] earning capacity." *Incontro v. Jacobs*, 277 Neb. 275, 285, 761 N.W.2d 551, 559-60 (2009). While the case before us includes a request for an upward modification instead of a downward modification, the State is in effect asking us to use earning capacity in a similar manner—to order Lee to pay more child support than her circumstances would otherwise demand. The case before us does not present facts that justify such use of earning capacity. Lee's decrease in income since the initial complaint to modify was not due to her fault or voluntary choice. On the contrary, Lee has remained unemployed despite numerous efforts on her part to find employment. Therefore, it was an abuse of discretion for the district court to decide that there was a material change in circumstances based upon earning capacity.

CONCLUSION

Because the evidence demonstrated that Lee could not attain a minimum-wage earning capacity by reasonable efforts, the district court abused its discretion in imputing such earning capacity to her. And because the State did not present sufficient evidence of a material change in circumstances since the original divorce decree, the district court also abused its discretion in finding a material change in circumstances that warranted modification of Lee's child support obligation. We reverse.

REVERSED.

CASSEL, Judge, dissenting.

I respectfully disagree with the majority opinion. The majority opinion correctly recites our standard of review of de novo on the record for abuse of discretion. But I find no abuse of discretion in either the district court's imputation of minimum-wage earning capacity to Lee or the court's determination that there had been a material change in circumstances.

Imputation of Minimum Wage.

The evidence provides overwhelming support for a determination that Lee had an earning capacity at least equal to the minimum wage over a 40-hour week—indeed, she admitted as much. Lee has consistently earned at least minimum wage in her previous jobs and often earned more than minimum wage. She earned $10.50 per hour at ASI, where she worked 60 hours per week. She began her employment at ASI in September 2010, and it continued after the State commenced this modification proceeding until at least February 12, 2011. At ASI, Lee also earned overtime pay for the hours she worked in excess of 40 hours per week. Lee earned $10 per hour at "Country Printer" as a printer's assistant starting in March 2010. And during her marriage to James, Lee held steady employment in the nursing industry. Lee testified that nursing positions paid even more than what she earned at ASI. James also testified that Lee maintained employment of at least minimum wage throughout their marriage.

Even though Lee was unemployed at the time of the order of modification, the evidence of her occupational skills indicated that she remained qualified to obtain employment paying at least minimum wage. At the time of trial, Lee held a valid nursing license in Indiana and could reinstate her licenses in Nebraska and South Dakota by paying certain fees and taking a continuing education course. Lee testified that she was qualified for and was applying for jobs above minimum-wage level, including positions such as legal assistant, patient account coordinator, office assistant, office manager, and a data entry position. One of these positions paid as much as $15 to $18 per hour.

Lee admitted that she was "likely qualified to obtain at least minimum wage employment." She admitted that she was capable of working at least 40 hours per week. Although she testified that she had gone to "rehab" in May 2010, she also stated that she had maintained her sobriety since April. At the conclusion of her testimony, she was asked if "it would be reasonable to expect that [she] could hold minimum wage employment," to which she responded, "I'm trying to."

Based on this evidence, the district court found, "There is no question that [Lee] is capable of minimum wage employment. . . . She doesn't deny that and I wouldn't expect her to. She's clearly making efforts to gain employment . . . ." I entirely agree with this assessment of the evidence.

The Nebraska Child Support Guidelines clearly permit a trial court to consider a parent's earning capacity when determining the amount of child support obligation. If applicable, earning capacity may be considered in lieu of a parent's actual, present income and may include factors such as work history, education, occupational skills, and job opportunities. Neb. Ct. R. § 4-204. While the courts have mainly used earning capacity when a parent suffers a reduction in income due to his or her own fault or choice, the child support guidelines do not dictate that earning capacity be used only in such situations. The need to examine a party's earning capacity is especially true when it appears that the parent is capable of earning more income than

is presently being earned. *Gangwish v. Gangwish*, 267 Neb. 901, 678 N.W.2d 503 (2004).

Lee's earning capacity was not diminished by the fact that she had been unable to find replacement employment at the time of trial. In *Graber v. Graber*, 220 Neb. 816, 374 N.W.2d 8 (1985), *disapproved on other grounds, Wagner v. Wagner*, 224 Neb. 155, 396 N.W.2d 282 (1986), a few months before the modification hearing, the parent obligated to pay child support suffered an illness that prevented her from working. In light of evidence that her disability would probably not last longer than a few months and because of her qualifications, the Nebraska Supreme Court held that her unemployment was temporary and was not reason to reduce her child support obligation. See *id*. I would similarly find that the facts surrounding Lee's unemployment indicate that it was merely temporary. Indeed, at the time of trial, Lee had only been without work for 1 month, was diligently applying for jobs, and even had a job interview that same day. There was no evidence to indicate that Lee was unable to hold full-time employment. Her unemployment was not due to illness, and she had no disabilities that would prevent her from working. On the contrary, Lee admitted that she was capable of working at least 40 hours per week and that she had in fact held steady employment throughout her marriage to James. I also note that Lee maintained her nursing license and was qualified for nursing positions. Given her work history, her nursing license, and the short length of her unemployment at the time of trial, I would find that Lee's unemployment at the time of trial was temporary and therefore was not reason to reduce her earning capacity.

Because Lee previously held and was qualified to hold positions that pay minimum wage or above and because her unemployment at the time of trial was temporary, the district court did not abuse its discretion in considering earning capacity instead of Lee's actual salary or in finding that Lee's earning capacity was at least minimum wage. Had the district court used Lee's earnings from her ASI employment to increase child support, it might have been an abuse of discretion in light of her temporary unemployment at the time of trial and her diligent and continuing efforts at obtaining new employment.

But I find no abuse of discretion in imputing earning capacity at only a minimum-wage level.

Material Change of Circumstances.

I similarly find no abuse of discretion in the district court's finding that there was a material change in circumstances that merited a modification of Lee's child support obligation. The Nebraska Supreme Court has held that a material change in circumstances is a concept which eludes precise, concrete definition. See *Dobbins v. Dobbins*, 226 Neb. 465, 411 N.W.2d 644 (1987). The Supreme Court has identified certain factors which a district court may consider in determining whether a material change has occurred or not. Among the factors to be considered in determining whether a material change of circumstances has occurred are changes in the financial position of the parent obligated to pay support, the needs of the children for whom support is paid, good or bad faith motive of the obligated parent in sustaining a reduction in income, and whether the change is temporary or permanent. *Incontro v. Jacobs*, 277 Neb. 275, 761 N.W.2d 551 (2009).

The Nebraska Child Support Guidelines include a provision that attempts to provide more predictability in determining the existence of a material change in circumstances. A rebuttable presumption establishing a material change of circumstances occurs when application of the child support guidelines results in a variation by 10 percent or more, but not less than $25, upward or downward, of the current child support obligation due to financial circumstances which have lasted 3 months and can reasonably be expected to last for an additional 6 months. *Grahovac v. Grahovac*, 12 Neb. App. 585, 680 N.W.2d 616 (2004) (relying on child support guideline now codified as Neb. Ct. R. § 4-217).

It is unnecessary to decide whether the material change of circumstances must exist at the time of filing of the complaint for modification or at the time of the subsequent order because, in the case before us, a material change of circumstances existed at both points in time. Lee argues that there was not a material change in circumstances because she had "lost her job at the time of the modification order and was making no

money[—]the same amount she was making at the time of the first order." Brief for appellant at 7. However, this argument ignores Lee's earning capacity.

Both at the time of the complaint to modify and at the time of the trial and court order, Lee's earning capacity was at least at a minimum-wage level. At either time, the court could properly impute this earning capacity to her in calculating her child support obligation. Using minimum wage to calculate Lee's child support obligation, the resulting monthly child support payment is $168.29 for two children and $168.29 for one child, an amount already reduced by the guidelines' basic subsistence limitation. Thus, under § 4-217, one compares $168.29 to zero, and $168.29 represents an increase of more than 10 percent and an amount greater than $25. And this earning capacity had obviously existed for more than 3 months—given her employment by ASI for a longer period—and was expected to continue indefinitely. Thus, a material change of circumstances is presumed under § 4-217.

The district court implicitly found that Lee did not rebut the presumption merely by establishing that she had not yet obtained replacement employment. I agree. The court did not apply the change retroactively to the time of the State's complaint to modify, but, instead, implemented the change only prospectively. I conclude that the court did not abuse its discretion in modifying the child support order to require Lee to pay support on the imputed earning capacity.

Because I find no abuse of discretion by the district court in imputing to Lee an earning capacity based on the minimum wage or in finding that there had been a material change in circumstances, I would affirm the court's order.