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be ordered to run concurrently with any other sentence, either explicitly or implicitly.

CONCLUSION

We conclude that the district court did not err when it rejected the constitutional challenges to § 28-1351. We further reject Scott's remaining assignments of error. We therefore affirm Scott's convictions. However, we note plain error in that the court ordered the sentence for use of a deadly weapon to run concurrently with the sentence for unlawful recruitment. We vacate the sentences because the sentence for use of a deadly weapon was erroneously ordered to run concurrently with the sentence for unlawful recruitment, and we remand the cause to the district court with directions to resentence so that the sentence for use of a deadly weapon shall run consecutively to all other sentences imposed.

AFFIRMED IN PART, AND IN PART VACATED AND REMANDED WITH DIRECTIONS FOR RESENTENCING.

GREG KRZYCKI, AS TRUSTEE OF THE SHIRLEY M. KRZYCKI TRUST, APPELLEE, V. ROBIN KRZYCKI, APPELLANT.

824 N.W.2d 659

Filed November 30, 2012. No. S-11-1080.

1. **Decedents' Estates: Banks and Banking.** All personal accounts in Nebraska are subject to Neb. Rev. Stat. §§ 30-2715 through 30-2746 (Reissue 2008), concerning nonprobate transfers of accounts.
2. **Decedents' Estates: Banks and Banking: Contracts.** Pursuant to Neb. Rev. Stat. § 30-2719(a) (Reissue 2008), a contract of deposit that contains provisions in substantially the form provided in this subsection establishes the type of account provided, and the account is governed by the provisions of Neb. Rev. Stat. §§ 30-2716 to 30-2733 (Reissue 2008) applicable to an account of that type.
3. **Decedents' Estates: Banks and Banking: Contracts: Evidence: Intent.** Only if a contract of deposit does not conform to the statutory forms provided in Neb. Rev. Stat. § 30-2719(a) (Reissue 2008) may evidence be presented on the issue of the intent of the depositor.
4. **Decedents' Estates: Banks and Banking: Contracts: Intent.** Neb. Rev. Stat. § 30-2719(b) (Reissue 2008) provides that when a contract of deposit does

not conform to any of the statutory forms, it is governed by the provisions of Neb. Rev. Stat. §§ 30-2716 to 30-2733 (Reissue 2008) applicable to the type of account that most nearly conforms to the depositor's intent.

5. **Decedents' Estates: Banks and Banking: Presumptions: Proof.** Neb. Rev. Stat. § 30-2719(b) (Reissue 2008) creates no presumption in favor of a type of account and does not set any standards related to burdens of proof.
6. ____: ____: ____: ____. When a dispute exists regarding the proportional ownership of multiple-party accounts during the lifetime of the parties, not a dispute regarding who owns the account, the statutes provide that certain statutory presumptions may be overcome only by clear and convincing evidence.
7. **Decedents' Estates: Banks and Banking: Proof: Intent.** Neb. Rev. Stat. § 30-2719(b) (Reissue 2008) does not provide a certain burden of proof with which a movant must move forward. Thus, in order to succeed in proving intent, pursuant to § 30-2719(b), a movant must prove his or her case by a greater weight of the evidence only.

Appeal from the District Court for Lancaster County: STEVEN D. BURNS, Judge. Affirmed.

Clark J. Grant, of Grant & Grant, for appellant.

Wayne E. Janssen for appellee.

HEAVICAN, C.J., WRIGHT, CONNOLLY, STEPHAN, MCCORMACK, MILLER-LERMAN, and CASSEL, JJ.

HEAVICAN, C.J.

INTRODUCTION

Shirley M. Krzycki was the sole settlor, trustee, and beneficiary of the Shirley M. Krzycki Trust (Trust) established to hold annual payments from an insurance settlement. Shirley died unexpectedly on August 19, 2009. She was survived by her four children: Greg Krzycki, appellee; Dawn Vogt; Robin Krzycki, appellant; and Zachary Krzycki. Upon Shirley's death, Greg was named successor trustee of the Trust. Greg filed suit in Lancaster County District Court claiming that sums on deposit in a Wells Fargo Bank (Wells Fargo) account, formerly owned by Shirley as "Primary Joint Owner," were property of the Trust. Shirley's daughter Robin was originally named "Secondary Joint Owner" on this account, and Robin refused to give to the Trust the sums on deposit in this account. After a bench trial, the district court held that the balance of the Wells Fargo account belonged to the Trust. Robin

appeals. We affirm, but for reasons different from those of the district court.

FACTUAL BACKGROUND

On September 5, 1982, Shirley and her husband, Ronald Krzycki, were involved in an automobile collision. Ronald was seriously injured in the collision, leaving him incapacitated. On December 27, 1984, Shirley entered into a settlement agreement related to this accident on behalf of herself individually, on behalf of her husband Ronald, and as guardian for their three minor children—Dawn, Robin, and Zachary (Greg was an adult at this time). Pursuant to the terms of the settlement, Shirley was to be paid $20,000 each November 1 for a period of 50 years, with the first payment due November 1, 1985. The settlement called for the payments to be made to Shirley during her life, and then to Shirley's estate upon her death.

On October 29, 1985, Shirley executed a will that was admitted to probate in Shirley's estate after her death. In the second paragraph, Shirley's will provides: "All of the rest, residue and remainder of my estate, both real, personal and mixed, . . . I leave to my children, share and share alike." In the third paragraph, the will provides:

> I intend to have in existence, at the time of my death, a bank account through which the settlement proceeds of a lawsuit which was filed in the year 1983 . . . . shall pass. . . . I direct that as those payments are received into said banking account, my children, or their issue by right of representation . . . , share equally in such payments. I intend to have one or more of my children listed on said account so as to enable them to obtain the funds for distribution according to this paragraph in any manner which may be convenient. I would recommend that my children consult with an accountant or an attorney in regard to the tax consequences, if any, of such payments to them, so that they can make the necessary arrangements in regard to the same.

In 1992, Shirley and Ronald divorced. A decree nunc pro tunc was filed on September 3, 1992. It contained the following language regarding the settlement payments:

> [S]ubsequent to and a [sic] result of said automobile accident a settlement was made to the benefit of the family of Ronald . . . , respondent herein; that said settlement results in a payment of $20,000.00 to [Shirley] on each and every November 1st with the final payment due on November 1, 2034; the settlement further requires that in the event petitioner, Shirley . . . die [sic] before November 1, 2034, any remaining payments set forth herein shall instead be paid, as they become due, to her estate.
>
> All remaining payments resulting from said insurance settlement, beginning with the payment due November 1, 1992, shall be paid to the . . . Trust.

The Trust was executed on August 31, 1992, as a part of the divorce settlement. Shirley was the sole settlor, trustee, and beneficiary of the Trust. According to the Trust document, the Trust was irrevocable. The Trust document provided that during her life, Shirley could pay all net income of the Trust to herself and could expend the principal of the Trust as she determined. Upon Shirley's death, after payment of expenses, the remainder of the Trust was to be paid to her four children, share and share alike. The Trust prohibited a beneficiary from anticipating, transferring, selling, assigning, or encumbering any payment or distribution of either principal or income. Paragraph VI of the Trust document provided that the trustee's powers did not include the power to gift the proceeds of the Trust.

The Trust document further provided that the property to be deposited into the Trust was contained in "Exhibit 'A'" attached to the Trust. The evidence submitted at trial did not contain an "Exhibit A." A quitclaim deed to certain farmland in Platte County, Nebraska, however, shows Shirley moved the family residence into the Trust. There is no disagreement between the parties that a valid Trust was created and still exists. There was no evidence presented at trial indicating Shirley sought legal advice or was given legal advice to assist her in establishing a separate trust account in the name of the Trust to hold the annual settlement payments. Ultimately, Shirley never established a separate trust account within the legal framework contemplated in the divorce decree.

Sometime between 2003 and 2005, Robin was out of work and needed a place to live, so she moved in with Shirley. Robin lived with Shirley until Shirley's death in 2009.

Beyond Shirley's will, the divorce decree, and the Trust document, no other writings were presented at trial expressing Shirley's intent behind her various financial transactions. The evidence does reference, however, several different bank accounts used during the last years of Shirley's life.

On September 28, 2001, Shirley completed a "Direct Deposit/Bank By Mail Enrollment Form" instructing the insurance company which was making the annual payments for the settlement at that time to deposit the annual payments into a Commercial Federal Bank (Commercial Federal) account she owned that also bore the names of Greg and Dawn. For some period prior to February 6, 2007, the annual settlement payments were deposited into this account.

The record shows that on October 28, 2005, a check for $20,000, which derived from the settlement, was deposited into the Commercial Federal account. This check was made payable to said account "FBO Shirley Krzycki, Trust." On November 1, 2006, another check for $20,000, which derived from the settlement, was deposited into the Commercial Federal account. This check was also made payable to said account "FBO Shirley Krzycki, Trust." Shirley withdrew funds from this account as needed to pay bills through a separate checking account she held with Commercial Federal, which also bore the names of Greg and Dawn.

In March 2006, Robin's name first appeared on an account with Shirley at Commercial Federal. Two of Shirley's certificates of deposit matured at this time, and she placed those funds, together with $4,649.84 from her Commercial Federal checking account, into this new account. One month later, most of the $4,649.84 was returned to Shirley's Commercial Federal checking account.

On February 6, 2007, Shirley engaged in a transfer of funds from accounts she owned with Commercial Federal to new accounts she opened with Wells Fargo. The following represents the facts of such transfer as relevant to this appeal. Shirley closed one Commercial Federal account, which bore

the names of Greg and Dawn, and transferred $31,493.87, all remaining funds, to her Commercial Federal checking account. Shirley then transferred substantially all of the funds in her Commercial Federal checking account into two new accounts she opened with Wells Fargo.

From the checking account, Shirley transferred $23,000 to open the Wells Fargo account that is the subject of this appeal. Shirley signed the documents necessary to open the account as "Primary Joint Owner." Robin was present when Shirley opened the account, and Robin signed the documents as "Secondary Joint Owner." Robin testified that she did not know why Shirley opened the account and that Shirley never indicated to Robin her intent in opening the account.

From the Commercial Federal checking account, Shirley also transferred $7,000 to a new checking account with Wells Fargo that also bore Robin's name. On the same day, Shirley's Commercial Federal account, which bore Robin's name, was also closed. Those proceeds, $42,222.82, were also moved to the new Wells Fargo account that is the subject of this appeal.

On February 22, 2007, $4,000 of the $7,000 deposited into Shirley's new Wells Fargo checking account was transferred to Shirley's Wells Fargo account that is the subject of this appeal. Such transactions show Wells Fargo became the primary bank used by Shirley at this time.

On July 26, 2007, Shirley completed a "Direct Deposit Enrollment Form" instructing the insurance company making the settlement payments to thereafter deposit the payments into the new Wells Fargo account that is the subject of this appeal. On November 1, a check for $20,000 deriving from the settlement was deposited into the Wells Fargo account. Such check was made payable to said account "FBO Shirley Krzycki, Trust." On November 1, 2008, another check for $20,000 deriving from the settlement was deposited into the Wells Fargo account. Such check was also made payable to said account "FBO Shirley Krzycki, Trust."

Shirley managed the subject Wells Fargo account on her own. Robin did not assist Shirley with the management of this account or make any action on behalf of the account. It is uncontested that beyond the annual settlement payments,

Shirley did not have any other large source of income during her life. Shirley's other sources of income included a small pension payment of $22.25 per month and a Social Security payment of approximately $1,249 per month. The monthly Social Security payments were deposited into her checking accounts.

Shirley died unexpectedly of cardiac arrest on August 19, 2009. After Shirley died, Robin presented to Wells Fargo and had the account which bore her name as "Secondary Joint Owner" transferred to her name only.

On January 28, 2011, Greg, as trustee of the Trust, filed a complaint claiming that the funds in the Wells Fargo account in the approximate amount of $77,937.09 were funds of the Trust. Greg alleged in his first cause of action that Robin had converted the funds of the Trust to her own use and asked for judgment against Robin in the amount of $77,937.09, plus interest and costs. Greg alleged in his second cause of action that Robin had come into possession of such funds subject to a constructive trust on behalf of the Trust and should be required to account for such funds and to turn such funds over to the Trust for administration according to the terms of the Trust.

Robin filed an answer alleging that when Shirley opened the Wells Fargo account, said account was owned by Shirley and Robin as joint tenants with rights of survivorship, that the Trust had no ownership interest in such account, and that Shirley intended the result at the time. After a bench trial, the district court found in favor of Greg, finding he had succeeded on both of his claims.

Specifically, the district court held that all of the funds in the Wells Fargo account were trust funds because they could be "traced" as originating from settlement payments and that to the extent Robin is the owner of that account, she owned it in constructive trust for the benefit of the Trust.[1] The district court held Robin correctly argued that the creation of a joint tenancy account establishes a presumption that Shirley intended Robin

[1] See *In re Estate of Redpath*, 224 Neb. 845, 847, 402 N.W.2d 648, 650 (1987).

to receive the funds in the account upon Shirley's death. The district court found, however, that Greg had overcome that presumption based upon the clear and convincing evidence he presented at trial.[2]

ASSIGNMENTS OF ERROR

On appeal, Robin assigns that the district court erred in (1) determining that the funds in the Wells Fargo account are trust funds belonging to the Trust, (2) determining that Greg adduced clear and convincing evidence to overcome the presumption that Shirley intended to create a joint tenancy account at Wells Fargo, and (3) imposing a constructive trust on the Wells Fargo account without any evidence that Robin obtained title to the account by fraud, misrepresentation, or an abuse of an influential or confidential relationship.

STANDARD OF REVIEW

An action for conversion sounds in law. A district court's factual determination in a bench trial in an action at law has the same effect as a jury verdict and will not be set aside unless clearly wrong.[3]

ANALYSIS

Whether Funds in Wells Fargo Account Are Trust Funds.

Robin assigns that the district court erred in finding the sums remaining on deposit in the Wells Fargo account are "trust" funds and that such funds belong to the Trust. We find the district court did not err in finding that the sums on deposit in the account are "trust" funds, because in signing her divorce decree, Shirley agreed to have the remaining settlement payments be paid to the Trust. Although Shirley never created a designated trust account within the legal framework contemplated in the divorce decree, the evidence shows the subject

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[2] See *In re Estate of Lienemann*, 222 Neb. 169, 382 N.W.2d 595 (1986) (superseded by statute as stated in *Eggleston v. Kovacich*, 274 Neb. 579, 742 N.W.2d 471 (2007)).

[3] *Imperial Empire Trading Co. v. City of Omaha*, 246 Neb. 919, 524 N.W.2d 314 (1994).

account was clearly designated as the account to receive the settlement payments for the benefit of the Trust.

Shirley never created a separate trust account with any banking institution to receive the annual settlement payments. There is no evidence in the record that Shirley sought legal advice or was given legal advice as to how to do so upon signing her divorce decree. The evidence shows that from at least 2001 until her death, Shirley simply directed the annual settlement payments be deposited into regular bank accounts.

Significantly, the last four annual settlement payments for a total of $80,000 were deposited into Shirley's designated accounts "FBO Shirley Krzycki, Trust." A portion of the first two of these four payments, $27,000 of $40,000, was transferred to the subject Wells Fargo account by Shirley, while the final two of these four payments were deposited into the Wells Fargo account upon Shirley's direction, for a total of $67,000 of settlement proceeds deposited into the account "for the benefit" of the Trust. The only other deposit made into this account was a transfer in the amount of $42,222.82 from the account Shirley opened with Commercial Federal when two of her certificates of deposit matured. Because it is uncontested that Shirley had no other large source of income, it is likely this money originated from two annual settlement payments and gained interest through Shirley's various deposits. Thus, we find the district court did not err in finding that the remaining $77,937.09 on deposit in the Wells Fargo account "for the benefit" of the Trust are trust proceeds belonging to the Trust, because no other separate trust account was created.

Whether Shirley Created Joint Tenancy Account at Wells Fargo.

We next address Robin's second assignment of error on appeal. Robin asserts that she has survivorship rights to the funds on deposit in the Wells Fargo account because Shirley named her as "Secondary Joint Owner" of the account. Robin argues that in doing so, Shirley created a joint tenancy account with rights of survivorship. Robin argues the district court correctly held, pursuant to this court's holding in *In re Estate of*

Lienemann,[4] that Shirley's creation of an account with Robin produces a presumption that Shirley intended for Robin to have the remainder of the account upon her death, and that such presumption can be overcome only by clear and convincing evidence. Robin asserts the district court erred in finding that Greg overcame this presumption based upon the evidence he presented at trial.

[1] Prior to 1993, in *In re Estate of Lienemann*, this court held that if a party opens a joint bank account, there is a presumption that the depositor intended the joint owner to own the funds upon the depositor's death, but that that presumption may be overcome by clear and convincing evidence.[5] In 1993, the relevant statutory provision upon which the *In re Estate of Lienemann* holding was based was repealed and the Nebraska Legislature passed Neb. Rev. Stat. §§ 30-2715 through 30-2746 (Reissue 2008), concerning nonprobate transfers of accounts. All personal accounts are subject to these statutes,[6] and the statutes are based upon §§ 6-201 through 6-227 of the Uniform Probate Code.[7] Thus, the *In re Estate of Lienemann* case, to the extent it addresses legal presumptions related to ownership of joint bank accounts, is no longer good law, and the district court erred in relying upon it.

[2,3] Pursuant to § 30-2719(a) of the new statutes, "[a] contract of deposit that contains provisions in substantially the form provided in this subsection establishes the type of account provided, and the account is governed by the provisions of sections 30-2716 to 20-2733 applicable to an account of that type." Thus, as this court held in *Eggleston v. Kovacich*,[8] even with clear and convincing evidence of intent, the provisions of a contract of deposit cannot be altered. Only if the contract of deposit does not conform to the statutory forms provided in

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[4] *In re Estate of Lienemann, supra* note 2.

[5] *Id.*

[6] See § 30-2718(b).

[7] Unif. Probate Code, rev. art. VI, §§ 6-201 through 6-227, 8 (part II) U.L.A. 433-48 (1998).

[8] *Eggleston v. Kovacich, supra* note 2. See § 30-2719(a).

§ 30-2719(a) may evidence be presented on the issue of the intent of the depositor.[9]

[4,5] The parties do not dispute that the contract establishing the Wells Fargo account does not conform to any of the statutory forms provided in § 30-2719(a). The Wells Fargo contract named Shirley as "Primary Joint Owner" and Robin as "Secondary Joint Owner." These titles are not listed or defined in § 30-2719(a). Pursuant to § 30-2719(a), an account may be a single-party account, a single-party account with a pay-on-death designation, a multiple-party account with a right of survivorship, a multiple-party account with a right of survivorship and a pay-on-death designation, a multiple-party account without a right of survivorship, or a single-party or multiple-party account with an agency designation. The agency designation may survive the disability or incapacity of the party or parties or terminate upon the disability or incapacity of the party or parties.[10] An agent "may make account transactions for parties but [has] no ownership or rights at death unless named as [a pay-on-death beneficiary]."[11] Section 30-2719(b) provides that when a contract does not conform to any of the statutory forms, it "is governed by the provisions of sections 30-2716 to 30-2733 applicable to the type of account that most nearly conforms to the depositor's intent." Section 30-2719(b) creates no presumption in favor of a type of account and does not set any standards related to burdens of proof.

[6,7] Accordingly, this court may look to the evidence beyond the contract of deposit establishing Shirley's intent in forming the Wells Fargo account. The court must then make a finding as to what kind of statutory account "most nearly conforms" to the account Shirley intended to create.[12] Because the proceeds of the account in dispute are in the hands of Robin, Greg has the burden to move forward with evidence

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[9] *Eggleston v. Kovacich, supra* note 2. See § 30-2719(b).

[10] § 30-2719(a).

[11] *Id.*

[12] § 30-2719(b). See, e.g., *In re Carstens*, No. BK10-83693-TJM, 2011 WL 869748 (Bankr. D. Neb. 2011).

on Shirley's intent. The court notes that when a dispute exists regarding the proportional ownership of multiple-party accounts during the lifetime of the parties, not a dispute regarding who owns the account as in this case, the statutes provide that certain statutory presumptions may be overcome only by "clear and convincing evidence."[13] However, § 30-2719(b) does not provide a certain burden of proof with which Greg must move forward.[14] Thus, the court will not write in a heightened burden of proof. We find that in order to succeed, Greg must prove his case as to Shirley's intent in creating the subject account by a greater weight of the evidence only. This appears to be the procedure Nebraska's federal bankruptcy court followed in *In re Carstens*.[15]

We find that based upon the evidence Greg provided through Shirley's will, the divorce decree, and the Trust document at trial, Shirley did not intend to create a survivorship account as Robin asserts. In her will, Shirley declared: "I intend to have in existence, at the time of my death, a bank account through which the settlement proceeds of a lawsuit which was filed in the year 1983 . . . shall pass." The parties do not dispute that the last 4 years of annual settlement payments were either directly deposited into the subject account or transferred to the account by Shirley. Shirley further expressed in her will:

> I direct that as those payments are received into said banking account, my children, or their issue by right of representation . . . , share equally in such payments. I intend to have one or more of my children listed on said account so as to enable them to obtain the funds for distribution according to this paragraph in any manner which may be convenient.

In keeping with these documents, Shirley named Robin, one of her children, on this account. Subject to the will, it is Robin's duty as one of Shirley's children "listed" on the designated account to receive the settlement payments in order

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[13] See § 30-2722(b).

[14] See *id*.

[15] *In re Carstens, supra* note 12.

to obtain the funds for equal distribution between herself and her siblings.

In signing the divorce decree to which the Trust document was attached, Shirley did not change her intent regarding the settlement funds as described in her will. The Trust document reiterates Shirley's intent that the funds from the settlement payments remaining upon her death are to be divided among her four children equally, not given solely to Robin.

We reject Robin's assertion that she had survivorship rights to the funds on deposit in the subject account. The statutes speak in terms of single-party or multiple-party accounts.[16] Based upon all the evidence presented, we find the subject account most nearly conforms to a single-party account with an agency designation. And under § 30-2720(c), the "[d]eath of the sole party or last surviving party terminates the authority of an agent." Thus, Shirley's death terminated Robin's authority as an agent. Hence, we conclude that Robin did not have survivorship rights to the funds upon Shirley's death.

Constructive Trust Claim.

Finally, Robin assigns that the district court erred in imposing a constructive trust on the Wells Fargo account without any finding that Robin obtained ownership of the account by fraud, misrepresentation, or abuse of an influential or confidential relationship. Greg sued Robin under the theories of both conversion and constructive trust. The district court found Greg succeeded on both claims. Because we have affirmed the district court's order finding Greg succeeded on his conversion claim, it is unnecessary for the court to address Robin's assignment of error related to Greg's alternate theory of recovery sounding in constructive trust.[17]

CONCLUSION

We conclude that the remaining sums on deposit in the subject Wells Fargo account "for the benefit" of the Trust are

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[16] See, e.g., §§ 30-2718(a) and 30-2719(a).

[17] See *Monahan v. School Dist. No. 1*, 229 Neb. 139, 425 N.W.2d 624 (1988).

trust funds belonging to the Trust. In creating the account, Shirley did not intend for Robin to have survivorship rights to the remaining balance of $77,937.09, and the account most nearly conforms to an agency or convenience account. Robin converted the funds in the account for her own use by refusing to turn them over to the Trust. Accordingly, we affirm the decision of the district court.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V.
DAMIEN D. WATKINS, APPELLANT.
825 N.W.2d 403

Filed November 30, 2012. No. S-11-1105.

1. **Postconviction: Proof: Appeal and Error.** A defendant requesting postconviction relief must establish the basis for such relief, and the findings of the district court will not be disturbed unless they are clearly erroneous.
2. **Postconviction: Constitutional Law: Proof.** A court must grant an evidentiary hearing to resolve the claims in a postconviction motion when the motion contains factual allegations which, if proved, constitute an infringement of the defendant's rights under the Nebraska or federal Constitution.
3. **Postconviction: Proof.** If a postconviction motion alleges only conclusions of fact or law, or if the records and files in the case affirmatively show that the defendant is entitled to no relief, the court is not required to grant an evidentiary hearing.
4. **Postconviction: Constitutional Law: Appeal and Error.** In appeals from postconviction proceedings, an appellate court reviews de novo a determination that the defendant failed to allege sufficient facts to demonstrate a violation of his or her constitutional rights or that the record and files affirmatively show that the defendant is entitled to no relief.
5. **Postconviction: Appeal and Error.** Whether a claim raised in a postconviction proceeding is procedurally barred is a question of law.
6. **Judgments: Appeal and Error.** When reviewing questions of law, an appellate court resolves the questions independently of the lower court's conclusion.
7. **Postconviction.** The need for finality in the criminal process requires that a defendant bring all claims for relief at the first opportunity.
8. **Postconviction: Appeal and Error.** It is fundamental that a motion for postconviction relief cannot be used to secure review of issues which were known to the defendant and could have been litigated on direct appeal.
9. ____: ____. An appellate court will not entertain a successive motion for postconviction relief unless the motion affirmatively shows on its face that the