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order denying Pittman's motion for postconviction relief is affirmed. Accordingly, the order of the district court denying Pittman's motion for postconviction relief is affirmed in part and in part reversed, and the cause is remanded with directions. The order denying Pittman's motion to alter or amend judgment is affirmed.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED WITH DIRECTIONS.

IRWIN, Judge, participating on briefs.

MOLLY M. PATTON, APPELLANT AND CROSS-APPELLEE, V. CURTIS L. PATTON, APPELLEE AND CROSS-APPELLANT.

818 N.W.2d 624

Filed July 24, 2012. No. A-11-461.

1. **Divorce: Child Custody: Child Support: Property Division: Alimony: Attorney Fees: Appeal and Error.** An appellate court's review in an action for dissolution of marriage is de novo on the record to determine whether there has been an abuse of discretion by the trial judge. This standard of review applies to the trial court's determinations regarding custody, child support, division of property, alimony, and attorney fees.
2. **Judges: Words and Phrases.** A judicial abuse of discretion requires that the reasons or rulings of a trial judge be clearly untenable, unfairly depriving a litigant of a substantial right and a just result.
3. **Evidence: Appeal and Error.** When evidence is in conflict, an appellate court considers, and may give weight to, the fact that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another.
4. **Child Support: Rules of the Supreme Court: Appeal and Error.** Interpretation of the Nebraska Child Support Guidelines presents a question of law, regarding which an appellate court is obligated to reach a conclusion independent of the determination reached by the court below.
5. **Child Support: Rules of the Supreme Court: Insurance: Proof.** The Nebraska Child Support Guidelines provide that the increased cost to the parent for health insurance for the children shall be prorated between the parents. The parent paying the premium receives a credit against his or her share of the monthly support, provided that the parent requesting the credit submits proof of the cost of health insurance coverage for the children.
6. **Child Custody: Child Support: Rules of the Supreme Court: Time: Words and Phrases.** The Nebraska Child Support Guidelines relative to joint physical custody provide that a "day" shall be generally defined as including an overnight period.

7. **Child Custody: Child Support: Rules of the Supreme Court: Time: Presumptions.** When a specific provision for joint physical custody is ordered and each party's parenting time exceeds 142 days per year, it is a rebuttable presumption that support shall be calculated using the joint custody worksheet of the Nebraska Child Support Guidelines.
8. **Child Support: Rules of the Supreme Court.** The Nebraska Child Support Guidelines offer flexibility and guidance, with the understanding that not every child support scenario will fit neatly into the calculation structure.
9. ___: ____. The main principle behind the child support guidelines is to recognize the equal duty of both parents to contribute to the support of their children in proportion to their respective net incomes.
10. **Alimony.** In addition to the specific criteria listed in Neb. Rev. Stat. § 42-365 (Reissue 2008), in considering alimony upon a dissolution of marriage, a court is to consider the income and earning capacity of each party, as well as the general equities of each situation.
11. ____. Alimony should not be used to equalize the incomes of the parties or to punish one of the parties.
12. ____. Disparity in income or potential income may partially justify an award of alimony.
13. ____. In determining whether alimony should be awarded, in what amount, and over what period of time, the ultimate criterion is one of reasonableness.
14. **Alimony: Appeal and Error.** In reviewing an alimony award, an appellate court does not determine whether it would have awarded the same amount of alimony as did the trial court, but whether the trial court's award is untenable such as to deprive a party of a substantial right or just result.
15. **Property Division.** Under Neb. Rev. Stat. § 42-365 (Reissue 2008), the equitable division of property is a three-step process. The first step is to classify the parties' property as marital or nonmarital. The second step is to value the marital assets and marital liabilities of the parties. The third step is to calculate and divide the net marital estate between the parties in accordance with the principles contained in § 42-365.
16. ____. Although the division of property is not subject to a precise mathematical formula, the general rule is to award a spouse one-third to one-half of the marital estate, the polestar being fairness and reasonableness as determined by the facts of each case.

Appeal from the District Court for Douglas County: MARLON A. POLK, Judge. Affirmed in part, and in part reversed and remanded with directions.

Christopher A. Vacanti, of Vacanti Shattuck, for appellant.

Justin A. Roberts, of Lustgarten & Roberts, P.C., L.L.O., for appellee.

INBODY, Chief Judge, and MOORE and PIRTLE, Judges.

MOORE, Judge.

INTRODUCTION

Molly M. Patton appeals, and Curtis L. Patton cross-appeals, from the decree of dissolution entered by the district court for Douglas County. At issue in this appeal is the determination of child support, alimony, and division of the parties' retirement accounts. For the reasons set forth below, we find no error in the court's use of the joint custody child support worksheet or in its award of alimony and division of the retirement accounts. We do find error in the court's determination of Curtis' income and its calculation of the health insurance premium for the minor children.

BACKGROUND

Molly and Curtis were married on November 20, 1993, and two minor children have been born to the marriage. In April 2010, Molly filed a complaint for dissolution of marriage. A temporary order was entered in August which provided for the parties to have joint legal custody, with Molly designated as the primary residential parent and Curtis provided with parenting time. Curtis was required to pay $1,000 per month temporary child support and $300 per month temporary spousal support.

Trial was held in February 2011. The parties' negotiated parenting plan was approved by the district court. The plan provided for the parties to have joint legal custody and for Molly to have primary physical possession of the children. The plan provided for Curtis to have parenting time on alternate weekends from Friday at 5 p.m. to Monday at 8 a.m., every Wednesday from 5 p.m. to Thursday at 8 a.m., and on alternating Thursdays from 5 p.m. to Friday morning at 8 a.m. In addition, Curtis was provided with up to 7 days of vacation parenting time each year and alternating holidays as specified in the plan.

Evidence was adduced regarding the unresolved issues of child support, alimony, and division of the parties' marital estate.

Molly has a high school education and took some college courses prior to her marriage and prior to having children;

however, she did not complete a degree. Molly has been employed on a full-time basis throughout the marriage, with the exception of maternity leave after the children were born and a brief period when she was laid off from a previous job. At the time of trial, Molly was employed full time as a communications manager at an engineering firm at an hourly wage of $19.23. Molly works some overtime; however, overtime hours are not guaranteed. Molly's 2010 W-2 statement shows gross wages of $42,436, and after deductions for contributions to her 401K and cafeteria plan, her reported W-2 wages were $38,068. Molly has health and dental insurance for the children through her employment which costs her $294 per month and which is deducted from her earnings each month. Molly submitted an exhibit showing that monthly expenses for her and the children are $3,998.

Curtis is employed at an automobile dealership as the service drive manager. Curtis' income fluctuates annually and is based partially on commissions. His W-2 statements for 2007, 2008, and 2009 show gross wages of $72,934, $80,168, and $88,902, respectively. Curtis' W-2 for 2010 was not offered; however, his 2010 paystubs were received in evidence and showed gross income for 2010 of $87,764. Curtis testified that his current income has decreased, because in June 2010, the company lowered its compensation for the "customer satisfaction index" portion of his contract. Curtis' prior and current compensation agreements were received in evidence. Under both agreements, Curtis' base annual salary is $44,400. Under the prior agreement, Curtis received 2 percent of the adjusted net profit from the service department (net profit incentive). This percentage was increased to 2.5 percent under the current agreement. The contracts also provided a formula by which Curtis could receive a bonus based upon customer satisfaction surveys received by the service department (customer satisfaction bonus). Under the current agreement, the maximum amount of customer satisfaction bonus that Curtis could receive is $2,000. The net profit incentive and customer satisfaction bonus were paid separately from the base salary; however, the incentive and bonus were combined on the paystubs and collectively labeled as commissions. The 2010

paystubs show that the monthly commissions varied, ranging from $2,117 to $5,469. Curtis previously received additional compensation in the form of a car allowance and fuel allowance; however, this benefit was eliminated as of January 1, 2011, as confirmed by correspondence from Curtis' employer received in evidence. Curtis created an exhibit showing that his gross income from July 8, 2010, through January 24, 2011, was $47,905, from which he deducted the car and fuel allowances that he will no longer receive, arriving at an adjusted gross income for that time period of $45,647, or $6,521 per month. Curtis submitted an exhibit of monthly living expenses totaling $4,220. Although he was living in the basement of his father's house at the time of trial, Curtis included an anticipated rent amount of $1,000 for a three-bedroom apartment.

Molly submitted a sole custody child support worksheet, utilizing $5,532 for Curtis' net monthly income and $1,844 for her net monthly income, which placed Curtis' child support obligation at $1,433 per month for two children. Molly's calculation did not show gross income figures or deductions. Curtis submitted a child support worksheet utilizing $6,521 for his gross monthly income, $4,403 for his net monthly income, $3,505 for Molly's gross monthly income, and $2,753 for her net monthly income, which resulted in a child support obligation of $1,278 for two children. However, Curtis then prepared a calculation using a joint physical custody worksheet. He calculated the number of days that the children are in his custody at 160, or 43.8 percent of the year, and arrived at his monthly support obligation of $620.72.

Molly also asked for $500 per month in alimony for 8 years. Curtis opposed Molly's request for alimony, testifying that she did not give up any opportunities because of his career and that they shared in most of the household and child-rearing duties during the marriage. During closing remarks, Curtis' counsel suggested that alimony of $300 per month for 3 or 4 years would be appropriate.

The parties filed a chapter 13 bankruptcy proceeding in January 2010 that requires a $725 monthly payment for 5 years, which payment the parties had been splitting equally. In addition, the parties owe a marital debt to Molly's mother

of $3,500. The marital home was in foreclosure at the time of trial. The parties own one-half of a Florida time-share with Molly's parents. The parties also own vehicles and personal property.

The parties each have a retirement account. Curtis has a retirement/profit-sharing account with his employer valued at $9,300.94 as of September 30, 2010. Molly has a 401K profit-sharing/savings plan with her employer valued at $29,392 as of August 6, 2010, against which a loan of $6,000 had been taken in April 2010. The loan is being paid by Molly through monthly payroll deductions, and the outstanding balance of the loan as of January 2011 was $5,243.

The decree of dissolution was entered on April 1, 2011. The court adopted Curtis' child support worksheet, setting Curtis' child support at $620 per month for two children. Molly was ordered to maintain the existing health insurance coverage on the children. The parties were ordered to split the unreimbursed medical expenses and daycare expenses by Curtis paying 62 percent and Molly paying 38 percent of such expenses. Curtis was ordered to pay $400 per month in alimony for 48 months. The parties were ordered to each pay one-half of the bankruptcy plan payments, Molly was ordered to pay the debt to her mother, Molly was awarded the Florida time-share, and each party was awarded his or her own retirement and other accounts, as well as the personal property in his or her respective possession. Each party was ordered to pay his or her own attorney fees and costs.

On April 6, 2011, Molly filed a motion to alter or amend the decree, seeking alteration of the child support award. On April 8, Curtis filed a motion for new trial, alleging that there was an abuse of discretion in the court's award of alimony and that the division of the retirement accounts and time-share was inequitable. On May 6, the court entered an "Amendment to Decree," adding a paragraph to the decree, consistent with the Nebraska Child Support Guidelines, providing that in addition to the child support ordered in the decree, all reasonable and necessary direct expenditures made solely for the children such as clothing, schooling, extracurricular activities, or school-related expenses shall be allocated between the parties,

with Molly responsible for 38 percent and Curtis responsible for 62 percent of such expenses. See Neb. Ct. R. § 4-212 (rev. 2011).

Molly filed a timely appeal, and Curtis cross-appeals.

ASSIGNMENTS OF ERROR

Molly assigns error to the district court's award of child support. In his cross-appeal, Curtis alleges that the district court erred in awarding Molly alimony and in failing to divide the parties' retirement accounts on an equitable basis.

STANDARD OF REVIEW

[1,2] An appellate court's review in an action for dissolution of marriage is de novo on the record to determine whether there has been an abuse of discretion by the trial judge. *Klimek v. Klimek*, 18 Neb. App. 82, 775 N.W.2d 444 (2009). This standard of review applies to the trial court's determinations regarding custody, child support, division of property, alimony, and attorney fees. *Id.* A judicial abuse of discretion requires that the reasons or rulings of a trial judge be clearly untenable, unfairly depriving a litigant of a substantial right and a just result. *Id.*

[3] When evidence is in conflict, an appellate court considers, and may give weight to, the fact that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another. *Millatmal v. Millatmal*, 272 Neb. 452, 723 N.W.2d 79 (2006).

[4] Interpretation of the Nebraska Child Support Guidelines presents a question of law, regarding which an appellate court is obligated to reach a conclusion independent of the determination reached by the court below. *Gallner v. Hoffman*, 264 Neb. 995, 653 N.W.2d 838 (2002).

ANALYSIS

Child Support.

Molly argues that the district court abused its discretion in its determination of child support. Molly asserts that the district court did not accurately determine the parties' current income, did not use the correct amount for the health

insurance premium for the children, and erred in utilizing a joint custody calculation.

The court adopted the child support worksheets proposed by Curtis at trial, as is evidenced by the worksheets attached to the decree of dissolution. In these worksheets, Molly's gross monthly income was set at $3,505 and Curtis' was set at $6,521. The record shows that Molly's gross monthly income for 2010 was $3,536, which is very close to the amount utilized by the court. We find no error in the calculation of Molly's income. Molly argues that the amount utilized for Curtis was based upon an "arbitrary" timeframe from July 2010 through January 2011, which timeframe failed to take into account the fluctuations that occur to his income, which is based significantly on commissions. Brief for appellant at 10. Molly contends that the court should have used Curtis' entire 2010 income.

According to the paystubs in evidence, Curtis' gross income for 2010 was $87,764, or $7,313 per month. Curtis presented evidence that the "customer satisfaction index" portion of his income was declining due to a change in his contract in June 2010. He testified that under the current formula, the maximum that he could earn is $2,000, whereas he had earned between $2,500 and $3,000 under the previous formula. However, because the 2010 paystubs combine the customer satisfaction bonus with the net profit incentive, it is impossible to tell how much of the compensation is derived from each element. Given that the net profit incentive percentage was increased in the current agreement and there was no evidence presented to separate the net profit incentive from the customer satisfaction bonus, we cannot find that Curtis' income has decreased as a result of the change in the customer satisfaction bonus provision. Thus, we reject his calculation of income based upon an arbitrary timeframe from July 2010 through January 2011. Further, because there are fluctuations in the monthly commission compensation, it would be unfair to eliminate the first 6 months of 2010, particularly since the January commission compensation was significantly higher than any of the other months. Thus, we determine that the district court erred in adopting Curtis' income calculation. We conclude that the court

should have used Curtis' gross annual income for 2010 in the amount of $87,764 as the starting point in determining Curtis' current income for purposes of setting the child support obligation. The evidence does show that Curtis would no longer receive the car and fuel allowances beginning January 2011, which compensation totaled $4,515 in 2010 and was included in his gross income. Using Curtis' gross annual income for 2010 of $87,764, less the allowances income of $4,515, results in a gross income figure of $83,249, or $6,937 per month. We conclude that the district court erred in using the sum of $6,521 for Curtis' gross monthly income in calculating child support. On remand, the court is directed to use the sum of $6,937 for Curtis' gross monthly income.

[5] Molly also argues that the district court did not use the correct amount for the health insurance premium paid by Molly for the benefit of the minor children. The Nebraska Child Support Guidelines provide that the increased cost to the parent for health insurance for the children shall be prorated between the parents. The parent paying the premium receives a credit against his or her share of the monthly support, provided that the parent requesting the credit submits proof of the cost of health insurance coverage for the children. See Neb. Ct. R. § 4-215(A) (rev. 2011). Molly testified and submitted documentation which shows that her monthly cost to provide health and dental insurance for the children is $294.32. Curtis used a sum of $198 for the health insurance premium, which figure was adopted by the district court in its calculation. However, there is no evidence in the record to support that figure. We conclude that the district court erred in failing to use the correct amount for the health insurance premium that Molly pays for the children in determining each parent's share of support. On remand, the court is directed to use the sum of $294 for the health insurance premium for the children.

[6] Finally, Molly argues that the district court erred in utilizing a joint custody child support calculation. Molly first challenges the calculation of the number of days the children are with Curtis, which Curtis and the district court determined to be 160 days per year. The current child support guidelines relative to joint physical custody provide that a "day" shall be

generally defined as including an overnight period. § 4-212. Under the parties' parenting plan, Curtis has the children every other Friday from 5 p.m. to Monday at 8 a.m. (3 days × 26 weeks = 78 days), every Wednesday overnight from 5 p.m. to Thursday at 8 a.m. (1 day × 52 weeks = 52 days), and every other Thursday night from 5 p.m. to Friday at 8 a.m. (1 day × 26 weeks = 26 days). These parenting time periods equal 156 days per year. Curtis rounded the figure up to 160 by considering the potential for additional parenting time he may have under the plan when Molly is required to travel for her employment. We also note that the parenting plan provides Curtis with 7 additional vacation days each year. Thus, we find no error in the district court's calculation that Curtis has the children in his possession 160 days per year.

[7] We next address the question of whether the district court erred in using the joint custody calculation worksheet. Section 4-212 of the guidelines provides that "[w]hen a specific provision for joint physical custody is ordered and each party's parenting time exceeds 142 days per year, it is a rebuttable presumption that support shall be calculated using worksheet 3." Molly argues that the parenting plan and decree do not contain a specific provision for joint physical custody. Rather, the plan and decree provide for joint legal custody, with primary physical possession with Molly. Curtis argues that it is the actual custody arrangement, as opposed to the label, that dictates the use of the joint custody worksheet.

Several prior cases have addressed the use of the joint custody child support worksheet under prior versions of the child support guidelines, which guidelines did not contain the rebuttable presumption language above, but which provided that the joint custody child support worksheet may be used "when a specific provision for joint physical custody is ordered," leaving the decision to the discretion of the trial court.

In *Elsome v. Elsome*, 257 Neb. 889, 601 N.W.2d 537 (1999) (*Elsome*), the parties' decree provided for shared joint legal custody of the children, but neither party was designated as the primary physical custodian. The decree provided for a detailed shared custody arrangement which generally provided

that the children spend 4 days every week with the mother and 3 days every week with the father. At a subsequent modification hearing, the evidence showed that the arrangement had been slightly modified by the parties, such that the children were in the father's physical custody 38 to 40 percent of the time. On appeal from the modification order increasing the father's child support obligation, the Nebraska Supreme Court found that the district court erred in failing to use the joint custody worksheet in calculating child support, because the father had proved that a joint physical custody arrangement existed.

In *Pool v. Pool*, 9 Neb. App. 453, 613 N.W.2d 819 (2000) (*Pool*), also an appeal from a modification action, this court found that the district court erred in using the joint custody worksheet for purposes of determining child support. The original decree provided for joint custody of the children, but custody was modified to give the mother sole custody and the father was provided with visitation of every other weekend, plus an additional weekend day per month; weekday visitation two times a week from 4 to 8 p.m.; alternating holidays; and extended summer visitation continuously from June 1 to July 31 each year. The father's child support obligation was increased, using the joint custody worksheet. In a second modification proceeding, the district court again increased the father's child support obligation using the joint custody worksheet, finding that there had not been a material change in circumstances with regard to the amount of time that each party spent with the children. On appeal, we found that the parties did not have a true physical joint custody arrangement, as existed in *Elsome*, but that the mother had sole physical custody and the father had rather "'typical'" visitation. *Pool*, 9 Neb. App. at 458, 613 N.W.2d at 824. Thus, we found that it was error to base child support on the joint custody worksheet.

In *Heesacker v. Heesacker*, 262 Neb. 179, 629 N.W.2d 558 (2001) (*Heesacker*), the Supreme Court affirmed the trial court's use of the sole custody worksheet where the mother had physical custody and the father had liberal visitation which amounted to 144 days a year, or 39.45 percent of the time. In reaching this decision, the Supreme Court found that

the mother was the physical custodian who "deals most with [the child's] needs and the physical and emotional demands of her day-to-day care." *Id.* at 185, 629 N.W.2d at 562. The court found that the facts in *Heesacker* were distinguishable from *Elsome*, where the parents had an alternating, continuous physical custody arrangement, and further found that the facts were more in line with *Pool*, where the father had a "typical" visitation schedule which did not satisfy the requirements of joint physical custody. See, also, *Mathews v. Mathews*, 267 Neb. 604, 676 N.W.2d 42 (2004) (use of sole custody worksheet appropriate where mother had sole custody of children and father did not share joint physical custody).

This court again found that application of a joint custody calculation to determine child support was in error in *Drew on behalf of Reed v. Reed*, 16 Neb. App. 905, 755 N.W.2d 420 (2008). The version of the child support guidelines in effect at the time of trial and judgment in *Reed* continued to provide for the discretionary use of the joint custody worksheet "when a specific provision for joint physical custody is ordered." In *Reed*, the mother had sole legal and physical custody of the children and the father's parenting time amounted to 43 percent of the year, which the trial court found came close enough to "'factual joint custody.'" 16 Neb. App. at 907, 755 N.W.2d at 424. In modifying the trial court's order, we found that although the father "has extensive and varied parenting times, it is best described as liberal visitation," similar to *Pool* and *Heesacker*, and distinguishable from the detailed shared physical custody arrangement in *Elsome*. *Reed*, 16 Neb. App. at 911, 755 N.W.2d at 426.

Finally, in *Lucero v. Lucero*, 16 Neb. App. 706, 750 N.W.2d 377 (2008), this court addressed use of the joint custody worksheet following amendment to the guidelines as is now reflected in the current rule, § 4-212, which provides for a rebuttable presumption for use of the joint custody worksheet "[w]hen a specific provision for joint physical custody is ordered and each party's parenting time exceeds 142 days per year." In *Lucero*, there was no provision for joint physical custody of the child and the obligor mother's maximum visitation amounted to 90 days per year. Thus, we concluded that the

district court did not abuse its discretion in not using the joint custody worksheet.

We now turn to the facts present in the instant action. Although the parties share joint legal custody, Molly has primary physical possession. Thus, there is no "specific provision for joint physical custody." In *Elsome*, the Supreme Court found that although there was not a specific provision for joint physical custody, the actual parenting arrangement amounted to joint physical custody. We recognize that there are distinctions between *Elsome* and the case at hand. First, the decree in *Elsome* provided for joint legal custody but was silent as to physical custody, whereas in our case, primary physical possession was awarded to Molly. Second, the actual parenting arrangement in *Elsome* was a continuous alternating schedule, whereas in our case, Curtis has more of a "typical" visitation schedule, more akin to the situations in *Pool*, *Heesacker*, and *Reed, supra*, although Curtis' time with the children is greater than in those cases. Thus, at least with respect to the first requirement in the current guidelines—a specific provision for joint physical custody—the facts of this case do not support use of the joint physical custody worksheet as clearly as was present in *Elsome*.

However, the second portion of the current guidelines—when each party's parenting time exceeds 142 days per year—is clearly present in this case and distinguishes it from the prior cases discussed above. As we previously determined, Curtis has parenting time with the children at least 160 days a year, which satisfies the threshold for using the joint custody worksheet.

[8,9] The ultimate question becomes, then, whether the lack of a specific provision for joint physical custody prevents use of the joint custody worksheet when the threshold amount of parenting time is met for application of the rebuttable presumption. Under the circumstances of this case, we conclude that it does not. In reaching this conclusion, we note that the Nebraska Child Support Guidelines offer flexibility and guidance, with the understanding that not every child support scenario will fit neatly into the calculation structure. *Gress v. Gress*, 271 Neb. 122, 710 N.W.2d 318 (2006). The main principle behind the

child support guidelines is to recognize the equal duty of both parents to contribute to the support of their children in proportion to their respective net incomes. *Hendrix v. Sivick*, 19 Neb. App. 140, 803 N.W.2d 525 (2011). Considering that Curtis has the children at least 160 days per year, which is roughly 45 percent of the year, we conclude that he should be deemed to have joint physical custody for purposes of the child support calculation and that it was not error for the court to use the joint custody worksheet. In reaching this conclusion, we note that in addition to his monthly child support obligation, Curtis is also required to pay for his proportionate share of all reasonable and necessary direct expenditures for the children such as clothing, schooling, extracurricular activities, and school-related expenses.

In conclusion, we find that the district court erred in its determination of Curtis' income and the amount of the health insurance premium paid by Molly for the minor children. We find no error in the district court's use of the joint custody support worksheet and in its determination of the number of days the children are in Curtis' custody. We reverse the award of child support and remand the cause to the district court for a proper calculation of child support, utilizing $6,937 as gross monthly income for Curtis and $294 as the health insurance premium for the minor children.

Alimony.

Curtis assigns error to the district court's award of alimony to Molly. The court awarded alimony of $400 per month for 48 months.

[10] Neb. Rev. Stat. § 42-365 (Reissue 2008) provides in part:

> 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.

In addition to the specific criteria listed in § 42-365, a court is to consider the income and earning capacity of each party, as well as the general equities of each situation. *Millatmal v. Millatmal*, 272 Neb. 452, 723 N.W.2d 79 (2006).

[11-13] Alimony should not be used to equalize the incomes of the parties or to punish one of the parties. *Marcovitz v. Rogers*, 267 Neb. 456, 675 N.W.2d 132 (2004). However, disparity in income or potential income may partially justify an award of alimony. *Hosack v. Hosack*, 267 Neb. 934, 678 N.W.2d 746 (2004). In determining whether alimony should be awarded, in what amount, and over what period of time, the ultimate criterion is one of reasonableness. *Sitz v. Sitz*, 275 Neb. 832, 749 N.W.2d 470 (2008).

The parties were married for approximately 17 years. Curtis has consistently earned approximately twice as much income as Molly. Molly works on a full-time basis, as well as some overtime, and there is no argument that she is underemployed. Her net income, even after receipt of child support, is insufficient to meet her monthly expenses. On the other hand, Curtis' net monthly income, even after payment of child support, will allow him to meet his monthly expenses and pay the alimony obligation.

[14] In reviewing an alimony award, an appellate court does not determine whether it would have awarded the same amount of alimony as did the trial court, but whether the trial court's award is untenable such as to deprive a party of a substantial right or just result. *Sitz, supra*. After considering all of the factors involved in an award of alimony and the particular facts of this case, we find no abuse of discretion in the district court's award of alimony to Molly of $400 for 48 months.

Division of Retirement Accounts.

Curtis argues that the court's division of the parties' retirement accounts results in an inequitable division of property.

[15,16] Under § 42-365, the equitable division of property is a three-step process. The first step is to classify the

parties' property as marital or nonmarital. The second step is to value the marital assets and marital liabilities of the parties. The third step is to calculate and divide the net marital estate between the parties in accordance with the principles contained in § 42-365. *Gress v. Gress*, 271 Neb. 122, 710 N.W.2d 318 (2006). Although the division of property is not subject to a precise mathematical formula, the general rule is to award a spouse one-third to one-half of the marital estate, the polestar being fairness and reasonableness as determined by the facts of each case. *Id.*

In this case, there is no dispute that all of the parties' assets and debts are marital in nature. The district court did not value the marital assets and liabilities in its division of property. The district court awarded each party his or her respective retirement account. Curtis' account was valued at $9,300, and Molly's was valued at $29,392, less the outstanding loan of $5,243, for a net value of $24,149. There was limited evidence presented regarding the value of the balance of the parties' assets, and their testimony was divergent. The parties had apparently agreed to the division of the rest of their personal property. Curtis maintains that the division of this remaining property resulted in a fairly even distribution but that he should be awarded an equalization payment or a qualified domestic relations order to equalize the division of the retirement accounts. Molly maintains that Curtis received a greater value of the remaining assets, such that the award to each party of his or her respective retirement account is appropriate.

Molly testified that Curtis owns a life insurance policy with a surrender value of $2,400, which is verified by the list of assets in their bankruptcy schedule. Molly was awarded the one-half interest in the Florida time-share. Molly testified that the time-share was valued at $8,000; however, it is not clear from the record whether this is the total value or the value for their one-half interest. This asset is not included or valued in the bankruptcy schedule. Each party was awarded the vehicles and personal property in his or her respective possession. Specifically, Molly received the 2008 Chevrolet Equinox, valued by both parties at approximately $12,000, and Curtis was

awarded the 2005 Chevrolet Trailblazer and the 1993 Ford F-150 pickup. Curtis submitted a valuation of the Trailblazer of approximately $7,500. Molly testified that the Ford pickup was worth $1,800; however, the bankruptcy schedule valued it at $200. Curtis' personal property includes guns, hunting equipment, and a kayak which Molly valued at $9,000, $5,000, and $1,500, respectively. On the other hand, Curtis testified that the values of the hunting equipment and kayak were inflated; he testified they were worth approximately $500 to $700, and $300, respectively. He did not testify about the value of his guns. In addition to the equal division of the bankruptcy plan payment between the parties, Molly was ordered to pay the outstanding debt to her mother of $3,500, which money was used to purchase a vehicle for Curtis.

Under the circumstances of this case and given the divergent evidence, we cannot say that the district court abused its discretion in the division of the marital estate, including the award to each party of his or her respective retirement account.

CONCLUSION

The district court did not err in its award of alimony, in its division of the parties' retirement accounts, or in using the joint custody child support worksheet under the circumstances of this case. However, the court erred in its calculation of Curtis' income and of the amount of health and dental insurance premium attributable to the children. We therefore affirm in part, and in part reverse and remand with directions to recalculate the child support as discussed above.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED WITH DIRECTIONS.

STATE OF NEBRASKA, APPELLEE, V.
LUKE R. OHLRICH, APPELLANT.
817 N.W.2d 797

Filed July 31, 2012. No. A-11-559.

1. **Criminal Law: Statutes.** Neb. Rev. Stat. § 29-215 (Reissue 2008) is a penal statute that must be strictly construed.