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11/02/2026 07:40 AM CST

removing drunken drivers from the highways. *Marshall v. Wimes*, 261 Neb. 846, 626 N.W.2d 229 (2001). See, also, *Mackey v. Montrym*, 443 U.S. 1, 99 S. Ct. 2612, 61 L. Ed. 2d 321 (1979). The government also has an interest in ensuring that the ALR hearing will proceed in an orderly manner. § 60-498.01(7).

[31,32] The concept of due process embodies the notion of fundamental fairness and defies precise definition. *Marshall v. Wimes, supra*. Due process is a flexible notion that must be decided on the facts presented in a particular case and calls for such procedural protections as the particular situation demands. *Id*. We determine, based on the facts presented in this particular case, that allowing the arresting officer to testify by telephone did not violate Penry's due process rights. Consequently, the district court erred in concluding otherwise.

CONCLUSION

We conclude that the district court erred in finding that there was no statutory authorization for allowing the arresting officer to be sworn and to testify by telephone at the ALR hearing and in finding that such procedure violated Penry's due process rights. Accordingly, we reverse the judgment of the district court and remand the cause with directions to affirm the revocation of Penry's driving privileges.

REVERSED AND REMANDED WITH DIRECTIONS.

TIMOTHY J. POHLMANN, APPELLANT AND CROSS-APPELLEE, V. JANNA B. POHLMANN, APPELLEE AND CROSS-APPELLANT.

824 N.W.2d 63

Filed November 13, 2012. No. A-11-1041.

1. **Divorce: Child Custody: Child Support: Property Division: Alimony: 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, and alimony.
2. **Judgments: Words and Phrases.** An abuse of discretion occurs when the trial court's decision is based upon reasons that are untenable or unreasonable or if its action is clearly against justice or conscience, reason, and evidence.

3. **Evidence: Appeal and Error.** Where credible evidence is in conflict on a material issue of fact, the appellate court considers, and may give weight to, the fact that the trial court heard and observed the witnesses and accepted one version of the facts rather than another.
4. **Child Custody: Appeal and Error.** In contested custody cases, where material issues of fact are in great dispute, the standard of review and the amount of deference granted to the trial judge, who heard and observed the witnesses testify, are often dispositive of whether the trial court's determination is affirmed or reversed on appeal.
5. **Divorce: Property Division: Appeal and Error.** As a general principle, the date upon which a marital estate is valued should be rationally related to the property composing the marital estate, and the date of valuation is reviewed for an abuse of the trial court's discretion.
6. **Divorce: Property Division: Equity.** The purpose of assigning a date of valuation in a decree is to ensure that the marital estate is equitably divided.
7. **Trial: Expert Witnesses.** The determination of the weight that should be given expert testimony is uniquely the province of the fact finder.
8. **Alimony.** Disparity in income or potential income may partially justify an award of alimony.
9. ____. An award of alimony is intricately tied to the incomes and other relevant financial circumstances of each party.

Appeal from the District Court for Thayer County: VICKY L. JOHNSON, Judge. Affirmed in part, and in part reversed and remanded with directions.

Joseph H. Murray, P.C., L.L.O., of Germer, Murray & Johnson, and Lyle J. Koenig for appellant.

John W. Ballew, Jr., and Gregory A. Butcher, of Ballew, Covalt & Hazen, P.C., L.L.O., for appellee.

IRWIN, SIEVERS, and PIRTLE, Judges.

IRWIN, Judge.

I. INTRODUCTION

Timothy J. Pohlmann appeals and Janna B. Pohlmann cross-appeals from a decree of dissolution entered by the district court, which decree dissolved the parties' marriage, divided the marital assets and debts, awarded Janna custody of the parties' minor children, and ordered Timothy to pay child support and alimony. On appeal, Timothy asserts that the district court erred in awarding custody of the parties' children to Janna, in dividing the parties' marital property, in calculating

his income, and in awarding Janna alimony. On cross-appeal, Janna also asserts that the district court erred in calculating Timothy's income.

Upon our de novo review of the record, we cannot say that the district court abused its discretion in awarding custody of the parties' children to Janna or in dividing the parties' marital property. However, we find that the court did abuse its discretion in calculating Timothy's income. As a result of this error, we remand the matter to the district court to recalculate Timothy's annual income and to provide a recitation of the factual basis for its calculation. In addition, we reverse the district court's determinations concerning Timothy's child support obligation and Janna's alimony award, because the court should reconsider these awards in light of any changes to the calculation of Timothy's income.

II. BACKGROUND

Timothy and Janna were married on July 17, 1999, in Deshler, Nebraska. They have resided in Deshler continuously since the time of their marriage.

Three children were born of the marriage. The oldest child was born in April 2001, the second child was born in March 2003, and the youngest child was born in December 2006. All three children were minors at the time of the trial.

Throughout the majority of the parties' marriage, Timothy has been the primary financial provider for the family. He is self-employed as a farmer in Deshler. The parties own and rent a significant amount of land for Timothy to farm. In addition, Timothy assists his parents in farming and maintaining their land in exchange for his use of their farming equipment and machinery on his farmland.

Janna has been a stay-at-home mother for a majority of the parties' marriage. However, at various times during the marriage, she has been employed as a teacher within the Deshler community. In addition, she has assisted in managing the parties' farming operation.

On April 15, 2010, Timothy filed a complaint for dissolution of marriage. Timothy specifically asked that the parties' marriage be dissolved, that their marital assets and

debts be equitably divided, that he be awarded temporary and permanent custody of the parties' three minor children, and that Janna be ordered to pay temporary and permanent child support.

On April 29, 2010, Janna filed an answer and cross-complaint for dissolution of marriage. In her cross-complaint, Janna specifically asked that the parties' marriage be dissolved, that their marital assets and debts be equitably divided, that she be awarded temporary and permanent custody of the parties' minor children, and that Timothy be ordered to pay temporary and permanent child support and alimony and a portion of her attorney fees.

On June 21, 2010, the district court entered an order awarding Janna temporary custody of the children pending a trial and subject to Timothy's "reasonable rights of parenting time." In addition, the court ordered Timothy to vacate the marital home where the parties had been residing together and ordered him to "keep current the house payments, taxes and insurance, as well as licensing, taxes and insurance on any vehicles owned or used by the parties [and] to keep current the family's medical insurance." The court awarded Janna temporary child support in the amount of $1,725.03 per month, temporary alimony in the amount of $1,000 per month, and attorney fees in the amount of $2,000.

On July 26 through 29, 2011, trial was held. At trial, both parties testified concerning their employment histories, their relationships with the children and with each other, their contributions to the marriage, their present finances, and their marital property. In addition, each party presented the testimony of numerous witnesses concerning both Timothy's and Janna's general parenting abilities and fitness and their connections to the Deshler community. We will provide a more detailed recitation of the evidence presented by the parties as necessary in our analysis below.

After the trial, the district court entered a decree of dissolution. The court divided the parties' marital assets and debts; awarded Janna permanent custody of the children, subject to Timothy's parenting time; and ordered Timothy to pay child support, alimony, and a portion of Janna's attorney fees.

Subsequent to the entry of the decree, Timothy filed a motion for new trial. In the motion, he alleged that there was insufficient evidence to support the district court's findings with regard to custody of the children, the calculation of child support, the award of alimony to Janna, the division of the marital estate, and the award of attorney fees to Janna. He requested that the court vacate the decree of dissolution and grant a new trial.

A hearing was held on Timothy's motion. After the hearing, the district court entered an order indicating that it was treating Timothy's motion for new trial as a "motion to alter and amend." The court then altered the decree of dissolution such that Timothy was awarded certain additional marital property and a credit for mediation fees he had paid during the pendency of the proceedings and the value of certain property awarded to Janna was changed to more accurately reflect the testimony presented at trial. The district court stated that "all other provisions of [the] decree shall remain in full force and effect."

Timothy appeals and Janna cross-appeals here.

III. ASSIGNMENTS OF ERROR

On appeal, Timothy assigns four errors. He asserts, restated and renumbered, that the district court erred in awarding custody of the parties' children to Janna, in dividing the parties' marital property, in calculating his income, and in awarding Janna alimony in the amount of $1,000 per month for 48 months.

On cross-appeal, Janna assigns one error. She asserts that the district court erred in calculating Timothy's income.

IV. ANALYSIS

1. Standard of Review

[1] 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, and alimony. See, *Millatmal v. Millatmal*, 272 Neb. 452, 723

N.W.2d 79 (2006); *Gress v. Gress*, 271 Neb. 122, 710 N.W.2d 318 (2006).

[2] An abuse of discretion occurs when the trial court's decision is based upon reasons that are untenable or unreasonable or if its action is clearly against justice or conscience, reason, and evidence. *Adams v. Adams*, 13 Neb. App. 276, 691 N.W.2d 541 (2005).

2. Timothy's Appeal

(a) Custody

Throughout the dissolution proceedings, both Timothy and Janna requested sole custody of their three children. At trial, each presented a great deal of evidence concerning their relationships with the children and their parenting abilities.

Timothy testified that he is a very involved father who spends a great deal of time with each of his children, despite his oftentimes demanding work schedule. He testified that he and Janna have shared the parenting responsibilities, including feeding the children, bathing the children, doing laundry, and attending the children's activities and appointments. Timothy testified that the children enjoy helping him with the farming and that he spends additional time with them by taking them swimming or to "ball games" and by assisting them with their 4-H projects. Timothy testified that since the parties' separation, he has cut back on his work schedule in order to spend even more time with the children.

Janna testified that she has been the children's primary caregiver since their birth. Specifically, she testified that as a stay-at-home mother, she is the one who is responsible for feeding the children, playing with the children, getting the children ready in the mornings, putting the children to bed at night, helping the children with their homework, and making and keeping the children's various appointments. Janna testified that she has also served as a coach for her daughter's softball and basketball teams.

In addition to testifying about their own parenting skills, both Timothy and Janna provided evidence regarding the other's struggles and deficiencies in parenting. There was evidence in the record to indicate that Janna had an ongoing

extramarital affair just prior to Timothy's filing his complaint for dissolution of marriage. Timothy testified that as a result of the affair, Janna spent less time with the children and lied to him regularly about her whereabouts. In addition, there was evidence that there were times Janna took the parties' youngest child with her when she went to meet the man with whom she was having an affair. Timothy also testified that Janna has a problem managing her anger and that she often yells obscenities and throws things when the children are present. Janna admitted that she had an extramarital affair and testified that she had made a mistake. However, she denied that she ever took her youngest child with her when she was meeting the other man and denied that she had a serious problem with anger. She did indicate that she had sought counseling to help her deal with her feelings.

Janna testified that Timothy has a problem with alcohol and that she has observed him to be drunk when he was responsible for caring for the children. She also presented evidence that he works on the farm a great deal and that he is often not available to care for the children. Timothy testified that he underwent a substance abuse evaluation to prove that he did not have an alcohol problem. Timothy also denied that he worked too much to be able to care for the children and testified that to the extent necessary, he would alter his schedule to be even more available to the children.

The parties also provided evidence concerning Janna's desire to move away from the Deshler community after the dissolution proceedings and the impact such a move would have on the children. Janna testified that she was planning on moving to Bennington, Nebraska, after the trial because she no longer felt comfortable in the Deshler community. She indicated that many people in the community had poor opinions of her as a result of her engaging in an extramarital affair and that such opinions had started to affect the children and their ability to thrive in Deshler. To the contrary, Timothy presented evidence to demonstrate that the children were doing well in Deshler and that it would be in their best interests to remain in the only community they had ever known.

In the decree, the district court found, "the best interests of the minor children require that their legal and physical custody be awarded to [Janna]." The court indicated that in deciding to award custody to Janna, it relied on evidence that Janna had been the children's primary parent and on evidence of the negative involvement of the Deshler community during the parties' dissolution proceedings. The court stated:

> While it is understood that the conduct of [Janna] at the end of her marriage has been, by her own admission, inappropriate, making her an easy target for small town gossip, the extent of the involvement of the community in the private business of this couple is extraordinary. Unfortunately, the public animosity towards her has created an atmosphere which has adversely affected the minor children. It has infected their school, their activities and their church. It is impossible for [Janna] and the children to remain in the Deshler community because [the children] are constantly reminded of their parents' divorce. While one can understand why the community would disapprove of [Janna's] behavior, the consequence has been to poison the well that nourished three extraordinary children. This is truly unfortunate, for this looked to be a case where the parties, if left alone, could have worked out a joint custody relationship.

On appeal, Timothy argues that the district court abused its discretion in awarding custody of the children to Janna. Specifically, he asserts that the evidence presented at trial revealed that he is a good father capable of caring for the children, that Janna has bad morals and a problem with anger, and that the children are thriving in the Deshler community and will suffer harm if they have to move to Bennington with Janna. Simply stated, Timothy asserts that the evidence demonstrated that it would be in the children's best interests to reside with him, rather than with Janna. Upon our de novo review of the record, we cannot say that the district court abused its discretion in awarding custody of the parties' children to Janna.

When custody of a minor child is an issue in a proceeding to dissolve the marriage of the child's parents, child custody

is determined by parental fitness and the child's best interests. *Marcovitz v. Rogers*, 267 Neb. 456, 675 N.W.2d 132 (2004). Timothy does not assert that Janna is an unfit parent; rather, he focuses his argument on the children's best interests.

Neb. Rev. Stat. § 43-2923(6) (Cum. Supp. 2012) provides that in determining custody and parenting arrangements:

> [T]he court shall consider the best interests of the minor child, which shall include, but not be limited to, consideration of . . . .
>
> (a) The relationship of the minor child to each parent prior to the commencement of the action or any subsequent hearing;
>
> (b) The desires and wishes of the minor child, if of an age of comprehension but regardless of chronological age, when such desires and wishes are based on sound reasoning; [and]
>
> (c) The general health, welfare, and social behavior of the minor child.

In addition to these factors, the Nebraska Supreme Court has previously held that in determining a child's best interests, courts

> "'may consider factors such as general considerations of moral fitness of the child's parents, including the parents' sexual conduct; respective environments offered by each parent; the emotional relationship between child and parents; the age, sex, and health of the child and parents; the effect on the child as the result of continuing or disrupting an existing relationship; the attitude and stability of each parent's character; parental capacity to provide physical care and satisfy educational needs of the child; the child's preferential desire regarding custody if the child is of sufficient age of comprehension regardless of chronological age, and when such child's preference for custody is based on sound reasons; and the general health, welfare, and social behavior of the child.'"

Davidson v. Davidson, 254 Neb. 357, 368, 576 N.W.2d 779, 785 (1998).

In this case, Timothy argues that when we consider the evidence presented at trial in light of the specific factors concerning the children's best interests, it is clear that the children's best interests require awarding him custody. To support his argument, he points to evidence of Janna's extramarital affair and her problems with anger, in addition to evidence of his parenting abilities and his desire to provide the children stability by keeping them in the Deshler community, which is the only home they have ever known. Upon our review of the record, we agree that there is ample evidence in the record to support Timothy's assertion that he is a loving father who is capable of caring for his children.

However, we also find that there is ample evidence in the record to support the district court's decision to award custody to Janna. Such evidence includes testimony that Janna has been the child's primary caregiver while Timothy spent most of his time on the farm, evidence that the children are struggling within the Deshler community as a result of their parents' divorce, and evidence that Janna has gone to great efforts to ease the children's transition in Bennington.

[3,4] In essence, this is a case where the parties have presented conflicting evidence concerning every aspect of their parenting abilities and decisionmaking. And, where credible evidence is in conflict on a material issue of fact, the appellate court considers, and may give weight to, the fact that the trial court heard and observed the witnesses and accepted one version of the facts rather than another. *Marcovitz v. Rogers*, 267 Neb. 456, 675 N.W.2d 132 (2004). In fact, in contested custody cases, where material issues of fact are in great dispute, the standard of review and the amount of deference granted to the trial judge, who heard and observed the witnesses testify, are often dispositive of whether the trial court's determination is affirmed or reversed on appeal. See *id*.

Given all of the evidence, our standard of review, and deference to the trial court's observation of the witnesses, we cannot find that the district court abused its discretion in awarding custody of the children to Janna. We affirm the decision of the district court.

(b) Property Division

In the decree, the district court valued the assets and debts contained in the parties' marital estate "at or near the time of trial" in July 2011 and awarded both Timothy and Janna 50 percent of the total net marital estate. On appeal, Timothy challenges the district court's valuation and distribution of the marital estate. Upon our de novo review of the record, we affirm the decision of the district court.

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 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. *Sitz v. Sitz*, 275 Neb. 832, 749 N.W.2d 470 (2008). In this case, Timothy does not contest the district court's classifications of marital and nonmarital property. Rather, he focuses his arguments on the second and third steps of the division of property. We address each of his arguments in turn.

(i) Valuation of Marital Estate

Timothy argues that the district court erred in valuing the parties' marital assets and debts. First, he contends that the court erred in valuing the estate "at or near the time of trial" rather than on April 15, 2010, which is the date he filed his complaint for dissolution of marriage. He argues that after he filed his complaint, Janna made no contributions to the marriage—and specifically to the farming operations—and that any increase in the value of the marital estate during the pendency of the proceedings cannot be attributed to any joint efforts of the parties.

[5,6] As a general principle, the date upon which a marital estate is valued should be rationally related to the property composing the marital estate, and the date of valuation is reviewed for an abuse of the trial court's discretion. *Blaine v. Blaine*, 275 Neb. 87, 744 N.W.2d 444 (2008). The purpose of assigning a date of valuation in a decree is to ensure that the marital estate is equitably divided. *Id.*

We first note that although Timothy appears to argue that the court erred in determining the valuation date for the entire marital estate to be at the time of trial, the decree indicates that the district court did, in fact, specifically provide that certain marital property, including certain crops sold or harvested after April 15, 2010, and certain accounts held by Janna, was valued at the time Timothy filed his complaint. In addition, we note that Timothy's arguments with regard to the valuation of property focus primarily on the value of the farmland purchased during the marriage, which the court valued based on an appraisal conducted in March 2011, only a few months prior to the time of trial. This farmland is clearly the parties' largest marital asset. As such, we focus our analysis of Timothy's assertion on the value of the farmland.

The value of the parties' farmland increased significantly during the pendency of the dissolution proceedings. Evidence presented at trial revealed that this increase in value was not due to Timothy's individual efforts or farming practices, but instead was due to an increase in commodity prices. In the decree, the court indicated, "[I]t seems inequitable to not take into consideration appreciation (or depreciation) in a major marital asset if the movement in value upward or downward is strictly due to market forces beyond the control of either party."

Based upon the evidence presented at trial which demonstrated that the value of the farmland increased due to market forces rather than due to any of Timothy's efforts, we cannot say that the district court abused its discretion in valuing the farmland utilizing the 2011 appraisal which was completed only a few months prior to trial. We affirm the decision of the district court.

Timothy also contends that, despite the date utilized to value the farmland, the district court erred in relying on the 2011 land appraisal, which was completed by Bradley Elting, to determine the value of the parties' farmland. Specifically, Timothy argues that the appraisal is not an accurate representation of the current value of the farmland because Elting considered one parcel of land to be completely irrigated when it is not and another parcel of land to be fully functioning

when in fact that parcel requires a new well to be installed in order to function properly. Timothy asserts that the value of the farmland should be significantly less than as expressed in Elting's appraisal.

We understand Timothy's argument on appeal to assert that Elting's testimony at trial and his land appraisal are not credible evidence of the value of the farmland because of certain errors made by Elting. Contrary to Timothy's assertions, however, the decree entered by the district court indicates that the court found Elting to be a very credible witness. In fact, the decree indicates that the court understood that there was conflicting testimony about certain problems with the parcels of farmland, but that the court clearly accepted Elting's explanation of his valuation of the parcels rather than Timothy's explanation.

[7] The determination of the weight that should be given expert testimony is uniquely the province of the fact finder. *Anania v. Anania*, 6 Neb. App. 572, 576 N.W.2d 830 (1998). And, as we explained in our analysis above, when evidence is in conflict, an appellate court may consider, and give weight to, the fact that the lower court heard and observed the witnesses. See *Marcovitz v. Rogers*, 267 Neb. 456, 675 N.W.2d 132 (2004).

Upon our review of the record, we cannot say that the district court erred in accepting the expert testimony of Elting in its valuation of the parties' farmland. Although Timothy provided conflicting testimony about the value of the land, the district court was in the better position to determine the credibility of the witnesses. We affirm the decision of the district court concerning the value of the farmland.

(ii) Distribution of Marital Estate

Timothy argues that the district court erred in its distribution of the net marital estate between the parties. Specifically, he argues that Janna should receive only 35 percent of the estate, rather than the 50 percent awarded to her by the district court, because of the amount of assistance provided to the parties during the marriage by Timothy's parents. Upon our

review of the record, we conclude that Timothy's assertion has no merit.

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 determined by the facts of each case. *Millatmal v. Millatmal*, 272 Neb. 452, 723 N.W.2d 79 (2006). Section 42-365 provides in part, "The purpose of a property division is to distribute the marital assets equitably between the parties." That statutory section also indicates that in dividing the marital estate, a court should consider such things as the circumstances of the parties, the duration of the marriage, and the 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.

Here, Timothy argues that the district court erred in dividing the marital property such that he and Janna each receive 50 percent of the net estate because the court failed to take into consideration the amount of assistance provided to the parties by his parents. He asserts that the parties would not be in the financial situation they are in today but for the involvement of his parents. However, we must note that Timothy does not assert that anything provided to the parties by his parents was intended as a gift to him that should be set aside as his nonmarital property.

Upon our review of the record, we agree with Timothy's account of the amount of financial assistance provided to the parties by his parents. Such assistance was focused primarily on the parties' farming operation and on acquiring farmland at a discounted rate. It is clear that Timothy's parents helped the parties start and run a successful farming operation. However, we disagree with Timothy's assertion that because it was his parents who voluntarily assisted them during the marriage, he should be allocated more than 50 percent of the marital estate. Timothy concedes that the assets are marital property subject to a reasonable division by the court. Based on our review of the record in its entirety and of the decree entered by the district

court, we cannot say that the district court abused its discretion in awarding each party one-half of the marital estate.

(c) Calculation of Timothy's Annual Income

At trial, the parties presented a great deal of evidence concerning Timothy's annual income. A review of this evidence reveals that Timothy, as a self-employed farmer, has income that is prone to fluctuations from year to year. Timothy's tax returns in the 3 years prior to trial reflect such fluctuations. In 2008, Timothy reported farm income of $65,940. In 2009, Timothy reported farm income of $26,709. In 2010, Timothy reported farm income of only $9,000. Evidence presented at trial revealed that the large fluctuation in Timothy's annual farming income is due, at least in part, to his use of the cash basis of accounting. This type of accounting was described as a farmer's ability to "accurately predict what their taxable income will be by either holding receipts from one year to the next year . . . or by a combination of also paying bills before the end of the year that would be deductible as expense in the prior year." Essentially, this evidence demonstrates that Timothy's yearly tax returns are not an accurate indication of the amount of income he earned during any specific year.

In an attempt to try to provide a more accurate calculation of Timothy's annual income, Janna called a certified public accountant, Michael Hershberger, to testify at trial regarding Timothy's true 2010 farming income. Hershberger testified that he had reviewed Timothy's financial information from 2010, including income from crops that were grown in 2009, but sold in 2010, and crops grown in 2010 that were held over for sale until 2011. Hershberger testified that he calculated Timothy's 2010 income to be $193,420.

In the decree, the district court determined Timothy's earning capacity to be $101,000 per year. The court then based its child support calculation on Timothy's ability to earn $101,000 per year. The court explained how it determined Timothy's income as follows:

> [Timothy's] annual earning capacity is greater than what is evidenced by his tax returns, particularly his 2010

> return, which was filed after this divorce case was filed and reflects farming income of only $9,000.00. This is a significant decrease from the 2009 return, which showed $26,709.00 in income, particularly in a year when the farm economy produced significant returns. A self-employed person may lawfully manipulate the time and manner of sale of assets to affect their income for tax advantage. That has clearly taken place. The Court finds that the application of the income reflected in [Timothy's] 2010 income tax return would result in an unfair and inequitable support order. It further finds that [Janna] has rebutted the presumption that [Timothy's] taxable income should be applied in determining child support.
>
> . . . Hershberger's analysis . . . is that [Timothy's] 2010 earning capacity is $193,000.00. This amount, to state the obvious, is a significant difference from the tax return. The Court does not find that [Timothy's] earning capacity should be set at this amount, either, for it is not reasonable to assume that the extraordinary farm incomes reflected in the 2010 year will continue. Having already determined that the income tax returns of [Timothy] do not reflect his earning capacity, it would be error for the Court to average the income from the returns.
>
> [Janna] concedes in [her] brief that . . . Hershberger's analysis does not properly account for depreciation, lending further reason to not accept in full the analysis of . . . Hershberger. Averaging both amounts results in an average income of $101,000.00 per year.

On appeal, Timothy argues that the district court erred in its calculation of his annual income and, as a result, erred in its calculation of his child support obligation. Specifically, Timothy argues that the court's income calculation was based on an average of two numbers which the court determined were, by themselves, an inaccurate representation of Timothy's income. Timothy asserts that the court should have calculated his income by using the average income reported on his tax returns for the 3 years preceding the trial. Upon our de novo review of the record, we conclude that Timothy's assertion has merit. As a result, we remand with directions for the district

court to recalculate Timothy's annual income and his resulting child support obligation.

Based on our reading of the decree of dissolution, it appears that the district court found that Timothy's annual income tax returns were not an accurate reflection of his yearly income. In addition, the court found that the testimony and professional opinion of Hershberger were not an accurate reflection of Timothy's 2010 income because of certain errors in Hershberger's calculations and because 2010 represented a particularly prosperous year for farmers that was an anomaly, unlikely to be repeated. Despite the district court's findings, however, it went on to use an average of the farming income reported on Timothy's 2010 tax return and the opinion offered by Hershberger concerning Timothy's 2010 income to calculate Timothy's annual earning capacity. We find the court's calculation of Timothy's income to be problematic in two respects.

First, we find that the court erred in using two numbers it had specifically found to be inherently unreliable to calculate the 2010 income. Because the court found neither number to be an accurate reflection of Timothy's income, it is not clear how an average of those numbers would accurately reflect his income, and the court offered very little explanation about why it chose to calculate Timothy's income in this manner.

Second, we find it unreasonable to use an average of two numbers that are so far apart on the spectrum representing Timothy's possible 2010 income. His tax returns indicate that he earned only $9,000 in farming income, while Hershberger testified that Timothy's income was approximately $193,000. We recognize that parties to a dissolution often have a variance between their "numbers." And when the variance results because reasonable minds can differ, averaging the numbers submitted by the parties may well be appropriate. However, here, Hershberger testified that Timothy's income was more than 20 times larger than the reported income on his tax return. Given the facts of this case, we find such a variance to be unreasonable and the use of averaging of incomes using these numbers to be equally unreasonable.

Because of the inherent problems with the district court's calculation of Timothy's income, we find that the court abused its discretion in determining his income to be $101,000 and in basing his child support obligation on that number. There is no support in the record for the court's calculation, and the decree provides little explanation about why this number is representative of Timothy's income or earning capacity.

We remand the matter to the district court to recalculate Timothy's annual income and his resulting child support obligation. On remand, we direct the court to provide an explanation as to the evidentiary basis, based on the record as it currently exists, for its new income calculation. We note that in a situation such as this where it is difficult to precisely pinpoint a party's annual income, we are not looking for mathematical certainty; rather, a thorough and accurate review of the district court's income determination requires a detailed recitation of the manner in which the court determined the party's income.

(d) Alimony

In the decree, the district court ordered Timothy to pay Janna alimony in the amount of $1,000 per month for a period of 48 months. On appeal, Timothy argues that such an award is an abuse of discretion. Specifically, he argues that the amount of the award is unreasonable given the parties' current financial circumstances and that the duration of the award should be shortened to a period of 24 months. Given our conclusion that it is necessary to remand to the district court to recalculate Timothy's income, we also reverse the district court's decision concerning alimony.

[8] In awarding alimony, a court should consider, in addition to the specific criteria listed in § 42-365, the income and earning capacity of each party as well as the general equities of each situation. *Marcovitz v. Rogers*, 267 Neb. 456, 675 N.W.2d 132 (2004). Section 42-365 includes the following criteria:

> [T]he 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.

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).

[9] Clearly, an award of alimony is intricately tied to the incomes and other relevant financial circumstances of each party. See § 42-365. See, also, *Marcovitz v. Rogers, supra*. In our analysis above, we determined that the district court erred in calculating Timothy's income and we remanded with directions to recalculate that income. When the district court recalculates Timothy's income, the court's determination concerning an appropriate award of alimony will necessarily be affected.

Thus, we reverse the district court's award of alimony to Janna. However, we specifically do not find that the district court abused its discretion in entering the alimony award; rather, we simply direct the district court to reconsider the issue of alimony in light of the changed circumstances resulting from the recalculation of Timothy's income.

3. Janna's Cross-Appeal

On cross-appeal, Janna also argues that the district court erred in calculating Timothy's annual income and, as a result, erred in its calculation of his child support obligation. Like Timothy, Janna asserts that the court's income calculation was based on an average of two numbers which the court determined were, by themselves, an inaccurate representation of Timothy's income. However, unlike Timothy, Janna asserts that the district court should have calculated Timothy's annual income by adjusting the opinion of her expert, Hershberger, to account for straight-line depreciation.

Given our laborious discussion of the district court's determination of Timothy's income in relation to Timothy's assigned error and given our decision to remand this issue to

the district court to recalculate Timothy's income, we need not address Janna's assertion further.

V. CONCLUSION

Upon our de novo review of the record, we affirm the district court's decision to award custody of the parties' children to Janna and its division of the parties' marital estate. However, we find that the court abused its discretion in calculating Timothy's income. As a result of this error, we remand the matter to the district court to recalculate Timothy's annual income and to provide a recitation of the factual basis for its calculation. In addition, we reverse the district court's determinations concerning Timothy's child support obligation and Janna's alimony award, because the court should reconsider these awards in light of any changes to the calculation of Timothy's income.

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

GEM HUBBART, APPELLEE, V. HORMEL FOODS, APPELLANT, AND STATE OF NEBRASKA, WORKERS' COMPENSATION TRUST FUND, APPELLEE.

822 N.W.2d 444

Filed November 13, 2012. No. A-12-159.

1. **Workers' Compensation: Appeal and Error.** A judgment, order, or award of the compensation court may be modified, reversed, or set aside only upon the grounds that (1) the compensation court acted without or in excess of its powers; (2) the judgment, order, or award was procured by fraud; (3) there is not sufficient competent evidence in the record to warrant the making of the order, judgment, or award; or (4) the findings of fact by the compensation court do not support the order or award.
2. ____: ____. In determining whether to affirm, modify, reverse, or set aside a judgment of the Workers' Compensation Court review panel, a higher appellate court reviews the finding of the trial judge who conducted the original hearing; the findings of fact of the trial judge will not be disturbed on appeal unless clearly wrong.
3. ____: ____. With respect to questions of law in workers' compensation cases, an appellate court is obligated to make its own determination.