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DOUGLAS HARRINGTON, APPELLEE, V. FARMERS UNION CO-OPERATIVE INSURANCE COMPANY, APPELLANT.

696 N.W.2d 485

Filed May 10, 2005. No. A-03-958.

1. **Attorney Fees: Appeal and Error.** The standard of review on the trial court's determination of a request for sanctions under Neb. Rev. Stat. § 25-824 (Reissue 1995) is whether the trial court abused its discretion.
2. **Judges: Words and Phrases.** A judicial abuse of discretion exists when reasons or rulings of a trial judge are clearly untenable, unfairly depriving a litigant of a substantial right and denying just results in matters submitted for disposition.
3. **Statutes: Intent.** In construing a statute, a court must look at the statutory objective to be accomplished, the problem to be remedied, or the purpose to be served, and then place on the statute a reasonable construction which best achieves the purpose of the statute, rather than a construction defeating the statutory purpose.
4. **Statutes: Legislature: Intent.** The components of a series or collection of statutes pertaining to a certain subject matter may be conjunctively considered and construed in pari materia to determine the intent of the Legislature so that different provisions of the act are consistent, harmonious, and sensible.
5. **Courts: Juries: Verdicts.** Neb. Rev. Stat. § 25-1121 (Reissue 1995) states that the trial court in all cases may instruct the jury, if it renders a general verdict, to find upon particular questions of fact to be stated in writing and may direct a written finding thereon.
6. **Juries: Verdicts.** A jury's finding on a special verdict, special finding, or special question is binding on, and may not be ignored or disregarded by, the court, provided that it is relevant and material to the issues, is warranted by the evidence, does not contain an unwarranted conclusion of law, and has not been set aside on proper grounds.
7. **Juries.** A jury's answer to a special issue is conclusive on all issues covered by that answer.
8. **Juries: Verdicts: Judgments.** A jury's special finding controls a general verdict, and when such finding is inconsistent with the general verdict, it is the duty of the court to render judgment accordingly.
9. **Juries: Attorney Fees.** A jury's special finding does not abrogate the trial court's discretion to determine whether a party is entitled to attorney fees under Neb. Rev. Stat. § 25-824(2) (Reissue 1995).
10. **Attorney Fees: Words and Phrases.** The term "frivolous," as used in Neb. Rev. Stat. § 25-824 (Reissue 1995), connotes an improper motive or legal position so wholly without merit as to be ridiculous.
11. **Words and Phrases.** The definition of frivolous as set forth in *Randolph Oldsmobile Co. v. Nichols*, 11 Neb. App. 158, 645 N.W.2d 566 (2002), has been held to mean without rational argument based on law and evidence to support a litigant's position in the lawsuit.
12. **Actions.** Any doubt whether a legal position is frivolous or taken in bad faith should be resolved in favor of the one whose legal position is in question.
13. ____. The determination of whether a particular claim or defense is frivolous must depend upon the facts of a particular case.

Appeal from the District Court for Buffalo County: JOHN P. ICENOGLE, Judge. Affirmed.

William E. Gast, P.C., L.L.O., and Gene M. Eckel for appellant.

No appearance for appellee.

INBODY, Chief Judge, and SIEVERS and CASSEL, Judges.

CASSEL, Judge.

INTRODUCTION

Douglas Harrington sued Farmers Union Co-Operative Insurance Company (Farmers) under a fire insurance policy after Harrington's house burned. After a verdict for Farmers, the trial court denied Farmers' motion for attorney fees and costs under Neb. Rev. Stat. § 25-824(2) (Reissue 1995). Farmers appeals, asserting that the jury's additional special findings conclusively determined that the action was "frivolous and made in bad faith." Because we conclude that the jury's findings did not abrogate the trial court's discretion under § 25-824 and Neb. Rev. Stat. § 25-824.01 (Reissue 1995) and that the trial court did not abuse its discretion, we affirm.

BACKGROUND

Farmers insured Harrington's residential property. The insurance contract provided, in relevant part:

> **Concealment, fraud.** This entire policy shall be void if, whether before or after a loss, the insured has willfully concealed or misrepresented any material fact or circumstance concerning this insurance or the subject thereof, or the interest of the insured therein, or in case of any fraud or false swearing by the insured relating thereto.

On September 30, 1997, the insured property was destroyed by fire. Harrington filed a claim with Farmers. Farmers denied the claim.

On September 29, 1998, Harrington filed suit against Farmers for breach of the insurance contract and sought to recover benefits payable under the contract, as well as additional damages for Farmers' alleged bad faith refusal to pay the benefits. (Prior to trial, the trial court disposed of Harrington's bad faith claim by summary judgment.) Farmers generally denied the allegations

in Harrington's petition and alleged that Harrington had set the fire deliberately with the intent of defrauding Farmers. Farmers counterclaimed against Harrington to recover the $34,341.06 that Farmers had paid toward its mortgage lien on the insured property, plus interest. Farmers also requested costs. Harrington denied the allegations in Farmers' counterclaim. On April 30, 2003, Farmers moved for attorney fees and costs in accordance with § 25-824(2) and (3) and § 25-824.01.

On May 9, 2003, after a trial on the merits, the jury unanimously returned a general verdict for Farmers. At the same time—which followed more than 6 hours of deliberations, see Neb. Rev. Stat. § 25-1125 (Reissue 1995)—different majorities returned special findings in response to interrogatories Nos. 2 and 3, which stated:

> **INTERROGATORY NO. 2**
>
> Did [Farmers] establish both of the following by the greater weight of the evidence:
>
> (a) That the fire which destroyed [Harrington's] residential structure September 30-October 1, 1997 was willfully caused by [Harrington].
>
> **YES** X **NO** __
>
> (b) That [Harrington] intended that the fire destroy or damage the insured property.
>
> **YES** X **NO** __
>
> . . . .
>
> **INTERROGATORY NO. 3**
>
> Did [Farmers] establish both of the following by the greater weight of the evidence?
>
> (a) [Harrington] knowingly and willfully made representations of the material facts which were false, or concealed material facts, regarding the nature and circumstances of the fire and his claim for coverage.
>
> **YES** X **NO** __
>
> (b) That [Harrington] intentionally so acted in order to deceive [Farmers].
>
> **YES** X **NO** __

Eleven jurors signed interrogatory No. 2, and 10 jurors signed interrogatory No. 3.

On May 15, 2003, Harrington filed a motion for new trial and judgment notwithstanding the verdict. The trial court later overruled the motion for new trial after hearing counsel's arguments on the matter, but it did not mention the motion for judgment notwithstanding the verdict. In its order on the merits of the case, entered May 21, the trial court recounted the jury's findings, dismissed Harrington's causes of action, and entered judgment in favor of Farmers.

On June 26, 2003, the trial court conducted a hearing on Farmers' motion for attorney fees and costs. On July 22, the trial court entered an order awarding Farmers court costs. Regarding Farmers' request for attorney fees, the trial court stated in part:

> [Farmers'] theory for attorney fees is based upon the findings of the jury. [Farmers] asse[r]ts that because the jury found in favor of [Farmers], found that [Harrington] had started the fire, and found that [Harrington] had misrepresented information to [Farmers], [Harrington's] initiation of this litigation by definition was frivolous and in bad faith. Counsel for [Harrington] is correct that the outcome of the litigation is not the measure by which a court allows attorney fees for frivolous claims and bad faith. First the Court must recognize that the findings made by the jury in favor of [Farmers] are findings made by the preponderance of the evidence. That is, [Harrington] could not prove his version of the occurrences w[as] more likely true than [Farmers'], and the assertions of [Farmers] in its counterclaim[']s affirmative defenses were found more likely true than not. To award attorney fees on [an] outcome basis in fraud or misrepresentation cases, or in situations in which the defendant prevails on an affirmative defense, would be tantamount to allowing any party who prevails in litigation to obtain attorney fees from the opposing party.
>
> In reviewing the totality of the evidence as presented the Court cannot find that [Harrington's] assertion of rights and claims, nor the defenses made by [Harrington] to [Farmers'] affirmative defenses[,] w[as] frivolous or made in bad faith.

The trial court denied Farmers' request for attorney fees. Farmers appeals.

ASSIGNMENTS OF ERROR

Farmers alleges that the trial court erred in (1) overruling Farmers' motion for an award of fees and costs, (2) ruling that the trial court was not bound by the special findings of the jury, and (3) failing to recognize that Harrington knew that the allegations in his petition were false when he made them and were thus frivolous and made in bad faith.

STANDARD OF REVIEW

[1,2] The standard of review on the trial court's determination of a request for sanctions under § 25-824 is whether the trial court abused its discretion. *Detmer v. Bixler*, 10 Neb. App. 899, 642 N.W.2d 170 (2002). A judicial abuse of discretion exists when reasons or rulings of a trial judge are clearly untenable, unfairly depriving a litigant of a substantial right and denying just results in matters submitted for disposition. *Cedars Corp. v. Sun Valley Dev. Co.*, 253 Neb. 999, 573 N.W.2d 467 (1998).

ANALYSIS

Farmers essentially argues that the trial court erred in denying its motion for attorney fees because the jury's special findings bound the trial court on the issue of attorney fees and amounted to a determination that Harrington's claims were frivolous and made in bad faith. At the outset, we note that the record presented to this court does not include any of the trial proceedings or evidence adduced at the trial. The record does include the evidence offered at (1) the hearing on Farmers' motion for partial summary judgment and (2) the hearing on Farmers' motion for attorney fees pursuant to § 25-824(2).

We begin by recalling the general principles applicable to review of motions for attorney fees under § 25-824(2).

This court reviews the trial court's determination of a request for attorney fees under § 25-824(2) for an abuse of discretion. See *Detmer v. Bixler, supra*. Section 25-824(2) gives the trial court authority to grant attorney fees in certain situations and provides, in relevant part:

> [I]n any civil action commenced or appealed in any court of record in this state, the court *shall* award as part of its judgment and in addition to any other costs otherwise assessed

> reasonable attorney's fees and court costs against any attorney or party who has brought or defended a civil action that alleges a claim or defense which a court determines is frivolous or made in bad faith.

(Emphasis supplied.) Additionally, § 25-824.01 states:

> In determining the amount of a cost or an attorney's fee award pursuant to subsection (2) of section 25-824, the court shall exercise its sound discretion. When granting an award of costs and attorney's fees, the court shall specifically set forth the reasons for such award and shall, *in determining whether to assess attorney's fees and costs* and the amount to be assessed against offending attorneys and parties, consider the following factors, including, but not limited to: . . . (5) whether or not the action was prosecuted or defended in whole or in part in bad faith . . . .

(Emphasis supplied.) A casual reading of §§ 25-824 and 25-824.01 might suggest a contradiction between the requirement of § 25-824 that the trial court "shall" award attorney fees when a claim or defense is frivolous or made in bad faith and the classification in § 25-824.01 of "whether . . . the action was prosecuted or defended . . . in bad faith" as merely one factor among several in a nonexclusive list of factors that the trial court must consider "in determining whether to assess attorney's fees and costs."

[3,4] However, in construing these statutory provisions, we must look at "the statutory objective to be accomplished, the problem to be remedied, or the purpose to be served, and then place on the statute a reasonable construction which best achieves the purpose of the statute, rather than a construction defeating the statutory purpose." *Arthur v. Microsoft Corp.*, 267 Neb. 586, 593, 676 N.W.2d 29, 35 (2004). The components of a series or collection of statutes pertaining to a certain subject matter may be conjunctively considered and construed in pari materia to determine the intent of the Legislature so that different provisions of the act are consistent, harmonious, and sensible. *Id.*

Appellate courts have found the word "shall" to be directory rather than mandatory in some statutes. See, e.g., *Garcia v. Rubio*, 12 Neb. App. 228, 670 N.W.2d 475 (2003) (interpreting "shall" in Neb. Rev. Stat. § 43-1206 (Reissue 1998) as directory

rather than mandatory to save constitutionality of statute); *Randall v. Department of Motor Vehicles*, 10 Neb. App. 469, 632 N.W.2d 799 (2001) (noting that Nebraska Supreme Court has often interpreted "shall" as directory rather than mandatory in statutes involving time limitations). The purpose of § 25-824 is ostensibly to discourage claims and defenses that are frivolous or made in bad faith. In light of this purpose and considering § 25-824 in pari materia with § 25-824.01, we interpret "shall" in § 25-824(2) to be directory rather than mandatory. Therefore, Nebraska's statutory scheme requires the trial court "to exercise its sound discretion" in determining whether to award attorney fees, and whether a claim or defense was made in bad faith is but one factor to be considered by the trial court. § 25-824.01. We find nothing in the legislative history of 1987 Neb. Laws, L.B. 261, which added subsection (2) to § 25-824 and adopted § 25-824.01, to contradict the plain language of § 25-824.01. See, Judiciary Committee Hearing, 90th Leg., 1st Sess. (Feb. 18, 1987); Floor Debate, 90th Leg., 1st Sess. (1987).

[5-8] We next must determine what effect, if any, the jury's special findings had on the trial court's discretion to award attorney fees. We observe that Neb. Rev. Stat. § 25-1121 (Reissue 1995) states that the trial court "in all cases may instruct [the jury], if [it] render[s] a general verdict, to find upon particular questions of fact to be stated in writing, and may direct a written finding thereon." We assume, without deciding, that a special finding rendered after more than 6 hours of deliberation by a majority of jurors is valid and that so long as at least five-sixths or more of the members of the jury concur in a particular finding, it makes no difference that 11 jurors joined in answering one of the interrogatories while only 10 jurors concurred in the answer to another interrogatory. See § 25-1125. The specific question becomes whether such special findings abrogate the trial judge's usual discretion concerning a motion for attorney fees under § 25-824(2). We find no Nebraska case addressing this issue. Farmers would have us rely on the general rule:

> A jury's finding [on a special verdict, special finding, or special question] is binding on, and may not be ignored or disregarded by, the court, provided it is relevant and material to the issues, is warranted by the evidence, does not

> contain an unwarranted conclusion of law and has not been set aside on proper grounds. . . .
>
> . . . .
>
> An answer to a special issue is conclusive on all issues covered by it.

89 C.J.S. *Trial* § 1015 at 626-27 (2001), citing, inter alia, *Finch v. W. R. Roach Co.*, 299 Mich. 703, 1 N.W.2d 46 (1941) (holding that trial court did not abuse its discretion in denying motion for new trial when competent evidence supported jury's answers to special questions); *Superior Ins. Co. v. Owens*, 218 S.W.2d 517 (Tex. Civ. App. 1949) (holding in workers' compensation case that issue as to whether worker's total incapacity was temporary was adequately submitted to jury in special question asking for duration of total incapacity); *Ross v. Brainerd*, 54 A.2d 859 (D.C. App. 1947) (holding that trial court's refusal to direct verdict for lessees was proper because jury's answer to special question authorized judgment for lessor). Of course, several Nebraska cases state the related rule that a jury's special finding controls a general verdict and that when such finding is inconsistent with the general verdict, it is the duty of the court to render judgment accordingly. See, e.g., *Walker v. McCabe*, 110 Neb. 398, 193 N.W. 761 (1923); Neb. Rev. Stat. § 25-1120 (Reissue 1995). However, this general rule does not speak to whether a jury's special finding binds a trial court with respect to the matter of attorney fees, which matter by statute is specifically addressed to the trial court's discretion.

Although Farmers could find no case specifically addressing the issue before us and Harrington submitted no brief to this court, we have found two cases from other jurisdictions that confronted nearly identical claims. In *Maguire v. Merrimack Mut. Ins. Co.*, 133 N.H. 51, 573 A.2d 451 (1990), the insureds brought suit against the insurer when the insurer refused to pay fire insurance benefits on the ground that the insureds had committed arson and were attempting to collect insurance proceeds fraudulently. In addition to a general verdict for the insurer, the jury rendered a special verdict in the form of special interrogatories. The special verdict found by a preponderance of the evidence that the insureds, or someone acting on their behalf, had willfully and intentionally burned the insured property; that the

insureds willfully concealed or misrepresented a material fact or circumstance concerning their insurance; and that they swore falsely regarding their insurance to obtain policy proceeds. The insurer moved for attorney fees, asserting that the jury's special verdict was tantamount to a ruling that the insureds had instituted frivolous litigation in bad faith. The trial court denied the insurer's motion for attorney fees, and the insurer appealed. The trial court, in explaining its decision using language strikingly similar to the district court's rationale in the case before us, stated:

> " '[T]he burden of proof in this case was by a preponderance of the evidence. The evidence was circumstantial, and the material facts were largely established by expert testimony. There was significant conflicting testimony. Credibility of witnesses, as always, played a substantial role in the verdict. This Court cannot determine that [the insureds were] unreasonable in litigating this matter.
>
> . . . .
>
> " 'It may, at first blush, seem unjust not to award attorney's fees in an action where one who seeks to collect under his fire insurance policy, is determined to have burned his own home. However, an analysis of the [New Hampshire Supreme] Court's decision in [an earlier case], and the purposes behind the general rule against awarding of [sic] attorney's fees, indicate that it is not, in fact, unjust. In this case, the issue of the cause of the fire deserved to be litigated from an evidentiary standpoint.' "

Maguire v. Merrimack Mut. Ins. Co., 133 N.H. at 53, 573 A.2d at 452.

On appeal, the New Hampshire Supreme Court affirmed. It stated that whether to award attorney fees was a matter within the trial court's discretion. The *Maguire* court also observed that the trial court " 'may have [had] insights not conveyed by the record' " and was in the best position to determine whether a claim was made in bad faith. 133 N.H. at 55, 573 A.2d at 454. The court concluded that the jury's special verdict did not remove the trial judge's discretion regarding attorney fees.

In *Ohio Farmers Ins. Co. v. McKean*, 76 F. Supp. 2d 714 (S.D.W. Va. 1999), the court reached a contrary outcome. The

facts were substantially the same as in *Maguire v. Merrimack Mut. Ins. Co.*, 133 N.H. 51, 573 A.2d 451 (1990). The insurer filed a motion for attorney fees with the *McKean* court. That court tried the case and was, therefore, exercising the discretion accorded to a trial court for determining this question in the first instance. The court cited *Maguire* but tacitly declined to follow it, holding that in light of the jury's special verdict, the insurer had been entitled to attorney fees. The *McKean* court noted that prevailing litigants in its jurisdiction could recover attorney fees from the losing party when it was shown by clear and convincing evidence that the losing party engaged in fraudulent conduct injuring the other party.

[9] We find the reasoning in *Maguire* to be more persuasive, and we conclude that a jury's special finding does not abrogate the trial court's discretion to determine whether a party is entitled to attorney fees under § 25-824(2). We consider the decision in *McKean* to be distinguishable for two reasons. First, the *McKean* court, after recognizing that recovery of attorney fees required a showing by clear and convincing evidence, implicitly proceeded to find the evidence sufficient under that higher standard. In the instant case, the trial court recognized that the special finding was reached only by a preponderance of the evidence and, indeed, not unanimously. Second, the *McKean* court was exercising the discretion of a trial court in making the initial determination whether attorney fees should be recovered. In the case before us, we are reviewing the trial court's decision under an abuse of discretion standard. Moreover, as we have already noted, like the appellate court in *Maguire* and unlike the trial court in *McKean*, we do not have the trial record before us, as Farmers has not included the trial proceedings in the bill of exceptions.

Finally, we consider whether the trial court abused its discretion in denying Farmers' motion for attorney fees pursuant to § 25-824(2). A judicial abuse of discretion exists when reasons or rulings of a trial judge are clearly untenable, unfairly depriving a litigant of a substantial right and denying just results in matters submitted for disposition. *Cedars Corp. v. Sun Valley Dev. Co.*, 253 Neb. 999, 573 N.W.2d 467 (1998). Farmers specifically argues that the trial court erred in failing to find that Harrington's claims and defenses were frivolous or made in bad faith.

[10-13] In *Randolph Oldsmobile Co. v. Nichols*, 11 Neb. App. 158, 161, 645 N.W.2d 566, 569 (2002), this court summarized the authority concerning the term "frivolous":

> The term "frivolous," as used in § 25-824, connotes an improper motive or legal position so wholly without merit as to be ridiculous. . . . The definition of "frivolous" as set forth above has also been held to mean without rational argument based on law and evidence to support a litigant's position in the lawsuit. . . . Any doubt whether a legal position is frivolous or taken in bad faith should be resolved in favor of the one whose legal position is in question. . . . The determination of whether a particular claim or defense is frivolous must depend upon the facts of a particular case.

(Citations omitted.)

In denying Farmers' motion for attorney fees, the trial court noted that the jury's answers to the special interrogatories were made by a preponderance of the evidence, and we further note that the jury's answers to the special interrogatories were not unanimous. The trial court also alluded to its own discretion by expressing concern that "[t]o award attorney fees on [an] outcome basis in fraud or misrepresentation cases, or in situations in which the defendant prevails on an affirmative defense, would be tantamount to allowing any party who prevails in litigation to obtain attorney fees from the opposing party." After reviewing "the totality of the evidence" presented at trial, the trial court concluded that Harrington's claims and defenses were neither frivolous nor made in bad faith.

As stated above, we conclude that the jury's special findings do not bind the trial court when it determines whether to award attorney fees under § 24-824(2). Instead, the trial court may, in its discretion, consider any number of factors in ruling on a request for attorney fees pursuant to § 24-824(2), and "whether or not the action was prosecuted or defended in whole or in part in bad faith" is only one of those factors. § 25-824.01. In this case, the trial court raised several cogent points in denying Farmers' motion for attorney fees. Like the court in *Maguire v. Merrimack Mut. Ins. Co.*, 133 N.H. 51, 573 A.2d 451 (1990), we recognize that the trial court is in the best position to evaluate the credibility of evidence and testimony, and Farmers did not see fit

to provide us with the trial record on appeal. Therefore, we cannot conclude that the trial court abused its discretion in denying Farmers' motion for attorney fees.

CONCLUSION

Because the trial court did not abuse its discretion in denying Farmers' motion for attorney fees, we affirm.

AFFIRMED.

LESLIE K. WILD, APPELLEE, V.
BRIAN P. WILD, APPELLANT.
696 N.W.2d 886

Filed May 10, 2005. No. A-04-954.

1. **Child Custody: Visitation: Appeal and Error.** Child custody determinations, and visitation determinations, are matters initially entrusted to the discretion of the trial court, and although reviewed de novo on the record, the trial court's determination will normally be affirmed absent an abuse of discretion.
2. **Judges: Words and Phrases.** A judicial abuse of discretion exists when a judge, within the effective limits of authorized judicial power, elects to act or refrains from acting, and the selected option results in a decision which is untenable and unfairly deprives a litigant of a substantial right or a just result in matters submitted for disposition through a judicial system.
3. **Child Custody.** In order to prevail on a motion to remove a minor child to another jurisdiction, the custodial parent must first satisfy the court that he or she has a legitimate reason for leaving the state. After clearing that threshold, the custodial parent must next demonstrate that it is in the child's best interests to continue living with him or her.
4. **Child Custody: Proof.** Under Nebraska law, the burden has been placed on the custodial parent to satisfy the court that he or she has a legitimate reason for leaving the state and to demonstrate that it is in the child's best interests to continue living with him or her.
5. **Child Custody.** Legitimate employment opportunities for a custodial parent may constitute a legitimate reason for leaving the state.
6. ____. Legitimate employment opportunities may constitute a legitimate reason for leaving the state when there is a reasonable expectation of improvement in the career or occupation of a custodial parent.
7. ____. Legitimate employment opportunities may constitute a legitimate reason for leaving the state when a custodial parent's new job includes increased potential for salary advancement.
8. **Child Custody: Proof.** Although custody is not to be interpreted as a sentence to immobility, a custodial parent must prove a legitimate reason for removing a minor child from the jurisdiction.

9. **Child Custody.** After clearing the threshold of demonstrating a legitimate reason for leaving the state and removing a minor child to another state, a custodial parent must demonstrate that it is in the child's best interests to continue living with him or her.
10. **Child Custody: Visitation.** In determining whether removal to another jurisdiction is in the child's best interests, the trial court considers (1) each parent's motives for seeking or opposing the move; (2) the potential that the move holds for enhancing the quality of life for the child and the custodial parent; and (3) the impact such a move will have on contact between the child and the noncustodial parent, when viewed in the light of reasonable visitation.
11. **Child Custody.** The ultimate question in evaluating the parties' motives in seeking removal of a child to another jurisdiction is whether either party has elected or resisted a removal in an effort to frustrate or manipulate the other party.
12. ____. While some legitimate explanations a parent offers in seeking to remove or resisting removal of a child to another state might seem less compelling than others, none should be summarily rejected, at the stage of the analysis where each parent's motives are considered, without weighing the other considerations and how they all come to bear on the overall impact on the child.
13. ____. In determining the potential that the removal to another jurisdiction holds for enhancing the quality of life of the child and the custodial parent, a court should evaluate the following considerations: (1) the emotional, physical, and developmental needs of the child; (2) the child's opinion or preference as to where to live; (3) the extent to which the relocating parent's income or employment will be enhanced; (4) the degree to which housing or living conditions would be improved; (5) the existence of educational advantages; (6) the quality of the relationship between the child and each parent; (7) the strength of the child's ties to the present community and extended family there; and (8) the likelihood that allowing or denying the removal would antagonize hostilities between the two parties.
14. ____. The list of factors to be considered in determining the potential that the removal to another jurisdiction holds for enhancing the quality of life of the parent seeking removal and of the children should not be misconstrued as setting out a hierarchy of considerations, and depending on the circumstances of a particular case, any one consideration or combination of considerations may be variously weighted.
15. ____. The effect of the removal of a child to another jurisdiction must be evaluated in light of the child's relationship with each parent.
16. ____. The relationship of a child to siblings is entitled to consideration and weight in the decision whether to allow a parent to remove the child to another state.
17. **Child Custody: Visitation.** When one parent seeks to remove a child from the state where the other parent remains, the effect on the parent-child relationship must be viewed in light of the court's ability to devise reasonable visitation arrangements.
18. **Child Custody.** The issue of a change in custody must be considered separately and apart from a custodial parent's request to remove a child to another state.
19. ____. Ordinarily, custody of a minor child will not be modified unless there has been a material change in circumstances showing that the custodial parent is unfit or that the best interests of the child require such action.
20. **Child Custody: Appeal and Error.** An appellate court conducts a de novo review on the record in child custody determinations.

21. **Child Custody: Proof.** The party seeking modification of child custody bears the burden of showing a material change in circumstances.
22. **Child Custody.** A request to remove a child from the state, without more, does not amount to a material change in circumstances warranting a change of custody.
23. **Attorney Fees: Appeal and Error.** The district court's decision on a request for attorney fees is reviewed de novo on the record and will be affirmed in the absence of an abuse of discretion.

Appeal from the District Court for Sarpy County: WILLIAM B. ZASTERA, Judge. Affirmed in part, and in part reversed.

Stephanie Weber Milone for appellant.

Carll J. Kretsinger, P.C., for appellee.

IRWIN, CARLSON, and MOORE, Judges.

IRWIN, Judge.

I. INTRODUCTION

Brian P. Wild appeals from an order of the district court for Sarpy County which granted his ex-wife Leslie K. Wild's complaint for removal of the parties' minor child, Amber Lynn Wild, from Nebraska to Ohio. On appeal, Brian challenges the district court's findings that Leslie demonstrated a legitimate reason for removal and that removal is in Amber's best interests and contests the district court's failure to change custody or to award Brian attorney fees. Upon our de novo review of the record, we find that the district court abused its discretion in finding that Leslie satisfied her burden of proof with respect to both demonstrating a legitimate reason for removal and showing that removal is in Amber's best interests. As such, we reverse that finding of the district court. We find no abuse of discretion by the district court concerning either Brian's request for a change of custody or his request for attorney fees. As such, we affirm those rulings of the district court.

II. BACKGROUND

Brian and Leslie were married on April 3, 1993, in Florida. The record indicates that Brian was a member of the U.S. Air Force during the marriage and continues to be at this time, stationed at Offutt Air Force Base in Bellevue, Nebraska (Offutt). Leslie was employed as a civil service employee working at

Offutt during the latter portion of the marriage. Amber was the only child born to the parties during the marriage, and her date of birth is October 12, 1994. The marriage was dissolved by a decree entered on February 20, 2003. The record indicates that the decree incorporated a "settlement agreement to all issues presented to include custody, visitation and support."

In the dissolution decree, the district court found that both Brian and Leslie were fit and proper persons to be awarded custody of Amber, but that it was in Amber's best interests for custody to be awarded to Leslie. Brian was awarded visitation rights. Brian was also ordered to pay child support. In addition, the decree contained the following provision, which contemplates the possibility of either Brian's or Leslie's being relocated by the military because of their employment:

> 28. **CHANGE OF CIRCUMSTANCES:** That [Leslie] is a civil service employee of the United States Air Force; and, [Brian] is a military member of the United States Air Force; and, both parties acknowledge that they are both subject to being reassigned by the Air Force to another military location outside of the State of Nebraska; and, as such, both parties agree that if either party should be so reassigned by the United States Air Force outside of the State of Nebraska, that such reassignment will constitute a change of circumstance upon which either party may seek a modification of the provisions of this decree as same would pertain [to] the visitation rights of [Brian] with [Amber].

On October 7, 2003, Brian filed an application and affidavit for citation in contempt. In the filing, Brian alleged that Leslie had taken Amber to Idaho on vacation from "June 21-29, 2003, and [from] July 23-August 3, 2003," that those dates conflicted with dates on which Brian was to have had visitation in accordance with the decree, that Brian had notified Leslie that he was opposed to her taking Amber on vacation on those dates, and that Leslie's nonetheless taking Amber on vacation on those dates was "in defiance of the provisions" of the decree. On October 7, the district court issued an order commanding Leslie to appear and show cause why she should not be held in contempt. The record does not reflect any further disposition of Brian's application.

On November 7, 2003, Leslie filed a motion for leave to remove Amber from Nebraska. In the motion, Leslie alleged that there was uncertainty about her future employment at Offutt, that she had obtained a position with a company located at Wright-Patterson Air Force Base in Ohio, that the new position would pay less than her existing position but would provide for upward mobility, that the housing available in Ohio would be an improvement over her housing in Nebraska, that the schools would be "equal to or better than" Amber's school in Nebraska, that Amber had stated a desire to move to Ohio, and that removal would be in Amber's best interests. On November 19, Leslie filed a notice of withdrawal of the motion to remove, indicating that the position to which she had been hired in Ohio had been eliminated "due to funding."

On April 23, 2004, Leslie filed a complaint again requesting leave to remove Amber from Nebraska to Ohio. Leslie alleged that she had "been offered and ha[d] accepted a position of employment to begin June 1, 2004," with a company located in Dayton, Ohio. Leslie alleged that the new position would provide a "substantial increase in salary" over her position in Nebraska. Leslie made no allegations concerning "upward mobility" as in her previous request to remove Amber to Ohio. Leslie sought modification of child support and visitation as well as permission to remove Amber to Ohio. On May 25, Brian filed an answer and counterclaim. Brian sought to have the court deny the request to remove Amber to Ohio, alleged that Leslie should be equitably estopped from removing Amber to Ohio, and sought a change in custody.

On June 30, 2004, the district court heard testimony and received evidence on Leslie's complaint and Brian's answer and counterclaim. Leslie testified that she had already moved to Ohio, although the record indicates that Amber had remained in Nebraska with Brian pending resolution of the case. When asked why she "ch[o]se to go to Ohio," Leslie responded:

> I chose — I made a decision about last June or July [2003] that my relationship with [my fiance] was getting serious. My job [at Offutt], there w[ere] a lot of changes coming down, rumor has it that [my employer] here in Omaha will close within the next two to three years. There was a lot of

> uncertainty with whether or not it was going to be open. My career progression was at its highest level as a GS-9, and I wanted to — to be able to progress in the career that I've chosen in security.

Leslie acknowledged that it was "basically a rumor" that her position at Offutt might be eliminated or moved, and she testified that her office "was going to go through a restructure." Leslie testified that the staff of the office she worked in at Offutt was "slowly but surely shrinking" and that "[t]here was a lot of work going away." However, she further testified that the job she did at Offutt was, as of the date of the hearing, still being done at Offutt, although her position had been filled by somebody else.

Leslie indicated that her new job in Ohio provided a pay increase of approximately $7,000 per year, before taxes, over the position she had in Nebraska. Leslie testified, however, that if she were allowed to remove Amber to Ohio, she would be willing to be responsible for paying to transport Amber back to Nebraska for visitation with Brian "eight to ten" times per year. Leslie testified that she would accompany Amber on flights back to Nebraska, at a likely cost of $269 to $325 per ticket, those 8 to 10 times per year. The cost to Leslie of such transportation would thus be approximately between $4,300 and $6,500 per year, depending on the cost of the tickets and the number of trips.

Leslie testified that her former job in Nebraska was "part of civil service," that she received vacation time each pay period, that she received support toward medical and dental expenses, that she had flexibility with regard to hours, and that she had the opportunity to work overtime. Leslie testified that her new job in Ohio was an entry-level position with a security company working at Wright-Patterson Air Force Base and that her new job was a position from which she could be terminated at any time.

Leslie testified that she and Amber lived in a "rather big apartment" in Nebraska and that the apartment complex had no playground, although there was a school playground located down the street for Amber. In Ohio, Leslie had moved in with her fiance, and she testified that he has a three-bedroom home with a "good-sized backyard [and] a small front yard for Amber to play in."

The record indicates that Amber has some special education needs associated with a "serious reading problem." Amber's school in Nebraska had placed her in a special education program to address the reading problem. Leslie testified that she had not checked into the availability of any special reading programs for Amber in Ohio. Leslie testified that she did not know of any educational advantages that would be made available to Amber by removing her to Ohio and that Leslie "ha[d] not had a chance to look at [such advantages] yet." Leslie did not know what school Amber would attend in Ohio, although one school was located near Leslie and her fiance's home, and she did not know whether Amber's school would utilize a "year-round" calendar or a "traditional" calendar; the record indicates that both calendars are available in the area Leslie proposed to remove Amber to.

Brian has another daughter, from a prior relationship—Amber's 15-year-old half sister, Andrea Wild. Brian has had sole custody of Andrea since 1999. In addition, one of Leslie's brothers, his wife, and their children live in Omaha. Most of the rest of Leslie's extended family lives in Idaho or Washington, and Brian's extended family lives in Colorado or Arizona. The record does not indicate any extended family in Ohio.

On July 21, 2004, the district court entered an opinion and order. The court held as follows:

> The first question to be answered by the Court is: does [Leslie] have a legitimate reason for the move.
>
> The evidence presented to the Court was that [Leslie's] job prospects for advancement as a civilian employee of the Air Force at Offutt Air Force [B]ase were at a dead end, and if she were to advance she would be required to move in any case if she remained with the Air Force.
>
> Had [Leslie] elected to continue with her [former] employment she would in all likelihood have had to [be] relocated in the near future, and had she been required to do so the provision of the Decree, with reference to reassignment[,] would have been automatic. However, in this case it is the opinion of the Court that the automatic provision of the Decree is not operative as to change of circumstance and [*Farnsworth v. Farnsworth*, 257 Neb. 242, 597 N.W.2d 592 (1999),] and [its progeny] are controlling.

> [Leslie] obtained a position in Ohio at a substantial increase in pay, and with what appears to be a job with a future and not subject to reassignment. Thus, it is the opinion of the Court that [Leslie] has [met] the threshold [test] of having a legitimate reason for moving.
>
> The Court now must make a determination on the issue of the best interest of the child. The case law in this State sets out several areas to be used by the trial Court in determining whether the move would be in the best interest of the child.
>
> The Court having considered these finds that the move to Ohio would be in [Amber's] best interest and grants [Leslie's] Motion to Remove [Amber].

The court entered a new visitation order, ordered Leslie to pay all costs of transportation, and ordered both parties to pay their respective attorney fees and costs. This timely appeal followed.

III. ASSIGNMENTS OF ERROR

Brian has assigned, inter alia, that the district court erred in granting Leslie's request to remove Amber to Ohio, in denying his request for a change of custody, and in denying his request for attorney fees. In light of our resolution of these assignments of error, we need not discuss Brian's other assignments of error.

IV. ANALYSIS

1. Standard of Review

[1,2] Child custody determinations, and visitation determinations, are matters initially entrusted to the discretion of the trial court, and although reviewed de novo on the record, the trial court's determination will normally be affirmed absent an abuse of discretion. *Tremain v. Tremain*, 264 Neb. 328, 646 N.W.2d 661 (2002); *McLaughlin v. McLaughlin*, 264 Neb. 232, 647 N.W.2d 577 (2002); *Vogel v. Vogel*, 262 Neb. 1030, 637 N.W.2d 611 (2002); *Brown v. Brown*, 260 Neb. 954, 621 N.W.2d 70 (2000); *Jack v. Clinton*, 259 Neb. 198, 609 N.W.2d 328 (2000); *Farnsworth v. Farnsworth*, 257 Neb. 242, 597 N.W.2d 592 (1999). A judicial abuse of discretion exists when a judge, within the effective limits of authorized judicial power, elects to act or refrains from acting, and the selected option results in a

decision which is untenable and unfairly deprives a litigant of a substantial right or a just result in matters submitted for disposition through a judicial system. *McLaughlin v. McLaughlin, supra*; *Vogel v. Vogel, supra*; *Brown v. Brown, supra*. See, *Jack v. Clinton, supra*; *Farnsworth v. Farnsworth, supra*.

2. Removal of Amber to Ohio

Brian first asserts that the district court erred in granting Leslie's request to remove Amber to Ohio. We find that Leslie failed to carry her burden to demonstrate a legitimate reason for removing Amber to Ohio, because the record fails to demonstrate that the employment opportunity taken by Leslie provided a reasonable improvement in her career or an opportunity for career advancement. We further find that Leslie failed to carry her burden to demonstrate that allowing removal would be in Amber's best interests, because the record fails to demonstrate that Ohio provides any benefits to Amber under the various factors considered in the best interests analysis. As a result, we conclude that on the record provided, the district court abused its discretion in allowing Leslie to remove Amber to Ohio.

[3,4] The relevant test to be applied in cases where a custodial parent seeks court permission to remove a minor child from the state has been set forth by the Nebraska Supreme Court on numerous occasions. See, *Tremain v. Tremain, supra*; *McLaughlin v. McLaughlin, supra*; *Vogel v. Vogel, supra*; *Brown v. Brown, supra*; *Jack v. Clinton, supra*; *Farnsworth v. Farnsworth, supra*. In order to prevail on a motion to remove a minor child to another jurisdiction, the custodial parent must first satisfy the court that he or she has a legitimate reason for leaving the state. After clearing that threshold, the custodial parent must next demonstrate that it is in the child's best interests to continue living with him or her. *Id.* Under Nebraska law, the burden has been placed on the custodial parent to satisfy this test. See *Brown v. Brown, supra*.

(a) Legitimate Reason to Leave State

Leslie has asserted, and the district court found, that she had a legitimate reason to leave Nebraska and take Amber to Ohio because of a career opportunity. At the time of the trial in this case, Leslie had already accepted a job in Ohio and moved from

Nebraska. We conclude, however, that Leslie failed to carry her burden to demonstrate that the employment in Ohio was a legitimate reason to leave Nebraska and take Amber to Ohio, because Leslie failed to demonstrate that the employment opportunity provided a reasonable improvement in her career or an opportunity for career advancement.

[5-7] Previous cases in Nebraska have recognized that legitimate employment opportunities for the custodial parent may constitute a legitimate reason for leaving the state. See, *Brown v. Brown*, 260 Neb. 954, 621 N.W.2d 70 (2000); *Jack v. Clinton*, 259 Neb. 198, 609 N.W.2d 328 (2000); *Farnsworth v. Farnsworth*, 257 Neb. 242, 597 N.W.2d 592 (1999); *Carraher v. Carraher*, 9 Neb. App. 23, 607 N.W.2d 547 (2000). However, the Nebraska Supreme Court has specifically held that such legitimate employment opportunities may constitute a legitimate reason "where there is a 'reasonable expectation of improvement in the career or occupation of the custodial parent.' " *Farnsworth v. Farnsworth*, 257 Neb. at 252, 597 N.W.2d at 600, quoting *Gerber v. Gerber*, 225 Neb. 611, 407 N.W.2d 497 (1987). See, also, *Jack v. Clinton, supra*. Similarly, such legitimate employment opportunities may constitute a legitimate reason "where the custodial parent's new job included increased potential for salary advancement." *Jack v. Clinton*, 259 Neb. at 205, 609 N.W.2d at 333. See, also, *Farnsworth v. Farnsworth, supra*.

In *Jack v. Clinton, supra*, the Nebraska Supreme Court found that the custodial parent had met the threshold requirement of proving a legitimate reason for leaving Nebraska and removing the minor children to Pennsylvania. The evidence in that case included testimony from the custodial parent that her employment opportunity in Pennsylvania "offered greater potential for salary advancement than the job she had held" in Nebraska. *Id.* at 205, 609 N.W.2d at 334. In addition, the custodial parent had testified that her employment opportunity in Pennsylvania required less overtime and allowed her to spend more time with the minor children. On the basis of that evidence, the Supreme Court held that the district court had sufficient evidence to conclude that the custodial parent "had a reasonable expectation for improvement in her career." *Id.*

Similarly, in *Farnsworth v. Farnsworth, supra*, the Nebraska Supreme Court found that the custodial parent had met the threshold requirement of proving a legitimate reason for leaving Nebraska and removing the minor child to Colorado. The evidence in that case indicated that the custodial parent had conducted an unsuccessful search for better employment in Nebraska and, having failed to uncover such opportunities, obtained a job in Colorado "with greater income, benefits, and career-advancement potential" than her employment in Nebraska. *Farnsworth v. Farnsworth*, 257 Neb. at 252, 597 N.W.2d at 600. On the basis of that evidence, the Supreme Court held that "significant career enrichment is a legitimate motive in and of itself." *Id.* at 253, 597 N.W.2d at 600.

The present case is distinguishable from both *Jack v. Clinton, supra*, and *Farnsworth v. Farnsworth, supra*, because Leslie failed to adduce evidence comparable to the evidence adduced by the custodial parent in those cases. Leslie failed to present any evidence that her new employment in Ohio provided any opportunity for career advancement. Leslie testified that the position was an "entry level" security position and acknowledged that the position was one from which she could be terminated at any time. She did not testify or opine that there would be any opportunity for either career advancement or income increases. She did not testify that the job provided any benefits or any advantageous schedule. By comparison, the record indicates that Leslie's employment in Nebraska was a civil service position with the military that offered job security and benefits. Although the district court concluded that the position in Nebraska was a "dead end" position, there was no evidence to indicate that the position in Ohio offered any greater opportunity for advancement.

The record does indicate that the employment in Ohio was at a greater present salary, even without evidence of any kind of salary advancement opportunities. However, the record clearly indicates that this increase in salary is not of any benefit to Leslie or, more importantly, to the interests of Amber. Leslie indicated that her new position in Ohio paid approximately $7,000 per year more than her position in Nebraska. However, Leslie failed to produce any evidence indicating the cost-of-living differences

between Nebraska and Ohio, and further, Leslie testified that she would be responsible for paying all transportation costs associated with bringing Amber back to Nebraska to visit with Brian. The record indicates that those additional transportation costs may total as much as $6,500 per year or more.

Leslie failed to demonstrate that the employment opportunity in Ohio constitutes a reasonable expectation of improvement in her career or occupation or that it includes increased potential for salary advancement. To the extent the new position does offer an increase in Leslie's income, Leslie presented no evidence concerning the cost-of-living differences between Nebraska and Ohio, and the entire increase will be consumed just to pay for the costs of transporting Amber back to Nebraska for visitation with Brian.

We further note that the record in the present case does not indicate any other legitimate reason for Leslie to leave Nebraska and remove Amber to Ohio. Unlike the record regarding the custodial parent in *Jack v. Clinton*, 259 Neb. 198, 609 N.W.2d 328 (2000), the record in the present case does not indicate that Leslie's new employment opportunity offers any close proximity to extended family. Rather, the record in the present case indicates that there was some extended family in Nebraska, including one of Leslie's brothers, his wife, their children, and Amber's half sister, Andrea, who lives with Brian, but that there is no such extended family at all in Ohio. See, also, *Brown v. Brown*, 260 Neb. 954, 621 N.W.2d 70 (2000) (legitimate reason to leave state shown by evidence of firm offer of employment that would enhance career and evidence of extended family in area of new employment). Additionally, although the record indicates that Leslie was motivated to move to Ohio to be nearer to her fiance, this is not a case concerning legitimate potential for the career advancement of a custodial parent's spouse occurring after a remarriage, or concerning a move to reside with a custodial parent's new spouse who is employed and resides in another state. Compare, *McLaughlin v. McLaughlin*, 264 Neb. 232, 647 N.W.2d 577 (2002); *Vogel v. Vogel*, 262 Neb. 1030, 637 N.W.2d 611 (2002).

It is apparent that the district court placed significant emphasis on the fact that Leslie's position in Nebraska was subject to

potential reassignment or relocation. The district court noted that Leslie's "job prospects for advancement as a civilian employee of the Air Force at Offutt Air Force [B]ase were at a dead end," that "if she were to advance she would be required to move in any case if she remained with the Air Force," that "[h]ad [Leslie] elected to continue with her [former] employment she would in all likelihood have had to [be] relocated in the near future," and that "had she been required to do so the provision of the Decree, with reference to reassignment[,] would have been automatic."

[8] The evidence, however, indicated merely a "rumor" that Leslie's position might be eliminated in Nebraska and a possibility that she could be reassigned or relocated by the military to a different location. There was no evidence that "in all likelihood" such relocation would happen. Rather, the parties jointly recognized that the possibility of relocation by the military was a reality of their respective employments, and the district court provided for such possibility in the dissolution decree. Speculation about rumors and possibilities cannot be sufficient to warrant allowing a custodial parent to voluntarily terminate employment in Nebraska and pursue a different job outside of Nebraska. Although custody is not to be interpreted as a sentence to immobility, the foregoing discussion demonstrates that the custodial parent must prove a legitimate reason for removing the minor child from the jurisdiction. See *Vogel v. Vogel, supra.*

As indicated above, we conclude that Leslie failed to satisfy her burden to demonstrate a legitimate reason for leaving Nebraska and removing Amber to Ohio. Unlike the evidence in every other case in Nebraska which has sustained a custodial parent's request to leave Nebraska for a new employment opportunity, the evidence in this case fails to indicate that the new position offers any opportunity for career advancement or salary advancement, and the actual immediate increase in salary does not afford a legitimate reason because none of the increase will benefit Leslie or the best interests of Amber because of Leslie's increased transportation costs to bring Amber back to Nebraska for visitation with Brian. Rather, the evidence adduced by Leslie in this case indicates that she wanted to move to Ohio to be nearer her fiance and to accept an entry-level position with a security company. Leslie presented no evidence that

would indicate that the new position afforded any opportunities for stability, benefits, or advancement superior to those of the position she had in Nebraska. As such, we conclude that the district court abused its discretion in finding that "[Leslie] obtained a position in Ohio at a substantial increase in pay, and with what appears to be a job with a future and not subject to reassignment."

(b) Amber's Best Interests

As noted, we conclude that the district court abused its discretion in finding that Leslie met her burden to prove a legitimate reason for leaving Nebraska and removing Amber to Ohio. We further conclude, however, that even if Leslie's entry-level security job in Ohio could be considered a significant career advancement opportunity, Leslie further failed to meet her burden to prove that removal to Ohio is in Amber's best interests, because the evidence adduced by Leslie indicates no benefit to Amber of being removed to Ohio. The district court abused its discretion in finding to the contrary.

[9,10] After clearing the threshold of demonstrating a legitimate reason for leaving the state and removing the minor child to another state, the custodial parent must demonstrate that it is in the child's best interests to continue living with him or her. *Tremain v. Tremain*, 264 Neb. 328, 646 N.W.2d 661 (2002); *McLaughlin v. McLaughlin*, 264 Neb. 232, 647 N.W.2d 577 (2002); *Vogel v. Vogel*, 262 Neb. 1030, 637 N.W.2d 611 (2002); *Brown v. Brown*, 260 Neb. 954, 621 N.W.2d 70 (2000); *Jack v. Clinton*, 259 Neb. 198, 609 N.W.2d 328 (2000); *Farnsworth v. Farnsworth*, 257 Neb. 242, 597 N.W.2d 592 (1999). In determining whether removal to another jurisdiction is in the child's best interests, the trial court considers (1) each parent's motives for seeking or opposing the move; (2) the potential that the move holds for enhancing the quality of life for the child and the custodial parent; and (3) the impact such a move will have on contact between the child and the noncustodial parent, when viewed in the light of reasonable visitation. *Id.*

In the present case, the district court did not elaborate on any of the best interests factors or give an indication of why the court determined that it was in Amber's best interests to be removed

from Nebraska to Ohio. Nonetheless, the court specifically found that "the move to Ohio would be in [Amber's] best interest[s]." We find that the evidence does not support this conclusion.

(i) Each Parent's Motives

The first factor that must be considered is each parent's motives for seeking or opposing the removal of the minor child from the jurisdiction. We conclude that at most, the evidence demonstrates that the parties' motives are balanced; this factor does not weigh in favor of a finding that removal is in Amber's best interests.

[11,12] The ultimate question in evaluating the parties' motives in seeking removal of a child to another jurisdiction is whether either party has elected or resisted a removal in an effort to frustrate or manipulate the other party. *McLaughlin v. McLaughlin, supra.* See, also, *Vogel v. Vogel, supra*; *Brown v. Brown, supra*; *Jack v. Clinton, supra*; *Farnsworth v. Farnsworth, supra.* Further, "while some legitimate explanations 'might seem less compelling than others . . . none should be summarily rejected at this stage of the analysis without weighing the other considerations and how they all come to bear on the overall impact on the child.' " *Jack v. Clinton*, 259 Neb. at 207, 609 N.W.2d at 334-35, quoting *Farnsworth v. Farnsworth, supra.*

The evidence in the present case indicates that Brian is an involved noncustodial father who regularly exercises his visitation and is concerned about the impact Leslie's removal of Amber from Nebraska to Ohio will have on that visitation. On the other hand, the evidence indicates that Leslie was motivated to seek removal to be nearer her fiance and to explore a different employment opportunity. As is true of the other cases decided by the appellate courts of Nebraska concerning this factor, we do not find that either party was acting in bad faith or with ill motives, and we conclude that the motives of the parties are balanced. See, *Tremain v. Tremain*, 264 Neb. 328, 646 N.W.2d 661 (2002); *McLaughlin v. McLaughlin*, 264 Neb. 232, 647 N.W.2d 577 (2002); *Vogel v. Vogel*, 262 Neb. 1030, 637 N.W.2d 611 (2002); *Brown v. Brown*, 260 Neb. 954, 621 N.W.2d 70 (2000); *Jack v. Clinton*, 259 Neb. 198, 609 N.W.2d 328 (2000); *Farnsworth v. Farnsworth*, 257 Neb. 242, 597 N.W.2d 592 (1999). As such, this

factor does not weigh in favor of a finding that it is in Amber's best interests to be removed to Ohio.

(ii) Quality of Life

The second factor that must be considered is the potential that the move holds for enhancing the quality of life for the child and the custodial parent. This factor requires an analysis of a number of other considerations which bear upon the potential enhancement of the child's quality of life. The evidence in the record in this case fails to demonstrate that the proposed removal to Ohio will significantly enhance Amber's quality of life. Leslie failed to adduce sufficient evidence to support a finding that this factor weighs in favor of removal.

[13,14] In determining the potential that the removal to another jurisdiction holds for enhancing the quality of life of the child and the custodial parent, a court should evaluate the following considerations: (1) the emotional, physical, and developmental needs of the child; (2) the child's opinion or preference as to where to live; (3) the extent to which the relocating parent's income or employment will be enhanced; (4) the degree to which housing or living conditions would be improved; (5) the existence of educational advantages; (6) the quality of the relationship between the child and each parent; (7) the strength of the child's ties to the present community and extended family there; and (8) the likelihood that allowing or denying the removal would antagonize hostilities between the two parties. See, *McLaughlin v. McLaughlin, supra*; *Vogel v. Vogel, supra*; *Brown v. Brown, supra*; *Jack v. Clinton, supra*; *Farnsworth v. Farnsworth, supra*. This list should not be misconstrued as setting out a hierarchy of considerations, and depending on the circumstances of a particular case, any one consideration or combination of considerations may be variously weighted. See *id.*

a. Emotional, Physical, and Developmental Needs

The record indicates that both parties in this case are capable of providing for the emotional, physical, and developmental needs of Amber. The record suggests that both are loving parents genuinely concerned about Amber's needs. There was no evidence presented to suggest that either party is incapable or deficient in any way in providing for Amber's emotional, physical,

and developmental needs. As such, this consideration is equally balanced and does not weigh in favor of removal.

b. Amber's Opinion or Preference

At the time of the trial in this matter, Amber was 9 years old. Leslie's attorney made an offer of proof at trial that if called, Amber would testify that she wants to go to Ohio, wants to try new things and see new places, and wants to remain with Leslie. This offer of proof was not made in response to any ruling by the court refusing proffered evidence, and when Brian's attorney objected to the offer of proof, the court overruled the objection, sustained the offer, and received Amber's deposition as evidence. In Amber's deposition, she testified that she was comfortable with moving to Ohio with Leslie, although Amber acknowledged that she would miss Brian. As such, the limited evidence in the record indicates that Amber is willing to move to Ohio, and this consideration may be seen as weighing in favor of allowing the removal.

c. Enhancement of Income or Employment

As fully addressed above in our discussion of Leslie's failure to prove that the new employment opportunity constitutes a legitimate reason for removing Amber to Ohio, the record in this case does not demonstrate that the move will result in an enhancement of Leslie's income or employment. Leslie failed to demonstrate that the new position offers any greater opportunity for advancement or salary increases or any greater benefits or working hours than her position in Nebraska. Further, although Leslie testified that the new position would pay a higher salary, as discussed above, Leslie failed to present any evidence about the cost-of-living difference, and virtually the entire increase in pay will be consumed to pay for Leslie's obligation to transport Amber back to Nebraska for visitation with Brian. Leslie did not present any evidence concerning her fiance's income or employment. Compare *McLaughlin v. McLaughlin*, 264 Neb. 232, 647 N.W.2d 577 (2002) (custodial parent's new spouse's income properly considered in this factor).

The result is that the record does not support a finding that Leslie's income or employment will be enhanced in any way

beneficial to Amber's best interests. This consideration does not weigh in favor of removal.

d. Housing or Living Conditions

Leslie testified that her housing in Nebraska was in a large apartment. Leslie testified that her housing in Ohio would be in her fiance's home. There was no evidence presented concerning the quality of the neighborhoods for either housing, and there was no evidence presented to indicate that the housing in Ohio will, other than by offering a backyard, provide any benefit to Amber's best interests. There was no evidence presented to indicate that the available housing in Nebraska was in any way deficient. This consideration does not weigh in favor of removal.

e. Educational Advantages

The record indicates that Amber has a learning deficiency and that she requires special education opportunities to benefit her reading difficulties. The record indicates that Amber's school in Nebraska had a specific program in place which was addressing Amber's needs. Leslie testified that she had not had an opportunity to look into the availability of any special education opportunities in Ohio. Leslie did not know what school Amber would attend in Ohio and did not know whether the school would employ a year-round calendar or a more traditional school calendar. Leslie did not provide any evidence about the relative quality of the schools in Nebraska or Ohio. Leslie failed to adduce any evidence which would suggest that removal to Ohio would afford Amber any educational advantage. This consideration does not weigh in favor of removal.

f. Quality of Relationship Between Child and Parents

With regard to this consideration, the record indicates only that Amber has a good relationship with both parties and that by necessity, removal will impact her relationship with Brian and the amount of time she is able to spend with Brian. There was no evidence presented to indicate that Amber has a stronger relationship with either parent. There was no expert evidence produced indicating that removal should be allowed because of such a stronger bond with Leslie. Compare *McLaughlin v. McLaughlin,*

supra (expert recommended granting removal because of bond with custodial parent).

[15] The effect of the removal of a child to another jurisdiction must be evaluated in light of the child's relationship with each parent. *Id.* See, also, *Brown v. Brown*, 260 Neb. 954, 621 N.W.2d 70 (2000). In this case, evaluating the effect of the removal in light of the child's relationship with each parent indicates that Amber's relationship with Brian will suffer, at least to the extent of a reduction in time spent together and in the frequency and ease of Amber's and Brian's contact with each other. There was no evidence presented to indicate that removal will have any impact on Amber's relationship with Leslie. This consideration, then, also does not weigh in favor of removal.

g. Ties to Community and Extended Family

There was little evidence presented concerning Amber's ties to the community in Nebraska; she was only 9 years old at the time of the trial. Amber indicated in her deposition that she did have friends in Nebraska, and the record indicates that Amber does have some extended family in Nebraska. Specifically, one of Leslie's brothers, his wife, and their children are in the community in Nebraska. The record does not indicate what kind of relationship Amber has with those relatives. See *McLaughlin v. McLaughlin*, 264 Neb. 232, 647 N.W.2d 577 (2002). The record indicates that there is no such extended family in Ohio.

[16] Of importance, Amber's half sister, Andrea, is also in the community in Nebraska; as noted above, Andrea is in Brian's sole custody. The record does indicate that Amber has a close relationship with Andrea. The Nebraska Supreme Court has specifically noted that the relationship of a child to siblings is entitled to consideration and weight. See *Brown v. Brown, supra* (court would be remiss not to consider relationship of children to younger siblings). As such, this consideration does not weigh in favor of removal.

h. Hostilities Between Parties

The record indicates that the parties have experienced some disagreements and some communication problems, although both parties testified that they have been able to resolve their

communication problems and work together concerning Amber. Nonetheless, Leslie herself specifically testified that she believed that her communication with Brian would be adversely impacted if the court granted her request to remove Amber to Ohio. This consideration does not weigh in favor of removal.

i. Conclusion on Quality of Life

As noted, the district court did not make specific findings concerning any of the best interests factors and did not make specific findings concerning any of the quality of life considerations. Our de novo review of the record, however, leads us to conclude that the quality of life considerations do not weigh in favor of allowing Leslie to remove Amber to Ohio. Even though there is no hierarchy of the considerations and no particular weight that must be given to any individual consideration in a given case, in the present case, the considerations almost uniformly fail to weigh in favor of removal. Leslie failed to prove an enhancement in the quality of life for Amber or herself from leaving Nebraska and going to Ohio. Because Leslie failed to adduce sufficient evidence to support a finding that Amber's quality of life would be enhanced, we find that this factor weighs against removal.

(iii) Impact of Move on Contact Between Child and Noncustodial Parent

The third factor that must be considered is the effect of allowing Leslie to remove Amber to Ohio upon Brian's ability to maintain a meaningful parent-child relationship with Amber. As is true with most applications for removal, the frequency of the noncustodial parent's visitation will necessarily be diminished by distance. See *McLaughlin v. McLaughlin*, 264 Neb. 232, 647 N.W.2d 577 (2002). Instead of being in the same community as Brian, Amber would be living in Dayton. We conclude that the evidence presented in this case fails to support a finding that Brian's parent-child relationship with Amber will not be adversely impacted by granting the removal.

[17] The effect on the parent-child relationship must be viewed in light of the court's ability to devise reasonable visitation arrangements. *McLaughlin v. McLaughlin, supra.* See, also, *Vogel v. Vogel*, 262 Neb. 1030, 637 N.W.2d 611 (2002). A

significant difficulty in assessing the court's ability to fashion such a reasonable visitation arrangement in the present case exists because of Leslie's lack of knowledge concerning what school Amber would attend and what calendar that school utilizes. The record indicates that Dayton has schools which utilize a year-round calendar and schools which utilize a traditional calendar. Leslie did not know how many of either were in the area she intended to move to, and, as noted, she did not know what school Amber would attend or what calendar the school would use.

Although Leslie testified that she would be willing to pay the transportation costs to bring Amber back to Nebraska to visit with Brian, and although she was affirmatively ordered to do so, the inadequacies concerning Leslie's evidence about Amber's potential school schedule bring into question the reasonableness of the district court's visitation plan. In *McLaughlin v. McLaughlin*, 264 Neb. at 246, 647 N.W.2d at 590, for example, the custodial parent was willing to drive halfway to help the noncustodial parent maintain visitation and was willing to provide "extended summer visitation." The Nebraska Supreme Court specifically found that the noncustodial parent could still maintain a meaningful relationship with the child "through a reasonable visitation schedule, which included extended visitation in the summer." *Id.* See, also, *Vogel v. Vogel, supra* (diminished contact resulting from move from Nebraska to Virginia mitigated by award of liberal visitation including almost entire summer school break); *Jack v. Clinton*, 259 Neb. 198, 609 N.W.2d 328 (2000) (diminished contact resulting from move from Nebraska to Pennsylvania mitigated by reasonable visitation order including 6 consecutive weeks in summer). Compare *Brown v. Brown*, 260 Neb. 954, 621 N.W.2d 70 (2000) (despite substantial and commendable concessions on visitation by custodial parent, it could not be reasonably questioned that move from Nebraska to New York would make existing relationship almost impossible to maintain). In the present case, however, Leslie failed to adduce evidence that Amber would even have an extended period of time in the summer during which Brian could exercise extended visitation. As such, the reasonableness of the district court's visitation order, which

specifically awarded Brian extended summer visitation, is not apparent on the basis of the evidence adduced by Leslie.

Although this case is similar to previous Nebraska removal cases, wherein it is almost always true that the noncustodial parent's visitation and contact with the child will necessarily be less than it would have been had the custodial parent and the child remained in Nebraska, this case is also different from such previous cases because of Leslie's failure to adduce sufficient evidence allowing us to determine the reasonableness of the district court's visitation order. The record presented is inadequate for us to determine that a reasonable visitation order can be entered which will mitigate the necessary reduction in time spent together by Brian and Amber. As such, it is impossible to determine that Brian's relationship with Amber will not be seriously damaged by allowing Leslie's removal of Amber to Ohio. As such, we conclude that this factor also does not weigh in favor of allowing removal.

(iv) Conclusion on Best Interests

The record does not demonstrate sufficient support for the district court's conclusion that it is in Amber's best interests to be removed from Nebraska to Ohio. None of the factors to be considered in evaluating Amber's best interests weighs in favor of allowing removal. Leslie failed to adduce sufficient evidence to demonstrate how allowing removal of Amber to Ohio would serve Amber's best interests. Because Leslie failed to meet her burden of proof on this issue, we conclude that the district court abused its discretion in summarily finding that allowing the removal would be in Amber's best interests.

(c) Conclusion on Removal

This is another in the growing line of difficult cases in Nebraska courts where a custodial parent seeks the opportunity to leave the state and relocate with a minor child. Like many of the previous cases, this one involves a noncustodial parent for whom the record does not contain negative evidence. The record reveals Brian to be a capable and loving father who vigorously exercises his visitation rights; has sole custody of Amber's half sister, Andrea; and desires to prevent the potential damage to his relationship with Amber that would arise from

Amber's removal to Ohio. In this case, the parties were divorced by a decree dated February 20, 2003, which was the result of a settlement agreement by the parties in which they agreed on all issues, including custody and visitation of Amber. Fewer than 10 months later, Leslie sought to remove Amber to Ohio, where Leslie's fiance lived and where she believed she had obtained new employment. When that employment did not come to fruition, Leslie withdrew her initial request. Approximately 5 months later, Leslie made a second request to remove Amber to Ohio. At trial, Leslie failed to adduce sufficient evidence to support her request for removal.

We conclude that Leslie failed to meet her burden of proving a legitimate reason for leaving Nebraska and removing Amber to Ohio. The record does not contain sufficient evidence to support a finding that Leslie's new employment opportunity in Ohio provides any opportunity for career or salary advancement greater than that of her employment in Nebraska. The record does not contain any evidence concerning the cost-of-living differences between Nebraska and Ohio, and the pay increase which Leslie did receive by taking the new employment will be almost entirely consumed merely by paying for transportation costs associated with bringing Amber to Nebraska to visit with Brian. As such, Leslie failed to meet her burden of proof on the threshold issue of establishing a legitimate reason for the move.

Additionally, Leslie failed to meet her burden of proof to demonstrate that removing Amber to Ohio would be in Amber's best interests. Although the motives of the parties in either seeking or opposing removal are equally balanced, the remaining factors to be considered in evaluating Amber's best interests—the potential for enhancement of Amber's quality of life and potential impact on the relationship between Amber and Brian—do not weigh in favor of allowing removal. Leslie failed to adduce sufficient evidence to demonstrate that removal to Ohio would be in Amber's best interests.

The district court abused its discretion in finding that Leslie had satisfied her burden of proof with respect to her request to remove Amber to Ohio. As such, we find merit to Brian's assignment of error, and we reverse the district court's order granting Leslie's request to remove Amber to Ohio.

3. Change in Custody

Brian next asserts that the district court erred in denying his counterclaim seeking a change in custody. We conclude that Brian has not proven a material change of circumstances showing that Leslie is unfit or that the best interests of Amber require such action. As such, we find no merit to this assignment of error.

[18-22] The issue of a change in custody must be considered separately and apart from the custodial parent's request to remove the child to another state. See *Tremain v. Tremain*, 264 Neb. 328, 646 N.W.2d 661 (2002). Ordinarily, custody of a minor child will not be modified unless there has been a material change in circumstances showing that the custodial parent is unfit or that the best interests of the child require such action. *Id.*; *Vogel v. Vogel*, 262 Neb. 1030, 637 N.W.2d 611 (2002). An appellate court conducts a de novo review on the record in child custody determinations. See *id.* The party seeking modification of child custody bears the burden of showing a material change in circumstances. *Id.* The Nebraska Supreme Court has previously stated that a request to remove a child from the state, without more, does not amount to a material change in circumstances warranting a change of custody. See *id.*

In the present case, Leslie testified that if the court denied her request to remove Amber to Ohio, she would return to Nebraska. Brian presented no evidence sufficient to demonstrate any material change in circumstances warranting a change of custody. Although we have concluded that it is in Amber's best interests to remain in Nebraska, we are not persuaded that Brian has sustained his burden of showing a material change in circumstances that would justify a change of custody. See *Tremain v. Tremain, supra*. As such, we find this assignment of error to be without merit.

4. Attorney Fees

Finally, Brian asserts that the district court erred in denying his request for attorney fees. The district court ordered each party to pay his or her own fees and costs. We do not find such a determination by the district court to be an abuse of discretion.

[23] The district court's decision on a request for attorney fees is reviewed de novo on the record and will be affirmed in the absence of an abuse of discretion. See *Gangwish v. Gangwish*,

267 Neb. 901, 678 N.W.2d 503 (2004). As noted above, we do not find sufficient evidence to attribute bad faith or ill motives to either party in this case, and the record does not establish any reason to conclude that the district court abused its discretion in ordering Brian and Leslie to pay their respective attorney fees. We find this assignment of error to be without merit.

V. CONCLUSION

We find that the district court abused its discretion in granting Leslie's request to remove Amber to Ohio. We find that Leslie failed to meet her burden of proof to demonstrate a legitimate reason for the move and to demonstrate that removal to Ohio would be in Amber's best interests. Accordingly, we reverse the district court's order granting removal.

We find no abuse of discretion by the district court with respect to Brian's requests for a change of custody and for attorney fees. Accordingly, we affirm those findings of the district court.

AFFIRMED IN PART, AND IN PART REVERSED.

STATE OF NEBRASKA, APPELLEE, V.
PETER J. ALBA, APPELLANT.
697 N.W.2d 295

Filed May 10, 2005. No. A-04-1125.

1. **Plea Bargains.** When there is a mistake of law in the plea agreement, the risk of such mistake falls on the State.
2. **Sentences: Appeal and Error.** Whether an appellate court is reviewing a sentence for its leniency or its excessiveness, a sentence imposed by a district court that is within the statutorily prescribed limits will not be disturbed on appeal unless there appears to be an abuse of the trial court's discretion.
3. **Judges: Words and Phrases.** A judicial abuse of discretion exists only when the reasons or rulings of a trial judge are clearly untenable, unfairly depriving a litigant of a substantial right and denying a just result in matters submitted for disposition.
4. **Statutes: Constitutional Law: Sentences.** A law which creates or enhances penalties that did not exist when the offense was committed is an unenforceable ex post facto law.
5. **Sentences.** A sentence is illegal when it is not authorized by the judgment of conviction or when it is greater or less than the permissible statutory penalty for the crime.
6. **Pleas: Records.** The record must support a finding that a plea of guilty has been entered freely, voluntarily, intelligently, and understandingly, which includes ensuring that the defendant understands the range of penalties.

7. **Plea Bargains: Contracts.** A plea bargain is a contract, the terms of which necessarily must be interpreted in light of the parties' reasonable expectations. The resolution of each case depends upon the essence of the particular agreement and the government's conduct relating to its obligations in that case.
8. **Plea Bargains: Prosecuting Attorneys: Specific Performance.** In dealing with a prosecutor's breach of a plea agreement, when the breach has been properly preserved for review, the defendant may be entitled to withdrawal of the plea or to specific performance.
9. **Judges: Plea Bargains: Sentences.** A judge is not bound to give a defendant the sentence recommended by a prosecutor under a plea agreement.
10. **Sentences.** It is the minimum portion of an indeterminate sentence which measures its severity.
11. **Plea Bargains: Prosecuting Attorneys: Sentences.** When the State is culpable in creating an illegal sentence in an otherwise lawful plea agreement, fundamental fairness and the analogous contract principles require that we allow the defendant to retain the benefit of his plea bargain and be lawfully sentenced.

Appeal from the District Court for Douglas County: J. MICHAEL COFFEY, Judge. Sentences vacated, and cause remanded for resentencing.

Casey J. Quinn for appellant.

Jon Bruning, Attorney General, and Susan J. Gustafson for appellee.

INBODY, Chief Judge, and IRWIN and SIEVERS, Judges.

SIEVERS, Judge.

INTRODUCTION

[1] Peter J. Alba appeals the sentencing order of the Douglas County District Court after his plea of nolo contendere to two counts of sexual assault of a child, first offense, for which he was sentenced to 5 to 10 years' imprisonment on count I and 10 to 15 years' imprisonment on count II, the sentences to run consecutively. The appeal centers on the fact that the State, defense counsel, and the judge treated the crimes in the plea bargain as Class II felonies when they in fact were lesser crimes, Class IV felonies. Alba asks that he be resentenced under the lesser penalties for Class IV felonies. The State argues that we should void the plea agreement, remand the cause, and essentially allow the prosecution to start over because the State did not get the benefit of its plea bargain. We hold that when there is a mistake of law in the plea agreement, the risk of such mistake falls on the

State. Thus, the plea agreement must be upheld, and Alba is entitled to be resentenced according to the law applicable to Class IV felonies, which is the correct gradation of the crimes in the plea agreement.

FACTUAL AND PROCEDURAL BACKGROUND

On October 28, 2003, Alba was charged by information with two counts of second-offense sexual assault of a child, Class IC felonies, pursuant to Neb. Rev. Stat. § 28-320.01(3) (Cum. Supp. 1996). Count I alleged that "on or about the 1st day of January, 1997," Alba subjected B.A., "a person of less than fourteen years of age or younger, to sexual contact." Count II alleged that "on or about the 1st day of January, 1997," Alba subjected Z.A., "a person of less than fourteen years of age or younger, to sexual contact."

On August 5, 2004, pursuant to a plea agreement, the State amended the information to allege each count as a first offense, which the State and the judge said made each count a Class II felony. The amended information expressly categorizes the crimes as Class II felonies. At the plea hearing, the trial judge, without objection from defense counsel or the State, advised Alba about the crimes and their penalties as though the crimes were Class II felonies, telling Alba that the crimes each carried a maximum prison sentence of 50 years and a minimum prison sentence of 1 year. Alba entered a plea of nolo contendere and was advised by the judge that he was pleading no contest to two Class II felonies, each of which carried a sentence as described above. A factual basis was entered, Alba's pleas were accepted, and an order was entered on September 27, 2004, sentencing Alba to imprisonment for 5 to 10 years on count I and for 10 to 15 years on count II, the sentences to be served consecutively. Alba appeals the sentences to this court.

ASSIGNMENTS OF ERROR

Alba asserts that the trial court erred by imposing an excessive sentence on each count.

STANDARD OF REVIEW

[2,3] Whether an appellate court is reviewing a sentence for its leniency or its excessiveness, a sentence imposed by a district

court that is within the statutorily prescribed limits will not be disturbed on appeal unless there appears to be an abuse of the trial court's discretion. *State v. Hamik*, 262 Neb. 761, 635 N.W.2d 123 (2001). A judicial abuse of discretion exists only when the reasons or rulings of a trial judge are clearly untenable, unfairly depriving a litigant of a substantial right and denying a just result in matters submitted for disposition. *Id.*

ANALYSIS

Statutory Penalty in Effect at Time of Crime Controls.

Under § 28-320.01, first-offense sexual assault of a child at the time of the crime was a Class IV felony, but the statute was later amended to change first-offense sexual assault of a child to a Class IIIA felony. See 1997 Neb. Laws, L.B. 364 (operative date July 1, 1998). Alba contends that because the crimes set forth in the information were alleged to have occurred on or about January 1, 1997, the version of § 28-320.01 classifying first-offense sexual assault as a Class IV felony controls here.

[4] We agree that the penalty provisions of § 28-320.01 in effect at the time of the alleged crimes set forth in the amended information, which provisions made first-offense sexual assault of a child a Class IV felony, are controlling, rather than the legislative amendment operative July 1, 1998, which made the crimes Class IIIA felonies. See *State v. Gray*, 259 Neb. 897, 612 N.W.2d 507 (2000) (law which creates or enhances penalties that did not exist when offense was committed is unenforceable ex post facto law).

Effect of Mistake in Plea Agreement.

[5] Alba contends that his sentences are illegal because they are not authorized for the crimes to which he pled no contest as part of the plea agreement. Alba's sentences were the result of a mistake in the proceedings by which the original charges were reduced from second- to first-offense sexual assault of a child, but the amended charges were wrongfully treated as Class II felonies—and treated as such by the State, the trial judge, and defense counsel. While the punishment for a Class II felony is 1 to 50 years' imprisonment, no such sentence is authorized for a first-offense violation of § 28-320.01, which is what Alba pled to and was found guilty of. Thus, the sentences imposed were

illegal because they were not authorized under § 28-320.01 and because they exceed the 5-year maximum sentence authorized at the time of Alba's crimes of first-offense sexual assault of a child. A sentence is illegal when it is not authorized by the judgment of conviction or when it is greater or less than the permissible statutory penalty for the crime. *U.S. v. Greatwalker*, 285 F.3d 727 (8th Cir. 2002). See, also, *State v. Lotter*, 255 Neb. 456, 586 N.W.2d 591 (1998) (sentence imposed was invalid in that maximum period of incarceration specified exceeded that which was authorized by statute), *cert. denied* 526 U.S. 1162, 119 S. Ct. 2056, 144 L. Ed. 2d 222 (1999); *State v. Hedglin*, 192 Neb. 545, 222 N.W.2d 829 (1974) (minimum portion of sentence was void as being in excess of minimum authorized by statute). Accordingly, we must vacate Alba's sentences.

[6] However, because the sentences were the result of a plea agreement, we must determine whether such agreement must also be vacated, as the State contends, or whether the remedy is to order resentencing of Alba for the correct gradation of the crimes to which he pled. We note that Alba does not complain of any due process violation from the obvious mistake made by his defense counsel, the State, and the trial judge in classifying the crime as a Class II felony instead of a Class IV felony. While the trial judge was clearly remiss in his duty to correctly advise Alba about the applicable penalties, Alba does not assign such as error. See *State v. Irish*, 223 Neb. 814, 394 N.W.2d 879 (1986) (record must support finding that plea of guilty has been entered freely, voluntarily, intelligently, and understandingly, which includes ensuring that defendant understands range of penalties). Obviously, he could not have relied, to his prejudice, on an incorrect advisory stating a much more severe penalty than was lawful. Therefore, while the penalty advisory was plainly error, it was not prejudicial, and by asking to be resentenced under the correct statute, Alba has also waived such error.

In contrast, the State requests that we vacate the plea agreement in its entirety, because doing so would "return both parties to the *status quo ante*." Brief of appellee at 14. The State complains that it was prejudiced because when it entered into the agreement, "the statutory sentencing range applicable to a Class II felony was an essential element of the agreement between the

parties." *Id.* at 15. The essence of the State's argument is that the State made the agreement because under it, Alba could still receive severe sentences, yet the victims and their families would be spared from testifying.

To support this argument, the State refers us to the sentencing hearing, during which the prosecutor commented:

> [T]he reduction of the charge was done with no reflection on a reduction in sentence. It was done to prevent th[e] family from having to go through a trial. . . . [T]hat decision by the family was not done with a reduction in sentencing in mind. It was done solely to save the child and th[e] family from the ordeal of a trial, because we felt that even the reduced charge carried enough exposure . . . that the Court would have at its discretion enough time to — enough exposure to make the appropriate ruling.

Plea Agreements as Contracts: Parties' Reasonable Expectations.

[7,8] In *State v. Howe*, 2 Neb. App 766, 778, 514 N.W.2d 356, 365 (1994), we stated:

> " 'A plea bargain is a contract, the terms of which necessarily must be interpreted in light of the parties' reasonable expectations. The resolution of each case depends upon the essence of the particular agreement and the Government's conduct relating to its obligations in that case.' " *United States v. Fields*, 766 F.2d 1161, 1168 (7th Cir. 1985).

Consistent with the view of plea agreements as contracts, the Nebraska Supreme Court has said that in dealing with a prosecutor's breach of a plea agreement, when the breach has been properly preserved for review, the defendant may be entitled to withdrawal of the plea or to specific performance. See *State v. Birge*, 263 Neb. 77, 638 N.W.2d 529 (2002). These remedies are obviously concepts from the law of contracts, but this case does not involve a prosecutor's breach of a plea agreement.

Therefore, we turn to the parties' reasonable expectations in reaching their bargain, and the emphasis is properly on "reasonable." While the State's representative argued at sentencing that the plea agreement was based on avoidance of trial for the family rather than on reduction of sentence, we find that such

position is inherently illogical. A reasonable prosecutor is bound to know that reduction in a charge via a plea agreement necessarily carries with it a reduction in the judge's sentencing discretion under the Nebraska sentencing scheme. Neb. Rev. Stat. § 28-105 (Cum. Supp. 2004), which classifies felonies by punishment, reveals that beginning with the most serious and proceeding to each descending class of felony, each lower gradation carries a lesser possible sentence—even if it is only in regard to the lower limit of the sentencing range. For example, a Class IC felony (as originally charged herein) carries a range of 5 to 50 years' imprisonment, whereas a Class II felony (two grades lower) carries a range of 1 to 50 years' imprisonment.

[9,10] Accordingly, although the State suggested to the trial court, and now argues to this court, that the State's agreement to the lesser charges was not based on reduction of sentences, some measure of possible sentence reduction was inherent in the agreement, even when the mistaken classification is considered. It is well established that a judge is not bound to give a defendant the sentence recommended by a prosecutor under a plea agreement. See *State v. Griger*, 190 Neb. 405, 208 N.W.2d 672 (1973). It is equally true that absent an abuse of discretion, the trial court's sentences stand. Finally, in considering the State's "benefit of the bargain" argument, we remember that as a practical matter, the minimum portion of an indeterminate sentence is that which measures the severity of the sentence. See *State v. King*, 196 Neb. 821, 246 N.W.2d 477 (1976). Here, even under the State's mistaken belief that it was reducing the charge from a Class IC felony to a Class II felony, the lower limit of the sentencing range would be reduced from 5 years to 1 year, or by 80 percent. Thus, the State's argument that no reduction in sentence was contemplated as part of the plea bargain must fail because such was not a reasonable expectation, since the reduction in charge carries a reduction in the sentencing judge's discretion. In summary, our decision is not determined by the State's statements at sentencing when such statements are inherently flawed, at least for the purpose of creating a "reasonable expectation" at sentencing. Admittedly, if the crimes were truly Class II felonies, the judge would have retained discretion of up to 50 years' imprisonment on the upper

limit of the sentence, but discretion on the lower limit would be substantially reduced, and as said, it is the lower limit of an indeterminate sentence which determines its severity.

The State's expectation that Alba would be subjected to two terms of 1 to 50 years' imprisonment after Alba pled no contest to two counts of first-offense sexual assault of a child is a fundamentally unreasonable expectation, because such a sentence is not a lawful sentence. Paradoxically, while Alba could hardly have expectations of a lesser sentence when everyone involved —the judge, the State, and his own lawyer—were talking about a sentence of 5 to 50 years' imprisonment, we think that due process requires that we attribute to Alba the minimum reasonable expectation for his sentencing: that it would be lawful.

What Is Remedy for Plea Agreement With Incorrect Gradation of Crimes in Agreement?

We begin the heart of our analysis by noting that there are a variety of permutations of fact patterns with flawed plea agreements which involve unauthorized sentences as a result of someone's mistake. See Annot., 87 A.L.R.4th 384 (1991), and cases cited therein. While we cannot detail all such cases, we summarize by noting that different jurisdictions have taken different approaches to the problem but that outcomes are largely fact specific.

The State's position is that if we apply the contract theory of plea negotiations as stated in *State v. Howe*, 2 Neb. App. 766, 514 N.W.2d 356 (1994), then we must conclude that the State did not receive the benefit of its bargain with Alba and that we should remand the cause with directions that the plea agreement be set aside. The State relies heavily upon *State v. Boley*, 32 Kan. App. 2d 1192, 95 P.3d 1022 (2004), a case where the defendant was originally charged with manufacture of methamphetamine or, in the alternative, attempted manufacture of methamphetamine and with conspiracy to manufacture methamphetamine. The prosecution agreed to dismiss all of the charges except the attempted manufacture of methamphetamine and to recommend a downward durational departure sentence of 48 months, which constituted a "severity level 1 penalty," in exchange for the defendant's plea. *Id.* at 1193, 95 P.3d at 1024. After the plea but

before sentencing, the defendant objected to the imposition of the severity level 1 penalty and argued that his conviction should carry the less severe level 3 penalty. This claim was rejected by the trial court, but on appeal, the appellate court found that the defendant was in fact entitled to a drug severity level 3 penalty. The Kansas Court of Appeals said that therefore, the "primary issue . . . concerns the State's ability to withdraw from the plea bargain after the case is remanded for resentencing." *Id.* at 1194, 95 P.3d at 1024. The *Boley* court found that the defendant and the State, in making their agreement, had relied upon the bases that the defendant would be convicted of a severity level 1 felony and that the State would recommend a downward departure sentence of 48 months. The *Boley* court found the agreement for the downward departure recommendation "meaningless," because the severity level 1 penalty carried a presumptive sentencing range of 138 to 204 months. *Id.* at 1194, 95 P.3d at 1025. The *Boley* court cited an earlier decision in *State v. Boswell*, 30 Kan. App. 2d 9, 37 P.3d 40 (2001), where the Kansas Court of Appeals held that an unconstitutional upward durational departure sentencing recommendation did not implicate the defendant's due process rights, because such term of the plea agreement provided an inducement to the State, not the defendant. Consequently, the *Boswell* court found that the defendant's inducement to enter the plea remained unaffected by the declaration that the departure sentence was unconstitutional. Relying upon *Jolly v. State*, 392 So. 2d 54 (Fla. App. 1981), the *Boswell* court held:

> [W]hen a plea agreement includes an agreement to recommend to the court an illegal sentence, the sentencing court imposes the recommended but illegal sentence, and the illegal sentence impermissibly increases the defendant's term of imprisonment, the State may either allow the defendant to withdraw his or her guilty plea, or agree that the illegal portion of the sentence be vacated and the defendant be resentenced to the proper lesser term.

(Emphasis omitted.) 30 Kan. App. 2d at 14, 37 P.3d at 44-45. However, *Boley* and *Boswell* are fundamentally distinguishable from the present case because no sentence recommendation was involved in the plea agreement in Alba's case.

In *State v. Boley*, 32 Kan. App. 2d 1192, 95 P.3d 1022 (2004), the court also relied heavily upon *U.S. v. Bunner*, 134 F.3d 1000 (10th Cir. 1998), *cert. denied* 525 U.S. 830, 119 S. Ct. 81, 142 L. Ed. 2d 64, where the defendant had agreed to plead guilty to an offense which the U.S. Supreme Court subsequently held was not criminalized by the pertinent statutes. The *Bunner* court reasoned that the defendant's remaining performance under the plea agreement held no value to the government and therefore frustrated the government's basis for entering into the plea agreement and that this provided the government an opportunity to escape its obligations under the agreement, if it so desired. In speaking about *Bunner*, the *Boley* court stated, "[T]he intervening change of law which frustrated the Government's intent in entering the plea agreement caused the agreement to become voidable." 32 Kan. App. 2d at 1198, 95 P.3d at 1027. In the instant case, there is no intervening change of law by an appellate court which impacts the parties' agreement.

Applying *Bunner*, the *Boley* court referenced the fact that the parties agreed the State would recommend a downward durational departure sentence of 48 months, but stated that the defendant, by successfully challenging his severity level conviction under the ruling in *State v. McAdam*, 277 Kan. 136, 83 P.3d 161 (2004), would receive a new sentence of 17 to 19 months. The *Boley* court admitted that while the State had not lost its entire "bargained-for value," the significant reduction in sentence "clearly frustrates the State's intended purpose in seeking a plea to a conviction under [Kan. Stat. Ann. §] 65-4159(a). Consequently, the plea agreement should be deemed voidable at the discretion of the prosecutor." *Boley*, 32 Kan. App. 2d at 1199, 95 P.3d at 1027. After reaching this result, the *Boley* court acknowledged that "[o]ther jurisdictions have taken a different approach." *Id.* The *Boley* court then discussed *State ex rel. Gessler v. Mazzone*, 212 W. Va. 368, 572 S.E.2d 891 (2002).

In *Mazzone, supra*, the West Virginia appellate court first said that the dismissal of some charges as well as the defendant's guilty pleas constituted two components of the plea agreement, but that they were inextricably intertwined. The *Mazzone* court then said when one component collapses, such as "the ability of

the court to legally sentence . . . as contemplated in the plea agreement, then the other countervailing component, i.e., the dismissal, must also collapse [because t]he 'bargain' become[s] impossible, through mutual mistake regarding statutory realities." *Id.* at 374, 572 S.E.2d at 897. The West Virginia appellate court held:

> Where a plea agreement cannot be discharged due to legal impossibility, the entire agreement must be set aside. The [defendant] cannot choose which portions are advantageous to him and implore this Court to apply only those certain portions. There is no equity in that result, no semblance of a bargain, and certainly no public policy which would support such a result.

Id. Accord *State v. Boley*, 32 Kan. App. 2d 1192, 95 P.3d 1022 (2004). The facts of the case before us do not show impossibility of performance, given that the agreement was for a no contest plea in exchange for a reduction in the gravity of the offenses—second offense to first offense—and that no particular sentence was part of the agreement. And, we bear in mind that even under a Class II felony (had it been lawful), Alba could still have received a sentence of 1 to 5 years' imprisonment, given the judge's sentencing range for Class II felonies and that such sentence would be the essential equivalent to the maximum sentence for a Class IV felony. In any event, the agreement with Alba did not include a specific term of imprisonment or probation as did the agreement in *Boley, supra.* And, there was no impossibility of performance of the agreement with Alba as there was with the agreement in *Mazzone, supra.*

Nonetheless, despite its decision, the *Boley* court acknowledged that where there is a mistake of law in a plea agreement, the risk of the mistake may fall to the prosecutor, who is presumed to be in a better position to know the applicable law, citing *U.S. v. Barron*, 172 F.3d 1153 (9th Cir. 1999), and *Coy v. Fields*, 200 Ariz. 442, 27 P.3d 799 (Ariz. App. 2001). The ultimate holding of the *Boley* court was as follows:

> Under the circumstances of this case, the State could not know our Supreme Court would rule that [Kan. Stat. Ann. §] 65-4159(a) and [Kan. Stat. Ann. §] 65-4161(a) proscribed identical conduct. As such, it is inequitable to apply

> such a presumption [that the State is in the best position to know the law] in this case.
>
> In conclusion, where a defendant has successfully challenged a sentence for a conviction subject to a plea on the basis that the sentence impermissibly *increases* the defendant's term of imprisonment beyond that permitted by law and resentencing would effectively frustrate the State's purpose in entering the plea agreement, the State may, in its discretion, withdraw from the plea agreement or choose to perform under the plea agreement as modified.

32 Kan. App. 2d at 1200, 95 P.3d at 1028.

Boley, supra, is a materially different case from the instant case, because what made the sentence impermissible in *Boley* was not a mistake of law by the parties to the plea agreement, but, rather, an unanticipated ruling by the Kansas Supreme Court. In the instant case, the factual pattern is far simpler, because the State, defense counsel, and the judge all treated the amended charges as higher grade felonies than they actually were. Moreover, there is no impossibility of performance here, and it is a relatively simple matter to resentence Alba for two Class IV felonies. Thus, we turn to those cases which we think are most on point, where there is a straightforward mistake of law in the plea agreement.

In *Coy v. Fields*, 200 Ariz. 442, 27 P.3d 799 (Ariz. App. 2001), Frederick John Coy was originally charged with kidnapping and two counts of sexual abuse. He entered into a plea agreement with the State of Arizona, pleading guilty to one count of unlawful imprisonment, a Class VI felony. The agreement further provided, " 'If probation is granted, [Coy] may be placed on lifetime probation pursuant to [a specified Arizona statute].' " *Id.* at 443, 27 P.3d at 800. The trial judge accepted the plea and imposed a term of probation of 15 years. Coy then challenged his sentence, asking to reduce the probation term to 3 years, because the maximum term of probation for a Class VI felony under Arizona law was 3 years. The State asserted that Coy should be bound by the terms of his plea agreement—lifetime probation—or, alternatively, that the State be allowed to withdraw from the plea agreement.

In *Coy, supra*, the Arizona Court of Appeals first found that the trial court had no jurisdiction to impose a probationary sentence not authorized by the legislature and that thus, the judge was obligated either to reduce the probationary term to 3 years or less or to set aside the sentencing, which the trial judge had done. The court then turned to the question of whether the State should be allowed to withdraw from the plea agreement. The court stated that the pivotal question was whether Coy had breached the agreement because he agreed to an extended probationary term when he accepted the agreement, yet subsequently challenged the enforceability of that provision. The Arizona court rejected the argument that Coy had breached the agreement and said that Coy was not prohibited from alerting the trial court that it had imposed an illegal term of probation. The State of Arizona, similarly to the State of Nebraska in this case, argued that under contract principles, setting aside the plea agreement was appropriate because the prosecutor had dropped the sex-based charges in the indictment as a concession to allow Coy to keep his job. In exchange, Coy agreed to the extended probation which the State of Arizona felt was necessary for the public's protection. Thus, the State argued that the nullification of the lengthy probationary provision frustrated the purpose of the plea agreement and thus warranted its rescission.

In rejecting the State's argument, the *Coy* court relied principally on a Utah case, *State v. Patience*, 944 P.2d 381 (Utah App. 1997), which we discuss separately later. In *Coy*, 200 Ariz. at 446, 27 P.3d at 803, the court held:

> We, too, hold the state accountable for knowing Arizona law when it negotiates, drafts, and enters into plea agreements. We agree with the court in *Patience* that the state bears the risk when, as here, a sentencing or probation provision in one of its plea agreements proves to be illegal and unenforceable. Of course, had there been an allegation and finding below that [Coy] had negotiated or entered into the plea agreement in bad faith, never intending to comply with the terms of the agreement or knowing that a probationary term of more than three years was impossible, the state's withdrawal from the plea would have been appropriate. *See* [*State v.*] *Taylor*[, 196 Ariz. 549, 2 P.3d 108 (Ariz. App.

> 1999)] (defendants must deal in good faith before they can attempt to claim benefits of contract law in plea agreement disputes). Because there was no valid ground on which the state was entitled to withdraw from the plea agreement, the respondent judge abused his discretion in setting the plea agreement aside.

We now turn to *Patience, supra*, where the defendant was charged with three counts of forgery and subsequently entered into a plea agreement with the State of Utah whereby she pled guilty to "three counts of attempted forgery, third degree felonies." 944 P.2d at 383. The trial court imposed consecutive prison terms for the three third degree felonies, but as in the instant case, the court, the prosecutor, and the defendant were apparently unaware that before the parties had negotiated and entered into their plea agreement, the Utah Legislature had reduced attempted forgery to a misdemeanor. As in the instant case, in *Patience*, the defendant appealed her sentence on the ground it was illegal and the State of Utah countered by seeking to rescind the plea agreement on the ground of mutual mistake and by asking that the original charges be reinstated. For analytical purposes, the facts in *Patience, supra*, and the facts in this case are identical. In refusing to rescind the plea agreement, the *Patience* court noted that the defendant had neither breached the agreement nor withdrawn or modified it, conditions which generally would have permitted the State to withdraw. The *Patience* court held that rescission was inappropriate even under a contract law analysis, citing 17A Am. Jur. 2d *Contracts* § 215 (1991) for the general rule that a party may not rescind an agreement based on mutual mistake where that party bears the risk of mistake. In *Patience*, 944 P.2d at 388, the Utah court held:

> In this case, we conclude the State bore the risk of the mistake as to the law in effect at the time the parties entered into the plea agreement. The State is generally in the better position to know the correct law, given that the State has control over the charges in the information and final say over whether to accept a defendant's plea, and the State must be deemed to know the law it is enforcing. Indeed, it is the State's law, duly enacted by its legislative branch, that

is in issue. The State must be charged with knowledge of its own legislative enactments and, in that sense, cannot be said to have been mistaken about the governing statute in effect when it agreed to the plea arrangement. *Cf. Osborne v. State*, 304 Md. 323, [339,] 499 A.2d 170, 178 (1985) (" 'The State must be held to be aware of the common law and the statutes of Maryland . . . and it should have bargained with [the defendant] accordingly. We will not allow the State to rescind this plea agreement merely because it made a bad bargain.' ").

Placing the burden on the State to be aware of the current provisions of the Utah statute under which defendant was charged is consistent with the constitutional concerns involved in plea agreements, as discussed above. Further, we note that this is not a situation where the law was not clear on its face, or where the State was somehow induced into the mistake about the law. Under these circumstances, we refuse to relieve the State of what it now considers a bad bargain where the plea agreement was the result of uninduced mistake as to the current provisions of Utah statute.

The foregoing holding from the Utah court describes exactly the situation involved here. We cannot logically write any pronouncement except that when engaging in plea bargaining, the prosecutor is bound to know the classification of the felony (and its penalties) that he or she is agreeing will be the amended charge. Plea bargaining is a well-established and, by now, virtually indispensable reality of the prosecution of criminal offenses. We hold the prosecution to the standard of knowing the gradation of offenses involved in a plea agreement, because knowing such is a fundamental part of the prosecutor's duties and because it is only a reasonable expectation. The risk of a mistake of law concerning the gradation of offense must rest on the prosecution when the plea agreement is capable of being performed and when a reasonable expectation of the prosecution did not form the basis of the agreement, thus frustrating the upholding of the agreement.

Given that defense counsel and the judge were operating under the same mistake, Alba, as an individual, cannot by any stretch of the imagination be said to have induced the State to enter into this agreement. In fact, Alba is really the only person

involved in the plea agreement, and the plea itself, who cannot be faulted for not knowing that first-offense sexual assault of a child is not a Class II felony. Obviously, the State now considers its plea bargain a "bad bargain," and it now seeks a "do-over" so that it can recharge Alba with the two counts of sexual assault of a child, second offense, carrying a penalty of 5 to 50 years' imprisonment per count. But, in exchange for Alba's plea, the State knowingly agreed to reduce the charges carrying such penalty to charges of first offense. At the time of the crime, the penalty for first-offense sexual assault of a child was a term of imprisonment for 0 to 5 years. See § 28-105 (Reissue 1995). And, the crimes the State agreed would be the charges to which Alba would plead—two counts of first-offense sexual assault of a child—were indisputably Class IV felonies. The only range of penalties authorized by law for the offenses charged in the amended information as a result of the plea bargain is 0 to 5 years' imprisonment, a $10,000 fine, or both. See *id.* The State is charged with knowing this. While the State was mistaken, it bears the risk of its own mistake. The State made the agreement with Alba that he would plead no contest to reduced charges, and a particular sentence was not part of the agreement. The State's expectations regarding sentencing were inherently unreasonable, as said earlier, and thus form no basis for rescission of the agreement. Alba is entitled to a lawful sentence based on the charges of which he and the State agreed that he would stand convicted.

We are fully aware that there are different approaches in different jurisdictions to what we can generically and broadly refer to as "plea bargain problems," and we have described some of those cases. Yet, the fact remains that the only authorities we have found completely on point are *Coy v. Fields*, 200 Ariz. 442, 27 P.3d 799 (Ariz. App. 2001), and *State v. Patience*, 944 P.2d 381 (Utah App. 1997). The approach of these two cases is rational and logical. Any other approach would reward careless prosecutorial work and impair the inviolability of plea agreements upon which the modern criminal justice system in all American jurisdictions depends so heavily. The victims in this case and the public may not have been well served. Nonetheless, we cannot write around the fact that prosecutors must be held to know the

very simple and fundamental law essential to their duties—the classification of the felonies involved in the plea bargains they are about to strike. Thus, we place the risk of the mistake of law here on the State.

[11] Ultimately, we merely enforce the only reasonable expectation that the parties could have, which is that a lawful sentence under § 28-320.01 would be imposed for the crimes charged as a result of the plea bargain. This places upon the State the burden of the mistake of law. The lawful sentence of imprisonment here is 0 to 5 years. When the State is culpable in creating an illegal sentence in an otherwise lawful plea agreement, we reject the proposition that the remedy is that the parties be returned to where they were before the plea agreement. Instead, fundamental fairness and the analogous contract principles require that we allow Alba to retain the benefit of his plea bargain and be lawfully sentenced.

CONCLUSION

We vacate Alba's sentences and remand the cause to the trial court with directions to resentence Alba for two counts of sexual assault of a child, first offense, giving proper credit for time served.

SENTENCES VACATED, AND CAUSE REMANDED FOR RESENTENCING.

IRWIN, Judge, dissenting.

Although I agree that Alba's sentences must be set aside and the case remanded for further proceedings, I do not agree with the disposition proposed by the majority, and I therefore dissent. I do not agree that the appropriate remedy is to place the burden of the mutual mistake made by Alba, the State, and the trial court solely on the State and allow Alba to unilaterally benefit from the mutual mistake by being sentenced in a fashion nobody had contemplated or agreed to when entering the plea agreement. I believe the appropriate remedy is to withdraw the plea as invalid and allow the parties to negotiate an entirely new plea agreement.

It is important to emphasize that the majority opinion recognizes that the tenets of *State v. Irish*, 223 Neb. 814, 394 N.W.2d 879 (1986), were not complied with because Alba was

not properly advised concerning the potential range of penalties to which his plea would subject him. It is fundamental in the plea-taking process that the trial court must examine the defendant and determine that he understands the range of penalties for the crime with which he is charged. See *id.* As such, the failure of the district court in this case to properly advise Alba concerning the range of penalties necessitates that the plea be withdrawn entirely. This is also consistent with the State's requested resolution of this case.

The Nebraska Supreme Court has clearly held that the State may withdraw from a plea bargain agreement at any time prior to, but not after, the actual entry of the guilty plea by the defendant or other action by him constituting detrimental reliance upon the agreement. See, *State v. Dillon*, 224 Neb. 503, 398 N.W.2d 718 (1987); *State ex rel. Fortner v. Urbom*, 211 Neb. 309, 318 N.W.2d 286 (1982). Inasmuch as no plea has validly been entered or accepted, the law in Nebraska clearly indicates that the State has the lawful ability to withdraw the plea agreement for any reason or, indeed, without giving a reason at all. See *State ex rel. Fortner v. Urbom, supra.* It is only more apparent that the State should have that right in this case, where it is clear that both Alba and the State were operating under a mutual mistake of law when negotiating the plea agreement.

The effect of the majority opinion is to suggest that plea agreements are essentially only for the benefit of the defendant and that the defendant is the only one who can assert prejudice from a mutual mistake in the plea process. There is little doubt that on this exact same fact pattern, the defendant would be entitled to withdraw his plea because of the failure to comply with *State v. Irish, supra.* The basis for allowing such a withdrawal would simply be that the plea was not valid because the tenets of *State v. Irish* had not been complied with. This is no less true where everyone, the court included, was mistaken concerning the law and the offense gradation that was central to the plea agreement and its negotiation. It is notable that the majority cites to no authority for the proposition that although "the penalty advisory was plainly error," the error can simply be overlooked because the defendant received the benefit of a mutual mistake that he was part of creating. The majority concludes that Alba

has "waived" any such error. However, the majority offers no explanation for why this error should simply be overlooked on the one hand and why on the other hand, "due process requires" that we attribute to Alba the expectation that his sentence would be within a range not contemplated by anyone involved in the plea process, even though Alba "does not complain of any due process violation" from the mutual mistake.

The primary authority that is relied upon by the majority for allowing the defendant to benefit from this mistake is distinguishable. In *State v. Patience*, 944 P.2d 381 (Utah App. 1997), the court recognized that the prosecutor is usually allowed to unilaterally rescind a plea agreement only where the defendant has breached the agreement. However, the authority relied on by the Utah court in reaching that conclusion was a case where the plea had lawfully been accepted and the State subsequently failed to comply with provisions of the agreement, not a case where the plea itself was not valid. See *State v. Copeland*, 765 P.2d 1266 (Utah 1988). A careful review of *State v. Patience* indicates that the Utah court's decision to order a new sentence, rather than to find the plea itself was invalid, was motivated primarily because the factual circumstances demonstrated that the legislature had changed the gradation of the offense after the information was filed and that by law, the defendant was entitled to the benefit of that change in legislation. Such is not the situation in the present case where, rather than being a legislative change, the error in the plea agreement was simply a mutual mistake by everyone involved concerning the proper gradation of the offense.

In *Coy v. Fields*, 200 Ariz. 442, 27 P.3d 799 (Ariz. App. 2001), the court similarly ordered that a new sentence be imposed and remanded the case for a new sentence. However, the Arizona court noted that the sentencing court would be free to impose a harsher sentence and deny probation entirely. Although *Coy v. Fields* is similar to the present case in that the mutual mistake concerned the possible penalty which might be imposed, the Arizona case is also significantly different from the present case because in the present case, everyone involved was mistaken as to the entire range of penalties which might be imposed, whereas in *Coy v. Fields*, the mistake was merely concerning part of the

potential sentence, if probation was actually imposed. And even to the extent *Coy v. Fields* supports the majority's position that the prosecutor bears some risk when everyone involved is equally mistaken during the plea negotiations, the result in *Coy v. Fields* was that the prosecutor was still able to receive the majority of the bargain negotiated and, in fact, the Arizona court even recognized that the new sentence to be imposed might be more harsh than what was initially imposed. The present case is far different, where the majority proposes to remove the State's negotiated range of sentences from two consecutive terms of 1 to 50 years' imprisonment and instead allow the defendant to choose a range of sentences of 0 to 5 years' imprisonment.

Moreover, I disagree with the notion that the State should be the party held solely responsible for the mistake in this case. Nobody involved with this case has disputed, and the majority recognizes, that everyone—including Alba (through his counsel), the State, and the trial court—was mistaken concerning the proper gradation of the offense. Moreover, everyone agrees that the parties operated under this mistaken belief during the entire plea negotiation.

There is nothing in the record of this case to support the majority's speculation that the potential range of sentences which would be available to the sentencing court was not an important, or even crucial, factor in the State's willingness to enter a plea agreement and reduce the charges. The majority, while arguing that the minimum portion of the sentencing range would have been reduced from 5 years' imprisonment if the crimes had been prosecuted as the originally charged Class IC felonies to 1 year's imprisonment if the crimes were actually Class II felonies as the parties believed, then dismisses the fact that the maximum possible sentence under both gradations would have been the same—50 years' imprisonment. Although it is often repeated in Nebraska case law that the minimum portion of an indeterminate sentence is the measure of the sentence's severity, the issue in this case is not the severity of a sentence imposed, but, rather, the importance of the possible sentencing range in persuading the State to reduce charges in the first place. The State's position in this regard is far from "inherently illogical," as the majority asserts, and is in fact entirely understandable and reasonable.

It has long been the law in Nebraska that "a person charged with the commission of a crime who has reached the age of accountability is conclusively presumed to know the law of the land, including both common law and statutory law." *Satterfield v. State*, 172 Neb. 275, 280, 109 N.W.2d 415, 418-19 (1961). Inasmuch as it is axiomatic that ignorance is no excuse concerning the state of law, I cannot agree with the majority's assertion that Alba is "really the only person involved in the plea agreement, and the plea itself, who cannot be faulted for not knowing" the proper gradation of the offense. There is simply no support for the notion that a criminal defendant, especially one represented by counsel, is somehow not accountable for knowing the law when negotiating a plea agreement.

A review of the majority opinion makes it clear that there is a split of authority in other jurisdictions concerning the proper remedy for a situation such as the present one. Although the majority goes to great lengths to discuss and distinguish cases which would allow the State to rescind the plea agreement, there is no clear indication why the factual distinction that some of those cases involved specific recommendations for a sentence rather than a negotiated range of sentences like in the present case is a significant legal distinction. Further, the cases which support the notion that the State should not be allowed to rescind the agreement are just as "technically" distinguishable, as noted above in this dissent. The bottom line is that a reading of cases from other jurisdictions handling this problem suggests that the factual details brought out in the majority opinion and in this dissent were not the motivating factors in the cases' resolutions. Rather, the cases indicate a difference of opinion about whether to declare the plea itself invalid or to merely hold that the prosecutor made a bad bargain and should be accountable for it.

In the present case, the binding law of Nebraska dictates that Alba was never properly advised prior to acceptance of his plea. As such, the plea must be declared invalid and must be withdrawn. The binding law of Nebraska further holds that the State may unilaterally withdraw a plea offer at any time before the plea has been validly accepted, even for no reason whatsoever. As such, I would follow the guidance of our Supreme Court and apply it to the facts of this case to conclude that the case should

be remanded and the plea be withdrawn. Both parties should be equally free to determine their own course of conduct at that stage.

CRAIG ARBTIN, APPELLANT AND CROSS-APPELLEE, V. PURITAN MANUFACTURING CO. AND COLUMBIA NATIONAL INSURANCE COMPANY/COLUMBIA INSURANCE GROUP, APPELLEES AND CROSS-APPELLANTS.

696 N.W.2d 905

Filed May 17, 2005. No. A-04-766.

1. **Workers' Compensation: Appeal and Error.** An appellate court may modify, reverse, or set aside a Workers' Compensation Court decision only when (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 did not support the order or award.
2. ____: ____. Upon appellate review, the findings of fact made by the trial judge of the compensation court have the effect of a jury verdict and will not be disturbed unless clearly wrong.
3. ____: ____. An appellate court is obligated in workers' compensation cases to make its own determinations as to questions of law.
4. ____: ____. 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 findings of the trial judge who conducted the original hearing.
5. **Workers' Compensation: Expert Witnesses.** It is the role of the Nebraska Workers' Compensation Court as the trier of fact to determine which, if any, expert witnesses to believe.
6. **Workers' Compensation: Appeal and Error.** Where the record presents nothing more than conflicting medical testimony, an appellate court will not substitute its judgment for that of the compensation court.
7. **Workers' Compensation.** The single judge of the Workers' Compensation Court is the sole judge of the credibility of the witnesses and the weight to be given their testimony, even where the issue is not one of live testimonial credibility.
8. ____. The determination of how the average weekly wage of a workers' compensation claimant should be calculated is a question of law.
9. ____. The rationale and holding in *Canas v. Maryland Cas. Co.*, 236 Neb. 164, 459 N.W.2d 533 (1990), regarding average weekly wage calculations in workers' compensation cases extend to situations involving work shortages.
10. **Workers' Compensation: Legislature: Intent.** The Legislature enacted the Nebraska Workers' Compensation Act to relieve injured workers from the adverse economic effects caused by a work-related injury or occupational disease.

Appeal from the Nebraska Workers' Compensation Court. Affirmed.

Glenn A. Pettis, Jr., for appellant.

Jerald L. Rauterkus and Jason R. Yungtum, of Erickson & Sederstrom, P.C., for appellees.

INBODY, Chief Judge, and IRWIN and CARLSON, Judges.

INBODY, Chief Judge.

INTRODUCTION

Craig Arbtin appeals from the order of the Nebraska Workers' Compensation Court review panel affirming in part and in part reversing the award entered by the trial court. Puritan Manufacturing Co. (Puritan) and Columbia National Insurance Company/Columbia Insurance Group (Columbia) have cross-appealed. For the reasons set forth herein, we affirm the order of the review panel in its entirety.

STATEMENT OF FACTS

On September 3, 2002, Arbtin filed a petition in the Nebraska Workers' Compensation Court alleging that on September 15, 2000, he was employed by Puritan and sustained a personal injury in an accident arising out of and in the course of his employment. Arbtin claimed that at the time of the accident, he was employed by Puritan as a welder and was earning approximately $12.50 per hour. Arbtin also asserted that "[h]is usual workweek included some overtime producing an average weekly wage of approximately $575.00."

The petition contained the following description of the accident:

> [Arbtin] had welded a large piece of metal in a welding jig which was on two sawhorses, as he attempted to move it, the piece and the jig began to fall off the sawhorses. [Arbtin] bent forward and jerked the piece and the jig back onto the sawhorses. As he did this, he felt a pulling sensation in his left shoulder and neck area. He worked the remaining hour on his shift and went home. At home that evening he experienced severe pain in the neck, upper back area, and left shoulder and was unable to sleep due to the

> pain. He took some nonprescription pain medication, but this did not completely relieve his pain. He attempted to return to work on Monday, September 18, 2000, but his activities at work increased his pain and the owner of the company took him to Midwest Minor Medical for treatment. Dr. Yvonne Stephenson started conservative care and referred him to Dr. [David] Clough who believed he had suffered a Rhomboid strain and ordered a trial of physical therapy. [Arbtin] attempted to continue working, but was terminated by [Puritan] in December of 2000. [Arbtin] told Dr. Clough about his termination on January 3, 2001 and his continuing pain but Dr. Clough released him finding him to be at maximum medical healing. [Arbtin] sought treatment from [Dr.] Jay Parsow who examined him on January 8, 2001. Dr. Parsow then died suddenly that evening. [Arbtin] then sought treatment from Dr. Kurt Gold who referred him to Dr. [Kirk] Hutton for surgery for a left rotator cuff tear. Surgery was performed on July 18, 2001. Dr. Gold also referred [Arbtin] to Dr. [Leslie] Hellbusch for cervical surgery. The defendant Columbia [National] Insurance Company refused the request for cervical surgery and refused all further treatment after receiving the opinions of Dr. Dean Wampler who performed an independent medical examination. [Arbtin] needs further surgery and has suffered both permanent disability to his whole body and a permanent scheduled member disability due to his injuries.

Arbtin's petition further asserted that his accident resulted in injuries to his neck and left shoulder and in "pain into his left chest area and back from the neck to under the scapula." He claimed that he had been unable to work due to his injuries, meaning he had not worked since his employment was terminated by Puritan. Arbtin admitted that Columbia "has made some payments to [him] for temporary total and permanent partial disability, medical expenses, and prescription medication, but has refused to allow all medical treatment that was required by the nature of [his] injuries." In its answer to Arbtin's petition, Puritan admitted that Arbtin was employed with Puritan on September 15, 2000, and that he suffered a work-related accident, but Puritan "dispute[d] the nature and extent" of Arbtin's

injuries. Puritan further claimed that all benefits due to Arbtin had been paid and denied all other allegations made by Arbtin.

In a pretrial order filed on July 9, 2003, the compensation court noted that the parties had stipulated that Arbtin was employed by Puritan at the time of the accident and that he "suffered a left shoulder injury . . . in an accident arising out of and in the course of his employment." The parties further stipulated that Arbtin was temporarily totally disabled for 57 weeks—from December 31, 2000, to February 2, 2002—and that Arbtin's shoulder injury had resulted in a 10-percent permanent impairment to his left arm. This left the following issues to be decided at trial: the amount of Arbtin's average weekly wage on September 15, 2000, whether Arbtin suffered a herniated cervical disk as a result of the work-related accident, the extent and duration of any temporary disability caused by Arbtin's herniated cervical disk after February 2, 2002, whether Arbtin was entitled to surgery to treat his herniated cervical disk, and whether Arbtin was entitled to payment of medical bills incurred as a result of his herniated cervical disk.

A trial was held on July 16, 2003. The parties entered numerous exhibits prior to any testimony, including Arbtin's medical records and a "wage statement" detailing the hours worked by Arbtin for Puritan in the 26 weekly pay periods prior to his work-related accident on September 15, 2000. Arbtin testified in his own behalf, stating that he was a welder for Puritan and that he was injured while he was performing his duties for Puritan on Friday, September 15. Arbtin said that when the accident occurred, "[i]t wasn't really painful. I just felt pulled. I mean, it's hard to describe; jerked." Arbtin testified that he first sought medical treatment for his injuries at Midwest Minor Medical (Midwest) on September 18. Arbtin testified that Midwest restricted him to light duty and that he received physical therapy beginning on approximately October 1. He first saw Dr. David Clough on October 13, and Arbtin testified Dr. Clough's prognosis was that Arbtin "had a rhomboid or a muscle strain" and that he should be recovered within a month. Arbtin said that Dr. Clough had indicated that Arbtin's injury was "a Workers' Compensation injury within a reasonable degree of medical certainty."

Arbtin next testified that he saw Dr. Yvonne Stephenson on December 30, 2000. Arbtin testified:

> I was removing a battery from my car, and . . . it was a light battery from Walmart, and the pain in my shoulder, the aggravation all came back, and all this in the same areas that happened on September 15th, and . . . I didn't have insurance because Puritan had terminated me, and they canceled my insurance immediately, and I didn't have my insurance, so I was kind of afraid to go to a doctor, but with the pain I was in, I went to a doctor.

When asked if he saw Dr. Clough again, Arbtin testified that he saw Dr. Clough on January 3, 2001, and that he told Dr. Clough about "what had happened when [he] lifted the battery out of [his] car." Arbtin said that he "went [to see Dr. Clough] like [he had] always done when [he] had pain, [he would] point to where the areas were, the neck and upper shoulder, where the neck meets the back . . . all the same areas." Arbtin testified Dr. Clough told Arbtin that nothing was wrong with him and that he should go back to work; but Arbtin was still in severe pain.

Arbtin testified that after being discharged by Dr. Clough, Arbtin was examined by Dr. Jay Parsow—who passed away soon after the examination—and by Dr. Kurt Gold. Arbtin said that Dr. Gold referred Arbtin to other professionals for more physical therapy and for further medical examinations. Arbtin testified that one of the specialists he was referred to recommended Arbtin have "surgery; cervical surgery, fusion" but that he was unable to have the surgery because Columbia denied it. Arbtin said that he did have shoulder surgery on July 18, 2001, which Columbia did not deny. Arbtin further testified that he received a permanent impairment rating after his shoulder surgery.

Arbtin next testified that during the 26 weekly pay periods prior to his work-related accident, there were "two periods of time when [his] wages were below [his] normal weekly wage." Arbtin said that during one of those weeks, "there was a shortage of work that week" and he left early "because there was no work." Arbtin could not recall whether the second period of lower-than-normal wages was the result of a shortage of work or a missed day of work due to illness. Arbtin said that he still had outstanding bills for medical care and medications and that he

had not been reimbursed for travel expenses he incurred as a result of his medical treatments. When asked how he felt at the time of trial, Arbtin said that his neck hurt "in [the] area where the neck meets the shoulder. It always hurts. And it gets worse . . . when it gets aggravated and starts going down between the upper shoulders."

On cross-examination, Arbtin admitted that his medical records from September 28, 2000, indicated that he denied any numbness or tingling in his left arm. He further admitted that his medical records from Midwest do not say anything about a herniated cervical disk. Arbtin also admitted that during the 26 weekly pay periods prior to his work-related accident, there were some weeks when he worked less than 40 hours per week and some weeks when he worked more than 40 hours per week. On redirect examination, Arbtin claimed that on December 30, when he saw Dr. Stephenson after lifting a battery out of his car, he reported the exact same symptoms as he did after his work-related accident.

Arbtin called Darla Sortino to testify on his behalf. Sortino testified that she and Arbtin had had a romantic relationship and that they had moved in together during the latter part of September 2000, after his work-related accident. She said that Arbtin complained of pain "[i]n his neck, his shoulder, his back, it was under his arm, his chest." Sortino also testified that during September, Arbtin was unable to sleep well and could not perform any kind of physical activities around the house, because he was "[b]asically, immobile due to pain." At the conclusion of Sortino's testimony, both parties rested.

On August 20, 2003, the workers' compensation trial court entered its award. The court first approved the parties' stipulations and then found that Arbtin's average weekly wage on September 15, 2000, was $497.60. Specifically, the court found:

> [Arbtin] argues that under Canas v. Maryland Cas. Co., 236 Neb. 164, 459 N.W.2d 533 (1990), [weeks with a shortage of work] should be excluded from calculation. However, Canas dealt with the exclusion of weeks when the employee was unable to work because of illness of the employee, absence for funeral, and the like. Canas did not contemplate the exclusion of weeks when there is a shortage of work,

> and the shortage of work is one of the reasons why it is necessary to average the employee's hours. Excluding no weeks, the Court has determined that for the first 17 weeks shown on [the wage statement, Arbtin] worked 715.5 hours and was compensated at the rate of $11.50 per hour. For the next 9 weeks, [Arbtin] worked 376.75 hours and was compensated at the rate of $12.50 per hour. Thus, the Court has concluded that [Arbtin] had an average weekly wage of $497.60 for the purpose of calculating his entitlement to temporary disability compensation. However, for the purpose of calculating his entitlement to permanent disability compensation, each week under 40 hours must be elevated to 40 hours. Thus, [Arbtin] is deemed to have worked 728.25 hours for the first 17 weeks and 384.50 hours for the last 9 weeks. Those calculations result in an average weekly wage for the purpose of calculating permanent disability compensation of $506.97.

Regarding the issue of the herniated cervical disk suffered by Arbtin, the trial court found that Arbtin had "failed to adduce persuasive evidence that he suffered a herniated cervical dis[k] as a result of his accident and injury of September 15, 2000." Specifically, the court found:

> Dr. Gold has expressed an opinion that [Arbtin's] herniated cervical dis[k] is a result of th[e] accident . . . . Dr. Hellbusch also expresses an opinion that the herniated cervical dis[k] was caused by th[e] accident . . . . Dr. [Gary] Walker of Idaho Falls, Idaho, has expressed an opinion connecting the accident of September 15, 2000, and [Arbtin's] cervical radiculopathy . . . .
>
> Dr. Clough expresses a contrary opinion in his report of June 30, 2003 . . . . Dr. [Dean] Wampler expresses a contrary opinion in his report of January 23, 2002 . . . .
>
> . . . The Court does not find the opinions expressed by [Dr. Gold, Dr. Hellbusch, or Dr. Walker] persuasive because they are based upon a history of neck pain from September 15, 2000, when the medical records do not reflect neck pain until January 8, 2001. The Court finds the opinions of Dr. Wampler and Dr. Clough more persuasive.

As a result of this finding, the trial court found that Arbtin suffered no compensable temporary disability as a result of the herniated disk, that he was not entitled to surgery to treat the herniated disk, and that he was not entitled to the payment of medical bills for the treatment of the herniated disk.

On August 29, 2003, Arbtin applied to the Workers' Compensation Court for a review of the trial court's order by a three-judge panel. On May 12, 2004, the review panel entered its "Order of Affirmance, in Part, and Reversal, in Part, on Review." The review panel determined that the trial court did not err when it found that Arbtin had failed to prove that he had suffered a herniated cervical disk as a result of his work-related accident, finding:

> It is a factual issue as to whether or not [Arbtin's] herniated dis[k] at C6-7 was caused by and/or the result of the accident of September 15, 2000. The trial judge saw and heard the witnesses testify and read the exhibits. We cannot say the trial judge was clearly wrong.

With regard to Arbtin's average weekly wage, the review panel reversed the award of the trial court. The review panel found:

> [Arbtin] claims that week 16, where [he] worked 31.75 hours for the week ending July 2, 2000, and week 23, where [he] worked 32.5 hours for the week ending August 20, 2000, should be excluded in the computation of [his] average weekly wage. [Arbtin] cites [Neb. Rev. Stat. §] 48-126 and Canas v. Maryland Cas. Co., 236 Neb. 164, 459 N.W.2d 533 (1990). . . . In Canas there was evidence that the plaintiff's ordinary work week was 45 to 50 hours per week. In this case, [Arbtin] argues that his ordinary work week can be determined by reviewing [the wage statement] showing the number of hours [he] worked each week. . . . The review of the wage statement shows that [Arbtin] had two weeks of work where he worked less than 37.75 hours. [Arbtin] worked six weeks where he had between 37.75 hours and under 40 hours. [Arbtin] work[ed] eleven weeks where he had between 40 and 45 hours and [he] worked seven weeks where he had more than 45 hours. It is reasonable to find that [Arbtin's] ordinary work week is at least 40 hours per week.

. . . .

> We believe that weeks 16 and 23 should be excluded in the computation of [Arbtin's] average weekly wage. When one excludes week 16 the number of hours worked at $11.50 per hour is 683.75 hours. The wages earned during this period of time would be $7,863.12. When week 23 is excluded [Arbtin] worked 344.25 hours at $12.50 per hour. This equals $4,303.12. The total wages for 24 weeks is $12,166.24 which divided by 24 weeks equals $506.93 per week. [Arbtin] is entitled to $337.95 per week for temporary benefits.

Arbtin has timely appealed to this court.

ASSIGNMENTS OF ERROR

Arbtin's assignments of error, restated, can be consolidated into one: The review panel erred when it affirmed the trial court's finding that Arbtin's herniated cervical disk was not a compensable injury that arose out of his work-related accident. Puritan and Columbia cross-appeal, alleging that the review panel erred when it reversed the trial court's award regarding Arbtin's average weekly wage.

STANDARD OF REVIEW

[1] An appellate court may modify, reverse, or set aside a Workers' Compensation Court decision only when (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 did not support the order or award. *Williamson v. Werner Enters.*, 12 Neb. App. 642, 682 N.W.2d 723 (2004).

[2,3] Upon appellate review, the findings of fact made by the trial judge of the compensation court have the effect of a jury verdict and will not be disturbed unless clearly wrong. *Id.* An appellate court is obligated in workers' compensation cases to make its own determinations as to questions of law. *Id.*

[4] 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 findings of the trial judge who conducted the original hearing. *Veatch v. American Tool*, 267 Neb. 711, 676 N.W.2d 730 (2004).

ANALYSIS

Compensability of Herniated Cervical Disk Injury.

Arbtin alleges that the review panel erred when it affirmed the trial court's finding that Arbtin's herniated cervical disk was not a result of his work-related accident. Upon appellate review, the findings of fact made by the trial judge of the compensation court have the effect of a jury verdict and will not be disturbed unless clearly wrong. *Williamson v. Werner Enters., supra.* 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 findings of the trial judge who conducted the original hearing. *Veatch v. American Tool, supra.*

[5,6] It is the role of the Nebraska Workers' Compensation Court as the trier of fact to determine which, if any, expert witnesses to believe. *Ludwick v. TriWest Healthcare Alliance*, 267 Neb. 887, 678 N.W.2d 517 (2004). Where the record presents nothing more than conflicting medical testimony, an appellate court will not substitute its judgment for that of the compensation court. *Frank v. A & L Insulation*, 256 Neb. 898, 594 N.W.2d 586 (1999).

The instant case presents a clear example of conflicting medical evidence. Arbtin presented reports from numerous physicians that support his position that his herniated cervical disk was the result of his work-related accident and was thus a compensable injury. However, Puritan produced reports from two physicians that conflicted with the opinions of the medical reports presented by Arbtin. Dr. Clough, one of the first physicians to treat Arbtin after the accident, noted on January 3, 2001, that Arbtin was complaining of pain in an area which "had not been injured during his original injury of September 1[5], 2000, nor noted on the October 13, 2000 exam." Also on January 3, 2001, Dr. Clough found Arbtin to be "at maximal medical improvement . . . . He remains without restrictions and on full work activities . . . . No further medical care will probably be necessary."

Further, Puritan offered a report by Dr. Dean Wampler, who examined and interviewed Arbtin on January 14, 2002. The purpose of Dr. Wampler's evaluation was to assess Arbtin's "physical condition, and explore issues of cause and effect relationships." Dr. Wampler found that many of Arbtin's complaints at the time of this assessment were "inconsistent with the medical records." Dr. Wampler also noted that Arbtin admitted that he had "some 'flare up' of his pain symptoms when struggling to get a battery out of his automobile at the end of December 2000." Ultimately, Dr. Wampler came to the following conclusions:

> [The] medical records show that . . . Arbtin had only a soft tissue injury in September, which resolved by late November of 2000. He then experienced a new injury while lifting a battery out of his vehicle, and resulting in symptoms of shoulder injury with possible cervical radiculopathy. Based on the information currently available to me, I believe with a reasonable degree of medical certainty that . . . Arbtin's shoulder surgery in July of 2001, and continuing symptoms to suggest cervical radiculopathy, are not connected to the work event in September 2000; but rather were caused by events at home on or about December 30, 2000.

(Emphasis omitted.)

In Arbtin's brief, he asserts that the trial court should not have accepted the opinions of Dr. Clough or Dr. Wampler because their "opinions were based upon inaccurate and incomplete facts." Brief for appellant at 21. However, Dr. Clough was one of the first physicians to treat Arbtin after his work-related accident, and Dr. Clough also examined Arbtin shortly after December 28, 2000, the date when Arbtin experienced pain when lifting a battery out of his car. A review of the record shows that Dr. Wampler, when performing his assessment, reviewed all of the relevant medical records produced at trial.

[7] The single judge of the Workers' Compensation Court is the sole judge of the credibility of the witnesses and the weight to be given their testimony, even where the issue is not one of live testimonial credibility. *Swanson v. Park Place Automotive*, 267 Neb. 133, 672 N.W.2d 405 (2003). Based on the evidence in the record, we cannot say that the trial court was clearly wrong

in finding the opinions of Drs. Clough and Wampler persuasive and in finding that Arbtin's herniated cervical disk was not a result of his work-related injury. Arbtin's assignment of error is therefore without merit.

Puritan and Columbia's Cross-Appeal.

On cross-appeal, Puritan and Columbia assert that the review panel committed error when it improperly reversed the trial court's computation of Arbtin's average weekly wage. The review panel found that "weeks 16 and 23 [weeks in which Arbtin worked less hours than he normally worked] should be excluded in the computation of [Arbtin's] average weekly wage."

[8] The determination of how the average weekly wage of a workers' compensation claimant should be calculated is a question of law. *Ramsey v. State*, 259 Neb. 176, 609 N.W.2d 18 (2000). Regarding questions of law, an appellate court in workers' compensation cases is obligated to make its own determinations. *Id.*

Neb. Rev. Stat. § 48-126 (Reissue 2004), which includes how compensable wages should be calculated in workers' compensation cases, provides in relevant part:

> In continuous employments, if immediately prior to the accident the rate of wages was fixed by the day or hour or by the output of the employee, his or her weekly wages shall be taken to be his or her average weekly income for the period of time ordinarily constituting his or her week's work, and using as the basis of calculation his or her earnings during as much of the preceding six months as he or she worked for the same employer, except as provided in sections 48-121 and 48-122. The calculation shall also be made with reference to the average earnings for a working day of ordinary length and exclusive of earnings from overtime.

The only evidence presented at trial by either party regarding what would constitute a normal workweek for Arbtin was a wage statement detailing the hours worked by Arbtin for Puritan in the 26 weekly pay periods prior to his work-related accident. The statement shows that for the nine weekly pay periods preceding his work-related injury, Arbtin earned $12.50 per hour, and that for the other weeks detailed in the wage statement, he earned

$11.50 per hour. For the 26 weekly pay periods preceding Arbtin's work-related injury, the number of hours Arbtin worked were: 37.75 hours in week 1 ending on March 19, 2000, 39.75 hours in week 2, 40 hours in week 3, 50.75 hours in week 4, 42.5 hours in week 5, 39.5 hours in week 6, 40 hours in week 7, 47.75 hours in week 8, 47.25 hours in week 9, 48.75 hours in week 10, 43.25 hours in week 11, 42.5 hours in week 12, 40.5 hours in week 13, 39.25 hours in each of weeks 14 and 15, 31.75 hours in week 16, 45 hours in week 17, 40 hours in week 18, 44.25 hours in week 19, 46.75 hours in week 20, 45.75 hours in week 21, 43 hours in week 22, 32.5 hours in week 23, 39.75 hours in week 24, 40 hours in week 25, and 44.75 hours in week 26 ending on September 10, 2000. As Arbtin testified at trial, and as Puritan and Columbia admitted in their brief, the low number of hours worked by Arbtin during weeks 16 and 23 was the result of a work shortage.

In the parties' briefs, each cites extensively to *Canas v. Maryland Cas. Co.*, 236 Neb. 164, 459 N.W.2d 533 (1990). In *Canas*, the employee's average workweek was 45 to 50 hours, and in the 6 months preceding his work-related injury, "each of [the employee's] workweeks was not less than 44.03 hours or more than 50.87 hours, with seven exceptions. In those 7 weeks, [the employee] worked 20.77, 37.43, 34.75, 14.35, 36.63, 7.78, and 36.75 hours, respectively." *Id.* at 167, 459 N.W.2d at 536. It was uncontroverted that the employee's shortened workweeks were "due to vacation time incurred in moving his family from Texas to Nebraska, sick leave, and holidays." *Id.* at 167, 459 N.W.2d at 536-37. The employer in *Canas* argued that "there would be fluctuations in an employee's workweeks preceding an accident" and that therefore the proper way to calculate an average weekly wage would be to multiply the actual number of hours the injured employee worked in the 26 weeks preceding an accident by the employee's hourly wage and then divide by 26. *Id.* at 167-68, 459 N.W.2d at 537.

The Nebraska Supreme Court disagreed with the employer, stating:

> The fallacy of the [employer's] argument can be demonstrated by deleting the following language from § 48-126: "for the period of time ordinarily constituting his or her

> week's work." Without that clause, the sentence at issue would read: "[W]eekly wages shall be taken to be his or her average weekly income . . . and using as the basis of calculation his or her earnings during as much of the preceding six months as he or she worked for the same employer." If the statute so read, one would determine the average weekly wage just as the [employer] suggest[s]. Thus, the [employer's] calculation would be the same even if the foregoing language were deleted. However, effect must be given, if possible, to all the several parts of a statute; no sentence, clause, or word should be rejected as meaningless or superfluous if it can be avoided. *NC+ Hybrids v. Growers Seed Assn.*, 219 Neb. 296, 363 N.W.2d 362 (1985). We conclude that by inclusion of the clause "for the period of time ordinarily constituting his or her week's work," the Legislature sought to exclude those abnormally low workweeks from the 26-week period used for the calculation.

Canas v. Maryland Cas. Co., 236 Neb. 164, 168, 459 N.W.2d 533, 537 (1990).

[9] Puritan and Columbia assert in their brief that "the Workers' Compensation Court Review Panel's extension of *Canas* was clearly wrong because *Canas* does not apply to the instant case." Brief for appellees on cross-appeal at 15. Puritan and Columbia first assert that *Canas* applies to "situations involving sickness, illness and holidays, not work shortages." Brief for appellees on cross-appeal at 16. It is true that the facts in *Canas* included an employee who worked a lower-than-normal amount of hours due to moving, sickness, and vacation. However, we see no reason to exclude work shortages from the logic or holding of *Canas*. Nowhere in *Canas* did the Nebraska Supreme Court indicate that the holding was limited to the facts of the case or that workers who missed worktime due to illness, vacation, or other reasons should be treated differently than workers whose employers had a lack of work for them to perform. Accordingly, we find that the rationale and holding in *Canas* regarding average weekly wage calculations extends to work shortages.

Puritan and Columbia next allege that Arbtin's workweeks were not "abnormally low." (Emphasis omitted.) Brief for appellees on cross-appeal at 16. A review of Arbtin's wage statement

indicates that if one does not consider the 2 weeks in which he worked lower-than-normal hours, Arbtin averaged a 42.83-hour workweek in the 26 weekly pay periods preceding his work-related injury. During week 16, he worked 31.75 hours, and during week 23, he worked 32.5 hours. Thus, in each of those weeks, he worked more than 10 hours less than he normally worked during the other 24 weeks included in the wage statement. It is clear to us that these weeks did not present "working day[s] of ordinary length" for Arbtin. See § 48-126. Accordingly, we find that the review panel properly excluded weeks 16 and 23 from its calculation of Arbtin's average weekly wage.

[10] Finally, Puritan and Columbia allege that the holding in *Canas* should apply not only to abnormally low workweeks, but also to abnormally high workweeks. In other words, Puritan and Columbia argue that if we find it is proper to exclude the weeks in which Arbtin worked less hours than he normally did from the calculation of his average weekly wage, we should similarly exclude those weeks in which he worked more hours than normal. Puritan and Columbia, citing *Harmon v. Irby Constr. Co.*, 258 Neb. 420, 604 N.W.2d 813 (1999), make the proposition that "workers compensation benefits are intended to be equitable, fair and just to both the employer and employee, while at the same time not creating a windfall for the employee." Brief for appellees on cross-appeal at 19. However, it has long been held that "the Legislature enacted the Nebraska Workers' Compensation Act to relieve injured workers from the adverse economic effects caused by a work-related injury or occupational disease." *Williamson v. Werner Enters.*, 12 Neb. App. 642, 652, 682 N.W.2d 723, 731 (2004). "In light of this beneficent purpose, we must give the act a liberal construction." *Id.*

Further, the Legislature has already addressed the use of abnormally high workweeks in average weekly wage calculations. In § 48-126, the Legislature provided: "The calculation shall also be made with reference to the average earnings for a working day of ordinary length and exclusive of earnings from overtime." Therefore, by excluding a worker's higher rate of pay for overtime from the calculation of the worker's average weekly wage, the Legislature has already dealt with the possible inequity that could result from abnormally high workweeks in the context of

average weekly wage calculations. In light of this, as well as the beneficent purpose of the Workers' Compensation Act, we decline to extend the holding of *Canas v. Maryland Cas. Co.*, 236 Neb. 164, 459 N.W.2d 533 (1990), to abnormally high workweeks. Therefore, we find that the review panel properly reversed the trial court's calculation of Arbtin's average weekly wage. Puritan and Columbia's assignment of error is without merit.

CONCLUSION

Finding that the review panel properly reversed the trial court's computation of Arbtin's average weekly wage and properly affirmed the trial court's finding that Arbtin failed to prove his herniated cervical disk occurred as a result of his work-related accident, we affirm the order of the review panel in its entirety.

AFFIRMED.

PAMELA J. BEVINS, FORMERLY KNOWN AS PAMELA J. GETTMAN, APPELLANT AND CROSS-APPELLEE, V. STEVEN H. GETTMAN, APPELLEE AND CROSS-APPELLANT.

697 N.W.2d 698

Filed May 24, 2005. No. A-03-913.

1. **Child Support: Visitation: Time.** An adjustment in child support may be made at the discretion of the court when visitation or parenting time substantially exceeds alternating weekends and holidays and 28 days or more in any 90-day period.
2. **Modification of Decree: Child Support: Appeal and Error.** Modification of child support payments is entrusted to the trial court's discretion, and although, on appeal, the issue is reviewed de novo on the record, the decision of the trial court will be affirmed absent an abuse of discretion.
3. **Judges: Words and Phrases.** A judicial abuse of discretion exists when a judge, within the effective limits of authorized judicial power, elects to act or refrains from acting, and the selected option results in a decision which is untenable and unfairly deprives a litigant of a substantial right or a just result in matters submitted for disposition through a judicial system.
4. **Child Support: Rules of the Supreme Court: Presumptions.** All orders for child support obligations shall be established in accordance with the provisions of the Nebraska Child Support Guidelines unless the court finds that one or both parties have produced sufficient evidence to rebut the presumption that the guidelines should be applied.
5. **Child Support: Stipulations: Rules of the Supreme Court.** All stipulated agreements for child support must be reviewed against the Nebraska Child Support

Guidelines, and if a deviation exists and is approved by the court, specific findings giving the reason for the deviation must be made.

6. **Stipulations: Courts: Public Policy.** A stipulation voluntarily entered into will be respected and enforced by the courts when such stipulation is not contrary to sound public policy.
7. **Child Support: Child Custody: Compromise and Settlement.** Generally, settlements in domestic cases are binding on the court unless unconscionable, but terms of a settlement concerning support and custody of children are excepted.
8. **Child Support: Rules of the Supreme Court.** The Nebraska Child Support Guidelines control the setting of child support, including whether there are grounds for a deviation.
9. **Child Support: Stipulations: Rules of the Supreme Court.** A stipulation of the parties about how child support will be determined does not override the requirements of paragraph C of the Nebraska Child Support Guidelines.
10. **Child Support: Child Custody: Rules of the Supreme Court.** When a specific provision for joint physical child custody is ordered, support may be calculated using worksheet 3 of the Nebraska Child Support Guidelines.
11. **Appeal and Error.** An appellate court will not consider an issue on appeal that was not presented to or passed upon by the trial court.

Appeal from the District Court for Douglas County: GERALD E. MORAN, Judge. Affirmed as modified.

Angela A. Houston and Jeffrey A. Wagner, of Schirber & Wagner, L.L.P., for appellant.

Virginia A. Albers, of Lieben, Whitted, Houghton & Slowiaczek, for appellee.

INBODY, Chief Judge, and IRWIN and SIEVERS, Judges.

SIEVERS, Judge.

Pamela J. Bevins, formerly known as Pamela J. Gettman, appeals the decision of the district court for Douglas County upon a petition to modify, which decision used a joint physical custody calculation to determine child support. At issue are a stipulation of the parties that child support be calculated on a joint custody basis as a deviation from the Nebraska Child Support Guidelines and the effect the courts should give to such a stipulation.

FACTUAL AND PROCEDURAL BACKGROUND

Pamela and Steven H. Gettman were married on April 4, 1987, in Omaha, Nebraska. During the marriage, one child, Mitchell H. Gettman, was born to the parties on December 3, 1993. A decree of dissolution of the marriage was entered on January 23, 2002.

Pursuant to the decree, Pamela was awarded custody of Mitchell, subject to Steven's right of visitation. Steven was ordered to pay $573.48 per month in child support.

Pamela filed a petition to modify the decree on September 9, 2002. In her petition, Pamela alleged that she was getting married on October 10 and that her future husband lived in Council Bluffs, Iowa. Pamela requested that the court enter an order granting her leave to remove Mitchell from Nebraska to Council Bluffs.

Steven filed his answer and cross-application to modify on October 3, 2002. In his answer, Steven asked that Pamela's application to modify be dismissed. In his cross-application, Steven alleged that since the entry of the decree, he has had parenting time of at least one-half of each week. He asked that the district court modify the decree and award the parties joint legal and physical custody, with Steven having primary physical possession, subject to Pamela's rights to parenting time. Steven also asked that neither party be ordered to pay child support because of the joint custody arrangement. Pamela filed her response to the cross-application to modify on October 4, asking that Steven's cross-application to modify be dismissed.

Steven filed an application for a show cause order on December 9, 2002, alleging that in violation of the Uniform Child Custody Jurisdiction Act, Pamela removed Mitchell from the State of Nebraska, without leave of the court, for permanent residence in Iowa. A show cause order was entered on December 10.

On April 1, 2003, counsel for both parties, as well as the parties, were present before the district court for Douglas County when the settlement stipulation was read into the record by Steven's attorney. While the settlement was recorded by a court reporter, the judge was not present. The settlement stated in part: "Child support will be calculated on a joint custody calculation basis and submitted by counsel at a later time. . . . And specifically in regard to the child support, the parties are calling it a deviation based on the parenting time." The stipulation also stated that "the pending application for contempt is dismissed."

Steven filed a motion to compel entry of a modification order on June 18, 2003, alleging that he had yet to receive a signed and approved modification order from Pamela's attorney. Steven then

asked the district court to enter the modification order submitted by his counsel, which order was attached to the motion, with or without the signature of Pamela's counsel. The proposed modification order cited a material change in circumstances, rather than a deviation from the child support guidelines, and established Steven's child support obligation at $178 per month, based on a joint custody calculation.

[1] A hearing was held on July 2, 2003, although no evidence was taken. From the comments of counsel, it is apparent that the parties were at odds, despite the earlier stipulation, as to how the child support should be calculated. Pamela's attorney stated:

> When the record was made before this Court [on April 1], the record does reflect what was indicated was a joint custody calculation, but I indicated to [Steven's attorney] at that time it would have to be calculated pursuant to the Nebraska Child Support Guidelines. [Steven's attorney] wanted to call it joint, that's fine, but it was never the intention of this party that that was the governing principle as to how this was to be calculated. It was the governing principle pursuant to Nebraska Child Support Guidelines and I think [paragraph] J controls the situation.

The trial judge found that paragraph J of the child support guidelines was not applicable in this case. Paragraph J provides that visitation or parenting time adjustments or direct cost sharing should be specified in the support order and that an adjustment in child support may be made at the discretion of the court when visitation or parenting time substantially exceeds alternating weekends and holidays and 28 days or more in any 90-day period. However, the trial court agreed that Steven's method of computing the child support, on a joint custody basis, was applicable.

On July 3, 2003, the modification order was entered, and it is essentially in accord with the stipulation read into the record and later submitted to the court by Steven's motion, with the attached proposed order. Pamela was granted permission to remove Mitchell from Nebraska to Council Bluffs. The district court ordered Steven to pay $209 per month in child support, based on a joint custody calculation, and the parties were to alternate claiming the income tax exemption for Mitchell each year. Steven's visitation was modified so as to extend his weekend

visitation to Monday mornings, maintain Tuesday overnight visitation, extend holiday visitations, and give him visitation during one-half of Mitchell's summer vacation. Pamela now appeals.

ASSIGNMENTS OF ERROR

Pamela alleges that the district court erred in using the calculation for joint physical custody from the Nebraska Child Support Guidelines in determining child support.

While Steven's brief has a cross-appeal, Steven's assignment of error reads: "If the Court reverses or remands the District Court or finds that the District Court abused its discretion in calculating child support on a 'joint custody calculation basis,' the Court should reverse and vacate the Modification Order in its entirety."

STANDARD OF REVIEW

[2] Modification of child support payments is entrusted to the trial court's discretion, and although, on appeal, the issue is reviewed de novo on the record, the decision of the trial court will be affirmed absent an abuse of discretion. *Peter v. Peter*, 262 Neb. 1017, 637 N.W.2d 865 (2002).

[3] A judicial abuse of discretion exists when a judge, within the effective limits of authorized judicial power, elects to act or refrains from acting, and the selected option results in a decision which is untenable and unfairly deprives a litigant of a substantial right or a just result in matters submitted for disposition through a judicial system. *Id.*

ANALYSIS

Pamela's Appeal.

When the district court signed the order after Steven's motion for entry of an order in accordance with the stipulation, the court used a joint custody calculation to determine child support. Pamela contends that such calculation was improper, and Steven asserts that it was correct. The fundamental issue involves the effect to be given to the parties' earlier stipulation about how child support should be calculated, in light of the issue the parties agreed was before the court for decision on July 2, 2003.

[4,5] Of necessity, we begin our analysis with paragraph C of the Nebraska Child Support Guidelines, which paragraph states in part:

> All orders for child support obligations shall be established in accordance with the provisions of the guidelines unless the court finds that one or both parties have produced sufficient evidence to rebut the presumption that the guidelines should be applied. *All stipulated agreements for child support must be reviewed against the guidelines and if a deviation exists and is approved by the court, specific findings giving the reason for the deviation must be made.*

(Emphasis supplied.)

[6-9] The district court's order references "material change in circumstances," but without naming the nature of such change, and does not include "specific findings" to support a deviation from the guidelines. See Nebraska Child Support Guidelines, paragraph C. Steven asserts that the district court properly calculated child support on a joint custody basis pursuant to the stipulation that there be a " 'deviation based on parenting time.' " Brief for appellee at 18. Steven refers to contractual concepts such as a court's not being free to rewrite the terms of parties' contracts, quoting *Gast v. Peters*, 267 Neb. 18, 671 N.W.2d 758 (2003). However, Steven ignores well-established authority that stipulation for child support is not binding on the court. As said in *Zerr v. Zerr*, 7 Neb. App. 885, 891, 586 N.W.2d 465, 470 (1998), the "[d]isposition of a question pertaining to a child's best interests is not governed exclusively by a parental stipulation." We have also said that a stipulation voluntarily entered into, which appears to be the case here, will be respected and enforced by the courts when such stipulation is not contrary to sound public policy. See *Walters v. Walters*, 12 Neb. App. 340, 673 N.W.2d 585 (2004). *Zerr v. Zerr, supra*, makes it clear that generally, settlements in domestic cases are binding on the court unless unconscionable, but that terms of a settlement concerning support and custody of children are excepted from that rule. Citing Neb. Rev. Stat. § 42-366(2) (Reissue 2004). The public policy at work here is well established—that the child support guidelines control the setting of child support, including whether there are grounds for a deviation. Paragraph C is very specific about the requirements for employing a deviation from the guidelines. And, no deviation was found and articulated by the district court as required by paragraph C. In summary, a stipulation of the parties about how

child support will be determined does not override the requirements of paragraph C of the guidelines. Accordingly, we now turn again to the guidelines.

[10] Paragraph L of the Nebraska Child Support Guidelines states that "[w]hen a specific provision for joint physical custody is ordered, support may be calculated using worksheet 3[, 'Calculation for Joint Physical Custody']." However, pursuant to the modification order, Steven was not awarded joint physical custody, but was awarded "reasonable and liberal parenting time." Because Steven was not awarded joint custody, child support calculated on the basis of joint custody is fundamentally incorrect, absent a finding of a deviation which would justify such calculation.

When the stipulation was read into the record on April 1, 2003, it was stated that "specifically in regard to the child support, the parties are calling it a deviation based on the parenting time." However, a deviation based on parenting time is not supported by the record, remembering that no evidence was ever introduced. Moreover, Steven's visitation or parenting time granted in the court's order is essentially that normally given a noncustodial parent and is what has come to be known as *Wilson v. Wilson* visitation, derived from *Wilson v. Wilson*, 224 Neb. 589, 399 N.W.2d 802 (1987). Steven's parenting time was to include alternating weekends from Friday at daycare until Monday morning at school or daycare, each week from Tuesday evening at daycare until Wednesday morning at school or daycare, extended holiday visitations, and one-half of Mitchell's summer vacations. The difference between Steven's visitation and the visitation in *Wilson v. Wilson* is that Steven's alternating weekend visitations are slightly extended, as Mitchell spends Sunday night with Steven and Steven gets Mitchell for Tuesday evenings. Thus, the "parenting time" in the court's order is not so substantially beyond *Wilson v. Wilson* visitation as to justify a joint custody child support calculation, and the fact that the parties stipulated that it does justify such a calculation is neither binding on the trial court nor determinative of the issue. With respect to child support, the facts and the guidelines control the calculation—the parties cannot control the calculation by stipulation, unless the stipulation comports with the guidelines. Any other holding would render the

guidelines superfluous, potentially disadvantage children, and destroy the uniformity the guidelines seek to accomplish.

The district court correctly found that paragraph J of the Nebraska Child Support Guidelines does not apply, because with the exception of the summer months, Steven does not have visitation which "substantially exceeds alternating weekends and holidays and 28 days or more in any 90-day period," as required by paragraph J in providing for "Visitation or Parenting Time Adjustments." However, with the provision for Steven to have Mitchell for one-half of his summer vacation from school, which would be 45 days out of approximately 90 days, Steven should receive a reduction in his support obligation for each month in the summer. Paragraph J allows a reduction of up to 80 percent, and we find that Steven's support for the months of June, July, and August, in 2004 and each year thereafter in which Mitchell spends one-half of the summer with Steven, shall be reduced by 50 percent.

Using the financial information in the district court's child support worksheets, about which there is no dispute, we recalculate Steven's child support obligation under the basic income and support calculation. See appendix A and appendix B. (We have used alternating exemptions of "2" and "3" for Steven and Pamela in alternating years because the parties were in agreement that those were the exemptions to be used and the incomes of the parties make such division appropriate.) Our recalculation shows that Steven's monthly child support obligation is $756.22 (using an average of two calculations—one calculation with Pamela claiming Mitchell as a tax deduction and one calculation with Steven claiming Mitchell as a tax deduction). Thus, the June, July, and August support, after the above-referenced reduction for summer visitation, would be $378.11.

Steven's Cross-Appeal.

In Steven's cross-appeal, he does not allege any error by the district court. Rather, Steven requests that in the event we reverse the district court's ruling on support, we reverse the entire ruling on modification and remand all of the issues before the court on April 1, 2003, for trial. Steven's argument, summarized, is that the various issues resolved in the stipulation were interdependent

and that thus, if we reverse the child support component, we must vacate the entire settlement and return the parties to their respective positions before they agreed to the stipulation.

However, as explained earlier, the parties' stipulated settlement agreement, except for the provisions concerning child visitation and support, is binding on the court unless one or more other provisions of that agreement are unconscionable. Both parties were represented and personally present at the second hearing, and no showing of unconscionability was made or suggested; nor is such unconscionability argued by Steven in his cross-appeal.

[11] Additionally, and perhaps of more significance, the record of the July 2, 2003, hearing reveals that the trial court inquired whether its understanding was correct that all issues except child support were resolved per the stipulation and as set forth in the proposed order. Pamela's attorney said yes, and Steven's attorney did not disagree. Therefore, Steven cannot now repudiate the position he took in the district court by asking that all issues be considered unresolved if we reverse the trial court's child support calculation. Steven's position is plainly contrary to the well-established doctrine that an appellate court will not consider an issue on appeal that was not presented to or passed upon by the trial court. *State v. Porter*, 259 Neb. 366, 610 N.W.2d 23 (2000). The only issue presented to the trial court on July 2 was how child support was to be set—under the settlement stipulation or under the guidelines without any deviation.

Therefore, we reject Steven's cross-appeal and find that the parties' stipulation of April 1, 2003, reaffirmed by them on July 2, is binding on the parties save with respect to child support, as the record does not justify the deviation in child support calculation to which the parties stipulated, and that such child support cannot be calculated on a joint custody basis. Therefore, the district court's order of July 3, giving life to that stipulation, is affirmed except as to our modification regarding child support.

CONCLUSION

For the reasons stated above, we modify the district court's calculation of child support, which was based on a joint custody arrangement. Steven's monthly child support obligation shall be

$378.11 for June, July, and August 2004 and $756.22 per month thereafter, except that he shall owe $378.11 payments for subsequent months of June, July, and August during summers when he has exercised his extended summer visitation.

We decline to make the change in support fully retroactive to September 2002, when Pamela filed her application to modify and thus started this process, as such an award would be unfair given that Steven is not wholly blameworthy for the delay and should not be subjected to financial hardship because of the length of time it took to resolve this matter. See *Riggs v Riggs*, 261 Neb. 344, 622 N.W.2d 861 (2001). Furthermore, the equities of the situation are such that retroactivity to April 2003, as ordered by the district court, would make Steven indebted by nearly $11,000 for back support. By the same token, Pamela has received inadequate support for over 2 years. Thus, in seeking to strike an equitable balance, we order the change in support to be retroactive to June 1, 2004, the calculation of which support shall include the summer deviation. The district court shall modify its order in accordance with our opinion and adopt the child support worksheets we have attached as appendix A and appendix B.

AFFIRMED AS MODIFIED.

APPENDIX A

CHILD SUPPORT CALCULATOR
Basic Custody Calculation
Exemptions: Mother (3); Father (2)
One Child

	Mother	Father
Total monthly income (taxable)	$ 4,681.00	$ 4,736.10
Total monthly income (nontaxable)	0.00	1,187.20
Tax Deductions		
Federal income tax	$ 438.40	$ 484.79
State income tax	140.99	153.01
FICA tax	358.10	362.31
Total tax deductions	$ 937.49	$ 1,000.11

Other Deductions		
Health insurance	$ 58.98	$ 0.00
Retirement	187.24	236.93
Child support previously ordered	0.00	0.00
Regular support for other children	0.00	0.00
Total other deductions	$ 246.22	$ 236.93
Total deductions	$ 1,183.71	$ 1,237.04
Child tax credit	$ 50.00	$ 0.00
Monthly net income	$ 3,447.29	$ 4,686.26
Combined monthly net income	$ 8,133.55	
Combined annual net income	97,602.60	
Percent contribution of each parent	42.38%	57.62%
Monthly support (Nebraska Child Support Guidelines table 1)	$ 1,313.00	
Each parent's monthly share	$ 556.45	$ 756.55

NUMBER OF CHILDREN CALCULATION

Number of Children	Combined Net Income	Table Amount		Obligor's Percentage		Child Support Due
One child	$8,133.55	$1,313.00	×	57.62%	=	$756.55

APPENDIX B

CHILD SUPPORT CALCULATOR
Basic Custody Calculation
Exemptions: Mother (2); Father (3)
One Child

	Mother	Father
Total monthly income (taxable)	$ 4,681.00	$ 4,736.10
Total monthly income (nontaxable)	0.00	1,187.20

Tax Deductions		
Federal income tax	$ 476.53	$ 446.67
State income tax	149.24	144.76
FICA tax	358.10	362.31
Total tax deductions	$ 983.87	$ 953.74
Other Deductions		
Health insurance	$ 58.98	$ 0.00
Retirement	187.24	236.93
Child support previously ordered	0.00	0.00
Regular support for other children	0.00	0.00
Total other deductions	$ 246.22	$ 236.93
Total deductions	$ 1,230.09	$ 1,190.67
Child tax credit	$ 0.00	$ 50.00
Monthly net income	$ 3,450.91	$ 4,682.63
Combined monthly net income	$ 8,133.54	
Combined annual net income	97,602.48	
Percent contribution of each parent	42.43%	57.57%
Monthly support (Nebraska Child Support Guidelines table 1)	$ 1,313.00	
Each parent's monthly share	$ 557.11	$ 755.89

NUMBER OF CHILDREN CALCULATION

Number of Children	Combined Net Income	Table Amount		Obligor's Percentage		Child Support Due
One child	$8,133.54	$1,313.00	×	57.57%	=	$755.89

IN RE INTEREST OF PRESTON P., A CHILD UNDER 18 YEARS OF AGE. STATE OF NEBRASKA, APPELLEE, V. BRANDY P., APPELLANT.

698 N.W.2d 199

Filed May 31, 2005. No. A-04-424.

1. **Juvenile Courts: Evidence: Appeal and Error.** Juvenile cases are reviewed de novo on the record, and the appellate court is required to reach a conclusion independent of the juvenile court's findings; however, when the evidence is in conflict, the appellate court will consider and give weight to the fact that the lower court observed the witnesses and accepted one version of the facts over the other.
2. **Parental Rights: Final Orders: Collateral Attack.** An adjudication is a final, appealable order, and case law provides that no collateral attack on an adjudication order is permitted except for a lack of jurisdiction or a denial of due process.
3. **Courts: Guardians Ad Litem.** Every court has inherent power to appoint a guardian ad litem to represent an incapacitated person in that court.
4. **Guardians Ad Litem: Appeal and Error.** An appellate court will review a court's failure to appoint a guardian ad litem for an abuse of discretion.
5. **Juvenile Courts: Guardians Ad Litem: Evidence.** A court does not abuse its discretion in failing to appoint a guardian ad litem when there is no evidence or reasonable inference that puts in issue a parent's capacity to understand the concept and consequences of entering an admission to a juvenile petition.
6. **Parental Rights.** An adjudication is not required prior to termination of parental rights under Neb. Rev. Stat. § 43-292(1) through (5) (Reissue 2004).

Appeal from the County Court for Phelps County: ROBERT A. IDE, Judge. Affirmed.

Charles D. Brewster, of Anderson, Klein, Swan & Brewster, for appellant.

Timothy E. Hoeft, Phelps County Attorney, for appellee.

INBODY, Chief Judge, and SIEVERS and CASSEL, Judges.

SIEVERS, Judge.

Brandy P. appeals from the decision of the Phelps County Court, sitting as a juvenile court, terminating her parental rights to her son Preston P. We reject Brandy's claim that we must reverse the termination because of an alleged lack of jurisdiction at the adjudication phase of the case.

FACTUAL AND PROCEDURAL BACKGROUND

We are faced with a record in excess of 800 pages which we summarize as follows:

Preston was born to Brandy on March 18, 1999. Records of the Nebraska Department of Health and Human Services (DHHS) identify Preston's father, but according to Brandy, Preston's father's whereabouts are unknown to her. Preston's father is not part of this appeal. Brandy also had another child, Ethan P., born March 25, 2002, who is not involved in this case.

On August 1, 2001, DHHS received an "intake" stating that Brandy was taken to a DHHS facility where she was given four diapers. Brandy stated that those were not enough diapers and that she had no food. On August 3, DHHS received information that Brandy had no diapers for Preston. A DHHS worker and a law enforcement officer went to Brandy's home and found that the home was filthy, including bugs and rotting food. Preston was removed from Brandy's home and placed in an emergency foster home.

On August 13, 2001, a petition was filed by a deputy Buffalo County Attorney alleging that Preston was a child as defined by Neb. Rev. Stat. § 43-247(3)(a) (Cum. Supp. 2002), in that the home he was residing in was found to be "in a seriously unsafe and unsanitary state."

Upon Brandy's request on September 7, 2001, the juvenile court appointed an attorney, Stephen Lowe, to represent her. An admission/denial and adjudication hearing was held on September 17. At that hearing, the petition was read aloud and Brandy acknowledged understanding the contents thereof—although it had to be explained twice. The court informed Brandy of the nature of the proceedings and explained her rights to her. The court also explained the possible dispositions which could be entered if Preston were adjudicated as a child described in § 43-247(3)(a). Brandy admitted the allegations made in the petition. The court determined that her admission was made knowingly, voluntarily, and intelligently, and a factual basis was established. The court then adjudicated Preston as a child described in § 43-247(3)(a), and he was placed in the temporary care and custody of DHHS for out-of-home placement—with the expectation that he would soon be placed with Brandy's parents,

if not with Brandy herself. A journal entry reflecting the juvenile court's findings was filed on September 17. No appeal was ever filed from such adjudication.

On September 28, 2001, Preston was placed with Brandy's parents—although Brandy had been living with them. Brandy moved out of her parents' home when Preston was placed with her parents. In November, after Brandy's parents were denied a license for foster care because both of them had been previously cited for assault, Preston was placed with his third foster family.

On October 1, 2001, upon a motion by the State, the Buffalo County Court had entered an order transferring jurisdiction of Preston's case to Phelps County. A disposition hearing was held on November 5. Brandy objected to the requirement of independent living in the DHHS case plan. Lowe, her attorney, stated that Brandy had limited resources and was pregnant. Brandy was living with her boyfriend and his mother, although her boyfriend was not the father of the expected child (who would be named Ethan, as noted above). The court adopted the DHHS case plan as modified (i.e., requiring that she work toward establishing independent living, where the plan had originally required her to establish it immediately, and requiring that she not allow any other persons who pose a risk to the safety and well-being of her children to stay or reside in her home, where the plan had originally extended that prohibition to all other persons). The court found that reasonable efforts had been made to return Preston to the parental home, but that such return was not in his best interests. The court ordered that Preston remain a ward of DHHS and ordered that a "CASA" worker be assigned to assist the guardian ad litem, who had been appointed for Preston prior to September 17. The journal entry and order reflecting such matters was filed on November 6.

Dr. John Meidlinger, a certified clinical psychologist, evaluated Brandy on January 16, 2002, to obtain information regarding her functioning after she was referred by a DHHS protection and safety worker. Dr. Meidlinger found that Brandy had a verbal IQ of 66, a performance IQ of 63, and a full-scale IQ of 62, placing her in the mildly retarded range of intellectual ability. Dr. Meidlinger's diagnosis was that Brandy had (1) depressive disorder, not otherwise specified; (2) intermittent explosive disorder

(occasionally exploding in angry outbursts); and (3) personality disorder with schizoid, avoidant, and borderline tendencies and, as noted above, mild retardation. Dr. Meidlinger reported that Brandy was apt to be volatile and unpredictable with Preston, overwhelmed by his needs, and prone toward responding to him by distancing herself or becoming angry and retaliating with punishment. Dr. Meidlinger also reported that Brandy "is apt to be only a marginal parent in the best of the times" and that she "is going to continue to have problems with impulse control and poor tolerance for stress and is likely to have continuing problems with being overwhelmed with the care of . . . young [Preston]."

A review hearing was held on May 6, 2002. The court adopted an amended case plan, which required that Brandy sign a medical release for any and all treating physicians and required that she cooperate with DHHS by providing medical information regarding any medical treatments or medications she was undergoing or taking. The court further found that placing Preston with Brandy would not be in his best interests and that he should remain with DHHS. The journal entry reflecting the same was filed on May 7.

Brandy filed a motion on September 7, 2002, seeking a court order returning the custody of Preston to her and also seeking termination of the juvenile proceedings. A review hearing was held on October 30. Brandy testified that she had been living with her boyfriend, Mark B., for over a year and planned to marry him. She testified that she visited Preston 3 days per week, had been preparing meals for him, and had generally been paying her bills. Brandy attended "team" meetings, with a DHHS case manager, a family support worker, and sometimes Mark, her family, or Lowe, twice per month and had three to four sessions left to complete for her parenting classes. Brandy was employed as a dishwasher at a hotel, working 20 to 25 hours per week at $5.15 per hour. Brandy said that she had applied for Social Security disability benefits. Brandy's son Ethan was 8 months old at the time of the hearing and was living with his father while in the custody of DHHS—Ethan had been removed from Brandy's care when he was 4 months old after Brandy left him unattended in a motor vehicle for 15 to 20 minutes. Mark testified that he was willing to assume the role of stepparent of Preston. He worked at a grocery

store at the time of the hearing but was soon going to be working at a convenience store instead. Mark was not attending Brandy's visits with Preston.

Kelly Madden, a DHHS case manager, testified that Brandy was scheduled for eight parenting classes and had attended three, but had four no-shows and had canceled once. Madden testified that Brandy had improved on fixing meals and had done a nice job with consistency and structure in June and July 2002, but that there had been some regression. Madden testified that Mark had not followed through with his psychological evaluation. Madden testified that it was not in Preston's best interests to be returned to Brandy.

The juvenile court filed its journal entry on November 5, 2002, and found that DHHS had made reasonable efforts to reunify the family but that it was in Preston's best interests to remain in the care and custody of DHHS for out-of-home placement. The court adopted exhibit 7, the case plan and court report.

A review and permanency hearing was held on February 12, 2003. Carrie Martinez, a family support worker, testified that she had been working with Brandy since December 2001 and was not comfortable, at the time of the hearing, with Preston's being returned to Brandy's care. Martinez testified that Preston had visits with Brandy three times per week and that those visits had been moved from a church to Brandy's home. Martinez testified that Brandy could not care for Preston on a full-time basis, as Brandy had a lot of emotional stress. Martinez testified that when Mark was at home, there were a lot of rules and regulations, and that on one occasion, Brandy told her that Mark did not want Brandy and Preston's visits to take place in his home. Martinez also testified that Mark stated that he did not "intend on doing the goals" of the case plan and did not want to participate in the plan. Toward the end of the hearing, Brandy stated, "I'm sorry, Your Honor. I'm done. . . . I can't take this anymore," and the record reflects that she left the courtroom. The juvenile court filed its journal entry on February 14 and adopted the case plan with the added amendment of the goal of independent living for Brandy. The court again found that DHHS had made reasonable efforts to reunify the family, but that it was in Preston's best interests to remain in the care and custody of DHHS for placement.

On February 20, 2003, Brandy filed an "Application for Further Evaluation," seeking a court order authorizing further psychiatric evaluation to determine her state of competency. A hearing on Brandy's application was held on February 26, and the court's "Journal Entry/Order" was filed on March 5. The court found and ordered that Brandy should undergo a further psychiatric evaluation. The court also directed that Dr. Meidlinger, who was to do the evaluation, address the following questions: (1) the extent of Brandy's parenting abilities, whether she would be able to provide sufficient parenting skills then or in the future, and, if so, the projected amount of time she would need to accomplish said skills; (2) whether Brandy was competent to relinquish her rights to Preston for the purpose of adoption; and (3) whether Brandy would be able to display appropriate contact if an open-ended adoption agreement were entered into between her and the adoptive parents.

On June 18, 2003, the Phelps County Attorney filed a motion to terminate Brandy's parental rights with regard to Preston under Neb. Rev. Stat. § 43-292(5), (6), and (7) (Reissue 2004). The alleged grounds for termination were that Brandy was "unable to discharge parental responsibilities because of mental illness or mental deficiency," that Preston remained in an out-of-home placement as a result of Brandy's "failure to comply with or her inability to achieve the goals set forth in the case plan," and that Preston had been in an out-of-home placement "for fifteen or more months of the most recent twenty two months."

An arraignment hearing on the motion to terminate Brandy's parental rights was held on June 25, 2003, and the court's journal entry was filed on July 3. The court advised Brandy of her rights and the consequence of a finding that the State had met its burden of proof—namely that her parental rights regarding Preston would be terminated. The court advised Brandy of the possible pleas, and Brandy entered a denial. The court appointed a guardian ad litem for Brandy. The court also granted Brandy's motion for an additional psychological evaluation.

A review hearing was held on August 6, 2003, which hearing also addressed the motion of Preston's guardian ad litem to terminate visitation, although such motion is not in our record. Brandy waived her right to be present at the hearing because it

was too difficult emotionally for her. Preston's foster mother testified that Preston had recently been exhibiting behavioral changes in the hours and days after his visits with Brandy and that he was angry after visits. She gave examples of such behaviors: throwing things out of the refrigerator, tearing drawers out of his dressers, and breaking a glass bottle that he did not want Brandy to have. Preston's preschool teacher also testified that Preston was aggressive and disruptive on the days after he had visits with Brandy.

Martinez, the family support worker, testified that Brandy was having 3-hour-long visits with Preston, but that Brandy had attended only one visit in June. Madden, the DHHS case manager, testified that in the preceding 6 months, Brandy had attended only one team meeting and had done "very little" to comply with her case plan.

The juvenile court found that it was in Preston's best interests to temporarily suspend regular visits, and the court ordered the involvement of a child therapist or child psychologist to get input on the visitation. A journal entry reflecting the same was filed on August 21, 2003. The court also adopted the DHHS case plan and court report, with some modifications including provisions for a child psychologist or therapist to get involved in therapy for Preston and to determine whether visitation was in his best interests. The court found that reasonable efforts had been made to reunify the family, but that it was in Preston's best interests to remain in the care and custody of DHHS for placement.

On October 1, 2003, Brandy filed a motion to withdraw her admission to the August 2001 petition to have Preston adjudicated. In her motion, Brandy alleged that she admitted to the allegations of the petition "without knowingly and intelligently understanding the ramifications of her admission to those allegations." She also alleged that subsequently to her admission to those allegations, she had been evaluated by Dr. Meidlinger on two separate occasions, and that he stated: " 'I am not at all convinced that Brandy is currently able to understand the implications of her position and it[s] potential permanence.' " She also alleged that Dr. Meidlinger stated: " 'I would strongly recommend that a Guardian Ad Litem be appoint[ed] to assist her in making appropriate decisions in court.' " We note that such a

guardian had been in place for Brandy for a considerable period of time. Brandy alleged that as part of the June 2003 motion to terminate her parental rights, the Phelps County Attorney had stated that Brandy was unable to discharge parental responsibilities " 'because of mental illness or mental deficiency.' " Brandy also alleged that she was unable to comprehend and understand the meanings of her entry of a plea and that as a result, her admissions to the adjudication petition's allegations were invalid.

On October 2, 2003, the Phelps County Attorney filed an objection to Brandy's motion to withdraw her admission. In his objection, the county attorney alleged that (1) Brandy entered her admission in the Buffalo County Court on September 17, 2001, with the assistance of counsel; (2) the disposition hearing was held on November 5 in the Phelps County Court, and Brandy appeared with the assistance of counsel; (3) the deadline to appeal the order of adjudication and disposition was December 6, and at no time before or after that deadline did Brandy file a notice of appeal; and (4) nearly 2 years had passed since the admission, the evaluations relied upon by Brandy's attorney occurred 1½ years after the initial disposition was held, and there were no allegations contained in those evaluations that alleged that Brandy was incapacitated at any time during the months of September or November 2001. On October 8, 2003, Brandy filed a reply to the county attorney's motion to terminate her parental rights.

At a hearing on October 7, 2003, the juvenile court heard Brandy's motion to withdraw her admission, and it then moved forward with the termination hearing while taking Brandy's motion to withdraw her admission under consideration. Brandy's motion was later overruled. The termination hearing was completed on October 8. At the hearing, Dr. Meidlinger, the clinical psychologist, testified that he conducted an evaluation of Brandy in January 2002 and got the impression that she was intellectually limited. After having Brandy perform the "Wechsler Adult Intelligence Scale–III" test, he found that Brandy had a verbal IQ of 66, a performance IQ of 63, and a full-scale IQ of 62, placing her in the mildly handicapped or retarded range of intellectual ability (that of the lowest 3 percent of the population in terms of functioning on the test). Dr. Meidlinger's diagnosis was that Brandy had (1) depressive disorder, not otherwise specified; (2)

intermittent explosive disorder (occasionally exploding in angry outbursts); and (3) personality disorder with schizoid, avoidant, and borderline tendencies and, as noted above, mild retardation. Dr. Meidlinger testified that he believed that Brandy was apt to be volatile and unpredictable with Preston, easily overwhelmed by his needs, and prone toward responding to him by distancing herself or becoming angry and retaliating with punishment.

Dr. Meidlinger testified about another meeting with Brandy, in May 2003. In that meeting, he and Brandy discussed open adoption with visitation. Brandy initially said that she would relinquish Preston's custody if she had visitation every weekend, but at another point in the meeting, she stated that she wanted reunification with Preston. Dr. Meidlinger testified that Brandy was at "continuing risk for impulsive acting out behavior; inconsistent, unstable relationships and work; continuing risk for social isolation; and continuing difficulties understanding and reacting appropriately to events and relationships" and that such would affect her ability to parent. In his May evaluation, Dr. Meidlinger recommended the appointment of a guardian ad litem for Brandy because of her intellectual limitation—we again note that such appointment had been done some time previously. Dr. Meidlinger testified that he had "serious doubts" about whether Brandy was mentally competent to relinquish her parental rights, but that with the assistance of a guardian ad litem, she would be able to do so—specifically, that Brandy needed explanatory language brought down to a fifth grade level before she would be able to understand it. Dr. Meidlinger testified that Brandy's chances of being able to successfully parent were very small, even over a long period of time. He testified that it would be in Preston's best interests not to be returned to Brandy's home and that Brandy's parental rights should be terminated.

Lowe, the attorney who represented Brandy at the September 2001 adjudication, testified that Brandy understood what was going on and that Brandy made a knowing admission to the adjudication petition's allegations. Lowe testified that Brandy did not undergo a psychological evaluation revealing her mental deficiency until several months after the adjudication. Lowe also testified that he had no reason to question Brandy's competence or her ability to assist with her own defense.

Madden, the case manager, testified that out of 83 available work sessions with a "healthy family" worker, Brandy attended 49, canceled 24, and no-showed 10 times. Madden also testified that out of 327 scheduled visits with Preston, Brandy attended 208½, canceled 114½, and no-showed 5 times. Madden testified that the professional who did Mark's psychological evaluation in January 2003 recommended "conjoint counseling" for Brandy and Mark's relationship and individual counseling for Mark, but that Mark refused counseling. Madden testified that Brandy attended few visits between February and August 2003. Madden testified that over the course of Brandy's contact with DHHS, she had lived at both her parents' house and Mark's house, and that Brandy started out strongly making progress on her case plan but, toward the end, had had a lack of progress. Madden testified that Mark often refused to participate in visitations or parenting sessions and that it was suggested to Brandy that she leave Mark if he was not willing to participate. Madden also testified that Brandy had had several contacts with law enforcement: (1) There was a domestic disturbance in June 2002, (2) Ethan was removed from Brandy's custody in July or August 2002, (3) Mark called to file a protection order against Brandy in January 2003 regarding her aggressive behavior, and (4) Brandy was caught shoplifting in April 2003.

A licensed mental health practitioner testified that she had been counseling Preston since August 29, 2003, and that she had met with him five times. She testified that Preston was "high-maintenance" and very active, defiant, and bossy. She testified that Preston tried to throw furniture and to hit and that she and Preston were working on behavior management. She recommended that if there were visitation after termination, it should be only twice a year and not during the holidays.

Martinez, the family support worker, testified that "anything that Mark was not going to agree [to] would backset [Brandy]." Martinez testified that Brandy was able to deal with increased visitation if she had enough rest and no interruptions or no "family involvements." Martinez also testified that up until February 2003, Brandy was making improvements in her parenting skills.

The juvenile court's journal entry on the termination hearing was filed on December 31, 2003. The juvenile court found that

Preston was placed out of Brandy's custody no later than January 2002; that said out-of-home placement continued until June 2003, the month of the filing of the motion to terminate; and that Preston continued in out-of-home placement at the date of the hearing—satisfying the 15-month requirement of § 43-292(7). The juvenile court also found that grounds for termination existed under § 43-292(5) and (6) in that Brandy did not seem to be able to take advantage of the services that the State had offered by reason of choice or by reason of the mental illness or mental deficiencies testified to by Dr. Meidlinger. The juvenile court found that Brandy had not complied with the case plans and that she was no longer attending visitations with Preston with any regularity. The juvenile court also cited Dr. Meidlinger's psychological report, which included the statement that Brandy "is apt to be only a marginal parent in the best of times," and his testimony, which included the statement that she "is apt, in her relationship with [Preston], to be . . . easily overwhelmed by his . . . needs." The juvenile court terminated Brandy's parental rights as to Preston after finding that grounds for termination existed and that such was in Preston's best interests.

Brandy filed a motion for new trial on January 7, 2004, alleging in part that the juvenile court's decision did not address the issue of whether or not it would be in Preston's best interests to have continued visitation with Brandy even if her parental rights were terminated. A hearing was held on January 14, and the juvenile court's journal entry and order was filed on January 22 denying Brandy's motion for new trial; however, such order did not resolve the visitation request made in her motion.

The hearing for final determination on Brandy's request for a visitation order was held on March 15, 2004, and the juvenile court's journal entry was filed on March 24. The juvenile court found that because an order had been entered terminating her parental rights, Brandy had no standing to request visitation. However, the juvenile court also found that it may be in Preston's best interests, "because of his age and other factors" as well as based on the opinions of the licensed mental health practitioner who testified at the termination hearing contained in a letter to Brandy's caseworker, that some therapeutic visits be made part of the case plan. Thus, the court ordered "contact or visitation in a

therapeutic setting for the benefit of [Preston]" and stated that "[i]f at some point the therapist determines that those therapeutic visits are more detrimental than beneficial to [Preston's] adjustment, then [DHHS] shall eliminate the therapeutic visits from its case plan." Brandy filed her notice of appeal on April 6, stating

> her intent to appeal to the Nebraska Court of Appeals the County Court's Order dated December 31, 2003, and March 15, 2004, [finding] that grounds exist for the termination of parental rights of Brandy . . . that the best interest[s] of Preston . . . require that such rights be terminated, that her admission to the original adjudication on September 17, 2001, was valid, and that she had no standing to request visitation.

Although no claim is made that the notice of appeal was not timely filed, we find that it was timely, because the juvenile court had not fully resolved Brandy's request for visitation and thus had not fully resolved the motion for new trial until its journal entry of March 24.

ASSIGNMENTS OF ERROR

Brandy alleges that the juvenile court erred in (1) not properly obtaining jurisdiction at the adjudication in this matter, because she did not have the mental capacity to understand the concept of entering an admission to the pending juvenile petition and her rights to due process of law were violated by the court's taking jurisdiction at that time; (2) failing to assign her a guardian ad litem prior to accepting her admission to the juvenile petition on file, which failure violated her rights to due process of law; and (3) failing to grant her motion to withdraw her admission to the juvenile petition, for the reason that she was not afforded a guardian ad litem to intervene on her behalf at the time and to represent to the court her mental deficiency and lack of understanding of the effect of her admission to the juvenile petition, and thus violating her rights to due process of law.

STANDARD OF REVIEW

[1] Juvenile cases are reviewed de novo on the record, and the appellate court is required to reach a conclusion independent of the juvenile court's findings; however, when the evidence is in conflict, the appellate court will consider and give weight to the

fact that the lower court observed the witnesses and accepted one version of the facts over the other. *In re Interest of Michael R.*, 11 Neb. App. 903, 662 N.W.2d 632 (2003).

ANALYSIS

[2] We begin with the fact that while Brandy is appealing the termination of her parental rights with regard to her son Preston, her assignments of error all relate to the admission/denial and adjudication hearing, from which adjudication she did not appeal. Clearly, an adjudication is a final, appealable order, and case law provides that no collateral attack on an adjudication order is permitted except for a lack of jurisdiction or a denial of due process. See *In re Interest of Ty M. & Devon M.*, 265 Neb. 150, 655 N.W.2d 672 (2003). Thus, our review of her assignments of error in this appeal is limited accordingly.

> The concept of due process embodies the notion of fundamental fairness and defies precise definition. As the U.S. Supreme Court has noted:
>
> "For all its consequence, 'due process' has never been, and perhaps can never be, precisely defined. '[U]nlike some legal rules,' this Court has said, due process 'is not a technical conception with a fixed content unrelated to time, place and circumstances.' . . . Rather, the phrase expresses the requirement of 'fundamental fairness,' a requirement whose meaning can be as opaque as its importance is lofty. Applying the Due Process Clause is therefore an uncertain enterprise which must discover what 'fundamental fairness' consists of in a particular situation by first considering any relevant precedents and then by assessing the several interests that are at stake." *Lassiter v. Department of Social Services*, 452 U.S. 18, 24-25, 101 S. Ct. 2153, 68 L. Ed. 2d 640 (1981).

In re Interest of Joseph L., 8 Neb. App. 539, 546, 598 N.W.2d 464, 470 (1999).

Jurisdiction and Guardian Ad Litem.

[3,4] Brandy argues that the juvenile court violated her due process rights by not properly obtaining jurisdiction at the adjudication in this matter, on the ground that she did not have the

mental capacity to understand the concept of entering an admission to the pending juvenile petition and because the juvenile court failed to assign her a guardian ad litem prior to accepting her admission to the juvenile petition on file. "Every court has inherent power to appoint a guardian ad litem to represent an incapacitated person in that court." *In re Interest of A.M.K.*, 227 Neb. 888, 889, 420 N.W.2d 718, 719 (1988). After reviewing Nebraska law, we do not find a standard of review for the failure to appoint a guardian ad litem for a parent at an adjudication hearing. But, because such an appointment necessarily would involve a factual determination by the trial court—based on evidence and observations of the person before the court—the appropriate standard of our review would be for an abuse of discretion. By itself, the fact that Brandy required two explanations of the proceedings did not compel appointment of a guardian ad litem, given that counsel did not request such an appointment and the record reveals no obvious incompetency or need for such an appointment. However, to further flesh out the matter, and because of a paucity of case law on this issue, we turn to the criminal law where the standard arguably is higher—given the civil nature of juvenile proceedings.

In *State v. Johnson*, 4 Neb. App. 776, 551 N.W.2d 742 (1996), Darrell Johnson was charged with two counts of incest, and as part of a plea bargain, he pled guilty to one count. During a post-conviction relief hearing, Johnson's attorney testified:

> "[W]e kept proceeding, and we would go from one meeting to the next and . . . Johnson . . . would kind of indicate that maybe he didn't understand what I said the first time. So we would repeat it. Eventually, it came down to asking [a psychiatrist] to perform an evaluation which included a determination with regard to competency to stand trial."

Id. at 778, 551 N.W.2d at 746. During an earlier plea hearing, Johnson's attorney had put into evidence a copy of the psychiatrist's report which said that Johnson was incompetent to stand trial. The psychiatrist diagnosed Johnson as suffering from posttraumatic stress disorder and dissociative disorder, with associated paranoia, and noted that Johnson had stated that his actions in his past were " 'as if someone else took his place.' " *Id.* However, Johnson's attorney did not request a hearing on

competency, and the court did not hold such a hearing sua sponte. The court asked Johnson how old he was, what school grade he had completed, whether he could read and write, whether he could understand what the judge was saying, and whether he was on drugs. Johnson answered appropriately, and the court, finding that Johnson had freely, voluntarily, knowingly, and intelligently withdrawn his former plea of not guilty, entered a guilty plea.

The following colloquy then occurred on the record between Johnson and his attorney:

"[Attorney]: . . . We discussed also your competency to stand trial?

"[Johnson]: Right.

"[Attorney]: And you believe that you were competent to stand trial and competent to enter this plea today?

"[Johnson]: That is correct."

The court then asked Johnson whether he committed the offense contained in the information. The following colloquy then occurred:

"[Johnson]: I wasn't here — I don't know. I do believe that it happened, yes.

"THE COURT: I'm sorry. I can't hear you.

"[Johnson]: I do believe it happened.

"THE COURT: Okay, and you believe you did it?

"[Johnson]: Well, I think Darrell Johnson did it, yes.

"THE COURT: And you're Darrell Johnson.

"[Johnson]: I'm Darrell Johnson.

"THE COURT: And you did it?

"[Johnson]: Well, I wasn't here, you know, I can't say.

"THE COURT: You don't have any independent recollection of it taking place; is that correct?

"[Johnson]: That is correct.

. . . .

"THE COURT: And even though you don't have an independent recollection of it taking place, you're willing to proceed with a guilty plea at this time based upon the information they have told you?

"[Johnson]: Yes."

> The court then found that Johnson had the capacity to understand the nature and the object of the proceedings against him, that he was able to "comprehend his own position in reference to the proceedings against him," and that he was able to make a rational defense and decision on how he should proceed. The court further found, beyond a reasonable doubt, that Johnson understood his rights and freely and voluntarily waived his rights and entered a plea.

State v. Johnson, 4 Neb. App. 776, 779-80, 551 N.W.2d 742, 747 (1996). In Johnson's postconviction appeal, after finding that the trial court had been faced with reasonable doubt regarding Johnson's competency at the plea hearing and at sentencing, we held that the trial court's failure to hold a full, fair, and adequate hearing on Johnson's competency to stand trial was a denial of due process and constituted plain error.

We have detailed *Johnson* extensively because, while a criminal case, it involves a collateral attack on the validity of a plea on competency grounds, and thus, is illustrative of what is needed to succeed in such a collateral attack. In the case before us, in contrast to *Johnson*, the record does not show that either the trial judge or Lowe, Brandy's own counsel at the hearing at issue, was aware of Brandy's diminished mental capacity or that such diminished capacity would prevent her from entering a valid plea at the time of the admission/denial and adjudication hearing. Our review of that initial proceeding reveals that the trial judge comprehensively provided the advisement of rights provided for in Neb. Rev. Stat. § 43-279.01 (Reissue 2004). When asked whether she understood the allegations in the deputy county attorney's petition, her rights, and the possible outcomes of various pleas, Brandy originally stated that she did understand and that she did not have any questions. The trial judge asked Lowe whether he believed that Brandy was prepared to enter an admission or denial, and Lowe explained that Brandy had indicated that she did want to have a trial and that the allegations in the petition were not true.

Lowe then asked the court whether he could have a moment with Brandy, and after a brief recess, it was brought to the court's attention that Brandy needed clarification. The following colloquy was had on the record:

> [Attorney] LOWE: Your Honor, maybe we can clarify a couple of things for [Brandy] that she told me that she didn't understand. And I'm not sure exactly what it was that you said that she understood and what it was that she didn't understand, so I'm just going to have her ask you to repeat whatever part she didn't get. So you need - - -
>
> [Brandy]: I didn't exactly understand any of it.
>
> THE COURT: You didn't understand what?
>
> [Brandy]: I didn't understand any of it. With the words.
>
> THE COURT: Well, then let's just go back through things.

While going over her rights and the possible outcomes of various pleas for the second time, the trial judge asked Brandy whether she understood the various aspects, and she made such responses as "Kinda," "Okay," "Yeah," and "Yes." Then the trial judge asked Brandy, "So at this point, do you have any questions at all about it?" Brandy replied, "No." The trial judge also asked Brandy whether she felt that she had had a full opportunity to talk to Lowe about what she should do, and Brandy replied in the affirmative. The trial judge then asked Lowe whether he felt that Brandy was ready to either admit or deny the allegations, and he responded that he believed Brandy to be ready. Brandy then admitted the allegation in the deputy county attorney's petition that Preston was a child described under § 43-247(3)(a). (The State provided the following factual basis to the court: On or about August 3, 2001, law enforcement and DHHS personnel went to Brandy's residence, where Preston was also living; the residence "was found to be in a state that was unsafe for [Preston] to be living in, including bugs, rotting food, lack of proper bedding, et cetera"; and, after the investigation, Preston was removed from the residence and from Brandy.) After Brandy admitted the allegations in the petition, the trial judge asked her whether she understood that she would not receive an adjudication trial, and Brandy said that she understood. Asked whether Brandy's admission was in contemplation of the State's not pursuing possible criminal charges arising out of the incident, Lowe responded, "That's part of it, too, Your Honor."

[5] At the termination hearing in October 2003, Lowe, who as recounted above had represented Brandy at the admission/denial

and adjudication hearing, testified (by telephone) that he thought Brandy understood what was going on and that there were no questions regarding Brandy's mental capacity at the time of the admission/denial and adjudication hearing. Lowe testified that he had fully discussed the admission with Brandy before she entered it and that she had indicated that she fully understood the consequences and ramifications of that admission. Lowe testified that Brandy's mental capacity was not brought to anyone's attention until she was evaluated by Dr. Meidlinger, several months after the admission/denial and adjudication hearing. Our record shows that Dr. Meidlinger's evaluation occurred in January 2002. Given that the juvenile adjudication process is complicated and obscure to a layperson who has never been involved in it, no inference of incompetency can be drawn from the fact that Brandy requested additional explanations from the court—and the court was patient and comprehensive in its explanations of the proceedings and their ramifications. As there was no evidence or reasonable inference that Brandy did not have the mental capacity to understand the concept and consequences of entering an admission to the pending juvenile petition, we cannot say that the trial court erred in failing to appoint a guardian ad litem for her prior to accepting her admission. Clearly, Brandy's mental capacity was not put in issue as the defendant's had been in *State v. Johnson*, 4 Neb. App. 776, 551 N.W.2d 742 (1996); thus, the juvenile court was not on notice of the need for a competency determination before proceeding, as we found the criminal court to have been in *Johnson*. The most that this record shows is that Brandy asked for additional explanation, and as noted above, that fact by itself does not equate to a finding of incompetency. Accordingly, the trial court had jurisdiction at the time of the admission/denial and adjudication hearing, and no denial of due process was then present—remembering that by the time of the termination proceeding, Brandy did have a guardian ad litem.

[6] Moreover, an adjudication is not required prior to termination of parental rights under § 43-292(1) through (5). See *In re Interest of Joshua M. et al.*, 256 Neb. 596, 591 N.W.2d 557 (1999). See, also, *In re Interest of Brook P. et al.*, 10 Neb. App. 577, 634 N.W.2d 290 (2001). And, one of the grounds for termination in the instant case was that of § 43-292(5), that Brandy

was "unable to discharge parental responsibilities because of mental illness or mental deficiency and there are reasonable grounds to believe that such condition will continue for a prolonged indeterminate period." Therefore, the prior adjudication and admission cannot be prejudicial to Brandy, as we could simply ignore the prior adjudication and assess whether grounds existed under § 43-292(5). See *In re Interest of Brook P. et al., supra* (treating first proceeding as functional equivalent of "no prior adjudication" due to defect in adjudication proceedings and finding that such treatment by itself does not deprive juvenile court of jurisdiction to proceed). Brandy did have a guardian ad litem at the termination hearing; thus, there could not have been a violation of her due process rights such as she claims with respect to the termination proceedings. See Neb. Rev. Stat. § 43-292.01 (Reissue 2004) (when termination of parent-juvenile relationship is sought under § 43-292(5), court shall appoint guardian ad litem for allegedly incompetent parent; court may, in any other case, appoint guardian ad litem, as deemed necessary or desirable, for any party).

Motion to Withdraw Admission.

Finally, Brandy argues that the juvenile court violated her due process rights by failing to grant her motion to withdraw her admission because she was not afforded a guardian ad litem at the admission/denial and adjudication hearing. However, our earlier discussion answers this claim and establishes that there was no error in denying her motion to withdraw her admission.

CONCLUSION

The juvenile court did not err in failing to appoint Brandy a guardian ad litem at the admission/denial and adjudication hearing; nor did the court err in accepting her admission to the petition's allegations, which admission is not subject to collateral attack. Because we have de novo review in this case, we note, despite the lack of assignments of error attacking any aspect of the termination hearing or its findings and outcome, that the record establishes that the juvenile court properly terminated Brandy's rights as to her son Preston.

AFFIRMED.

IN RE INTEREST OF DYLAN Z., A CHILD UNDER 18 YEARS OF AGE. STATE OF NEBRASKA, APPELLEE, V. ROY T., APPELLANT.

697 N.W.2d 707

Filed June 7, 2005. No. A-04-722.

1. **Juvenile Courts: Parental Rights: Appeal and Error.** In an appeal from an order terminating parental rights, an appellate court tries factual questions de novo on the record. Appellate review is independent of the juvenile court's findings. However, when the evidence is in conflict, an appellate court may give weight to the fact that the juvenile court observed the witnesses and accepted one version of facts over another.
2. **Juvenile Courts: Appeal and Error.** In reviewing questions of law arising under the Nebraska Juvenile Code, an appellate court reaches conclusions independent of the lower court's ruling.
3. **Abandonment: Words and Phrases.** In family law, the terms "abandoned" and "abandonment" can include many forms of child neglect, and the lines of distinction between the two are not always clear, so that failure to support or care for a child may sometimes be characterized as abandoning a child and sometimes be characterized as neglect.
4. **Parental Rights.** The rights of the parent and the child are protected separately by the adjudication and dispositional phases of juvenile proceedings.
5. ____. Allegations in a petition brought under Neb. Rev. Stat. § 43-247(3)(a) (Cum. Supp. 2002) are brought on behalf of the child, not to punish the parents.
6. ____. The purpose of the adjudication phase is to protect the interests of the child. The parents' rights are determined at the dispositional phase, not at the adjudication phase.
7. **Parental Rights: Evidence.** The adjudication phase and the termination phase require different burdens of proof—adjudication is based on a preponderance of the evidence, and termination of parental rights is based on clear and convincing evidence.
8. **Juvenile Courts.** In the adjudication phase, the juvenile court's only concern is whether the conditions in which the juvenile finds himself or herself fit within Neb. Rev. Stat. § 43-247 (Cum. Supp. 2002).
9. **Parental Rights.** The right of parents to maintain custody of their child is a natural right, subject only to the paramount interest which the public has in the protection of the rights of the child.
10. **Parental Rights: Due Process.** The fundamental liberty interest of natural parents in the care, custody, and management of their child is afforded due process protection.
11. ____: ____. State intervention to terminate the parent-child relationship must be accomplished by fundamentally fair procedures meeting the requisites of the Due Process Clause.
12. **Parental Rights: Evidence: Proof.** In order to terminate parental rights, the State must prove by clear and convincing evidence that one of the statutory grounds enumerated in Neb. Rev. Stat. § 43-292 (Reissue 2004) exists and that termination is in the child's best interests.

13. **Evidence: Words and Phrases.** Clear and convincing evidence means that amount of evidence which produces in the trier of fact a firm belief or conviction about the existence of a fact to be proven.
14. **Parental Rights: Time: Abandonment.** The crucial time period for purposes of determining whether a parent has intentionally abandoned a child for purposes of Neb. Rev. Stat. § 43-292(1) (Reissue 2004) is determined by counting back 6 months from the date the petition was filed.
15. **Parental Rights: Abandonment: Intent: Words and Phrases.** For purposes of Neb. Rev. Stat. § 43-292(1) (Reissue 2004), abandonment has been described as a parent's intentionally withholding from a child, without just cause or excuse, the parent's presence, care, love, protection, maintenance, and opportunity for the display of parental affection for the child.
16. **Abandonment: Intent.** The question of abandonment is largely one of intent, to be determined in each case from all the facts and circumstances.
17. **Parental Rights: Abandonment: Evidence: Intent.** To sustain a finding of abandonment under Neb. Rev. Stat. § 43-292(1) (Reissue 2004), such a finding must be based on clear and convincing evidence that the parent has demonstrated an intention to withhold parental care and maintenance, not on the parent's failure to provide such care and maintenance as a result of impediments which are not attributable to the parent.
18. **Parental Rights.** Although the plain language of Neb. Rev. Stat. § 43-292(7) (Reissue 2004) provides for termination of parental rights when the juvenile has been in an out-of-home placement for 15 or more of the most recent 22 months, proceedings to terminate parental rights must comport with fundamental fairness.

Appeal from the Separate Juvenile Court of Douglas County: ELIZABETH G. CRNKOVICH, Judge. Affirmed in part, and in part reversed and remanded.

Susan M. Bazis, of Bazis Law Offices, P.C., L.L.O., for appellant.

Stuart J. Dornan, Douglas County Attorney, Kim B. Hawekotte, and Emily Beller, Senior Certified Law Student, for appellee.

INBODY, Chief Judge, and IRWIN and SIEVERS, Judges.

IRWIN, Judge.

I. INTRODUCTION

Roy T. appeals from an order of the separate juvenile court of Douglas County adjudicating his son, Dylan Z., to be within the meaning of Neb. Rev. Stat. § 43-247(3)(a) (Cum. Supp. 2002) and terminating Roy's parental rights pursuant to Neb. Rev. Stat. § 43-292 (Reissue 2004). On appeal, Roy asserts the juvenile

court erred in finding that he had abandoned Dylan, that he had neglected Dylan, that Dylan had been in an out-of-home placement for 15 or more of the most recent 22 months, and that Dylan's best interests would be served by terminating Roy's parental rights. Roy challenges each of these findings primarily by arguing that he was not aware Dylan was his child until the State's petition in this case was filed and that the State failed to make reasonable efforts to contact him about Dylan. We find that the juvenile court did not err in adjudicating Dylan to be within the meaning of § 43-247(3)(a), and we affirm that portion of the juvenile court's order. We find the court erred in terminating Roy's parental rights based upon a finding that Roy intentionally abandoned or neglected Dylan or that Dylan has been in an out-of-home placement for 15 or more of the most recent 22 months, because the record does not indicate that Roy was aware that Dylan was his child. We also find that the record does not support the court's finding that termination of Roy's parental rights would be in Dylan's best interests.

II. BACKGROUND

1. Background Concerning Dylan's Mother

Dylan was born July 17, 2002. At birth, Dylan tested positive for amphetamines. As a result, the State immediately intervened for Dylan's safety and, on July 18, filed a motion for temporary custody. The court granted temporary custody of Dylan to the Nebraska Department of Health and Human Services (DHHS) the same day. Also on July 18, the State filed a petition against Dylan's mother, alleging that Dylan came within the meaning of § 43-247(3)(a) because Dylan's mother's "use of alcohol and/or controlled substances, [placed Dylan] at risk for harm." On August 23, the juvenile court adjudicated Dylan to be within the meaning of § 43-247(3)(a).

The record indicates that Dylan was placed in foster care in July 2002. Dylan has remained in the same foster home from that time through the pendency of these proceedings.

On July 7, 2003, the State filed a motion seeking to terminate the parental rights of Dylan's mother. The State sought such termination based on allegations that Dylan's mother had both abandoned and neglected him and that termination of her parental

rights was in Dylan's best interests. The juvenile court terminated Dylan's mother's parental rights on September 4, 2003.

2. Background Concerning Roy

Dylan's mother completed an affidavit of paternity on August 22, 2002, in which she indicated that Roy was Dylan's father. The DHHS protection safety worker who was assigned to this case testified that on or about August 22, she attempted to contact Roy by calling a telephone number provided by Dylan's mother in the affidavit of paternity. The protection safety worker testified that she spoke to a woman who identified herself as Roy's mother and that she left a message and telephone number with the woman, which message indicated that Roy was Dylan's father and that Roy should call the protection safety worker. The protection safety worker testified that in December 2002, she called the same telephone number again, that she spoke with a woman who identified herself as Roy's sister, and that Roy was again unavailable.

At trial, Roy presented testimony indicating that the telephone number provided to the protection safety worker by Dylan's mother was not correct. Specifically, the testimony indicated that the telephone number provided had been for Roy's mother's residence and that her telephone number had been changed several months prior to August 2002. Roy's mother testified that she changed telephone companies and that calls to her former telephone number were not forwarded to her new telephone number.

On February 10, 2004, the State filed a supplemental petition against Roy. In the petition, the State sought to have the court adjudicate Dylan as being within the meaning of § 43-247(3)(a) because of Roy's failure to have contact with Dylan, failure to provide financial support for Dylan, and failure "to put himself in a position to exercise proper parental care for [Dylan]." The State also sought to have Roy's parental rights terminated based on abandonment and neglect. On March 1, the State filed an amended supplemental petition in which the State added an allegation that termination of Roy's parental rights was warranted because Dylan had been in an out-of-home placement for 15 or more of the most recent 22 months. On June 8, the juvenile court adjudicated Dylan to be within the meaning of § 43-247(3)(a) and terminated Roy's parental rights.

3. Trial Testimony

(a) Roy's Contact with Dylan and DHHS

The record indicates that Roy contacted DHHS after being served with the supplemental petition. Roy testified that he was unaware that Dylan was his child until he was served with the petition in this case. The protection safety worker testified that Roy informed her that he had never received the messages she claimed to have left for him. Roy testified that he was aware that Dylan's mother had given birth to a child and that the State had taken custody of the child immediately. Roy testified that he contacted a relative of Dylan's mother and inquired whether Dylan was his child but that he was specifically told that Dylan was not his child. Roy testified that he requested visitation with Dylan but that DHHS denied his request.

At trial, the State presented evidence indicating that Roy had never had any contact with Dylan and had never provided any support for Dylan. Roy presented evidence indicating that he was unaware Dylan was his child and that immediately upon being notified Dylan was his child, he contacted DHHS and sought but was denied visitation. The record indicates that the protection safety worker alleged to have twice called a telephone number provided by Dylan's mother and left messages for Roy, but that the protection safety worker never attempted to visit Roy and never attempted to contact Roy by mail. Although the record indicates that only a partial address was provided to the protection safety worker, she testified that she looked in a telephone book to determine the full address. Additionally, the record indicates that in April 2003, the protection safety worker was aware Roy was incarcerated, but that she made no attempt to contact Roy during his incarceration. The protection safety worker testified at trial that she had never had any personal contact with Roy other than speaking to Roy on the telephone on the occasion when Roy called her after being served with the petition. The protection safety worker further acknowledged that Roy had called and left messages with her office seeking visitation with Dylan but that DHHS had "not allowed him to have visits with Dylan."

(b) Dylan's Best Interests

The protection safety worker testified that termination of Roy's parental rights was in Dylan's best interests. She testified that her opinion on Dylan's best interests was based upon four factors: Dylan's "special needs," the amount of time that Dylan had been in the same foster home, Roy's "living conditions," and a previous incident occurring with another child of Dylan's mother while residing with Roy.

(i) Dylan's Special Needs

The record indicates that after Dylan's birth, he had special needs because of his mother's drug use during pregnancy. However, the testimony indicated that at the time of trial, Dylan had no particular special needs other than perhaps asthma. Roy testified that he had cared for a nephew with asthma. In addition, the protection safety worker acknowledged that she had never discussed any of Dylan's needs with Roy and had never investigated Roy's ability to provide for Dylan's "special needs." Specifically, the protection safety worker testified that she had never talked to Roy "at any great length" about Dylan's needs, that she had not explored with Roy what would be required to care for Dylan, and that she had not performed any evaluations to determine whether Roy could handle Dylan's needs. Roy testified that in order to care for Dylan, Roy is willing to learn and understand whatever needs Dylan might have.

(ii) Dylan's Foster Home

As noted above, the record indicates that Dylan was placed in foster care in July 2002. Dylan has remained in the same foster care from that time throughout the pendency of these proceedings. The evidence presented at trial indicates that the foster home is a suitable placement and that Dylan receives appropriate care in the foster home.

(iii) Roy's Living Conditions

The record indicates that Roy was living with his mother at the time of trial. The protection safety worker acknowledged that she had never visited the home or otherwise investigated Roy's living conditions, other than to note that he did not have "independent"

housing. There was no evidence presented concerning the quality, size, or location of Roy's home.

(iv) Previous Incident

The record does not contain much information concerning the previous incident involving the other child of Dylan's mother while the child and Dylan's mother were residing with Roy. The record indicates that Roy owned a "pit bull" terrier and that the pit bull bit the child and "removed" portions of the child's genitalia. The record does not indicate whether Roy was present during the incident or what happened to lead to the incident, but does indicate that Roy was convicted and incarcerated on a charge of harboring a dangerous animal. The record also indicates that the child was not Roy's.

III. ASSIGNMENTS OF ERROR

On appeal, Roy has assigned numerous errors, which we consolidate for discussion to six. First, Roy asserts that the juvenile court erred in adjudicating Dylan to be within the meaning of § 43-247(3)(a). Second, Roy asserts that the juvenile court erred in finding that he had abandoned Dylan pursuant to § 43-292(1). Third, Roy asserts that the juvenile court erred in finding that he had neglected Dylan pursuant to § 43-292(2). Fourth, Roy asserts that the juvenile court erred in finding that Dylan had been in an out-of-home placement for 15 or more of the most recent 22 months, pursuant to § 43-292(7). Fifth, Roy asserts that the juvenile court erred in finding that termination of his parental rights was in Dylan's best interests. Sixth, Roy asserts that the juvenile court erred in allowing testimony concerning the previous incident involving the other child of Dylan's mother.

IV. ANALYSIS

1. Standard of Review

[1,2] In an appeal from an order terminating parental rights, an appellate court tries factual questions de novo on the record. Appellate review is independent of the juvenile court's findings. *In re Interest of Mainor T. & Estela T.*, 267 Neb. 232, 674 N.W.2d 442 (2004); *In re Interest of Stacey D. & Shannon D.*, 12 Neb. App. 707, 684 N.W.2d 594 (2004). However, when the evidence is in conflict, an appellate court may give weight to the

fact that the juvenile court observed the witnesses and accepted one version of facts over another. *Id.* In reviewing questions of law arising under the Nebraska Juvenile Code, an appellate court reaches conclusions independent of the lower court's ruling. *In re Interest of Mainor T. & Estela T., supra.*

2. Adjudication

Roy first asserts that the juvenile court erred in finding that Dylan was within the meaning of § 43-247(3)(a). Our de novo review of the record leads us to conclude that the juvenile court did not err in finding that the State had proven by a preponderance of the evidence that Dylan was abandoned for purposes of § 43-247(3)(a).

In the amended supplemental petition filed against Roy, the State alleged that Dylan came within the meaning of § 43-247(3)(a) because Roy had had no contact with Dylan and had not provided any emotional support for a period in excess of 6 months, had failed to provide Dylan with financial support for a period in excess of 6 months, and had failed to put himself in a position to exercise proper parental care for Dylan. The juvenile court found that the State had proven these allegations by a preponderance of the evidence.

Section 43-247 states:

> The juvenile court in each county as herein provided shall have jurisdiction of:
>
> . . . .
>
> (3) Any juvenile (a) . . . who is abandoned by his or her parent, guardian, or custodian; who lacks proper parental care by reason of the fault or habits of his or her parent, guardian, or custodian; whose parent, guardian, or custodian neglects or refuses to provide proper or necessary subsistence, education, or other care necessary for the health, morals, or well-being of such juvenile . . . .

[3] It appears from the amended supplemental petition and the juvenile court's findings that the court adjudicated Dylan on the basis that he is an abandoned child and also on the basis that he lacks proper parental support and parental care. See *In re Interest of Monique H.*, 12 Neb. App. 612, 681 N.W.2d 423 (2004). This court has previously recognized that in family law,

the terms "abandoned" and "abandonment" can include many forms of child neglect, and the lines of distinction between the two are not always clear, so that failure to support or care for a child may sometimes be characterized as abandoning a child and sometimes be characterized as neglect. *Id.*

[4-7] The rights of the parent and the child are protected separately by the adjudication and dispositional phases of juvenile proceedings. See *In re Interest of Amber G. et al.*, 250 Neb. 973, 554 N.W.2d 142 (1996). Allegations in a petition brought under § 43-247(3)(a) are brought on behalf of the child, not to punish the parents. See *In re Interest of Amber G. et al., supra.* The purpose of the adjudication phase is to protect the interests of the child. *In re Interest of Sabrina K.*, 262 Neb. 871, 635 N.W.2d 727 (2001); *In re Interest of Amber G. et al., supra*; *In re Interest of Monique H., supra*; *In re Interest of Rebekah T. et al.*, 11 Neb. App. 507, 654 N.W.2d 744 (2002). The parents' rights are determined at the dispositional phase, not at the adjudication phase. *In re Interest of Sabrina K., supra*; *In re Interest of Monique H., supra*; *In re Interest of Rebekah T., supra.* Further, the adjudication phase and the termination phase require different burdens of proof—adjudication is based on a preponderance of the evidence, and termination of parental rights is based on clear and convincing evidence. See *In re Interest of Monique H., supra.*

[8] Keeping all of these propositions of law in mind, we conclude that the juvenile court did not err in finding, for purposes of adjudication and the interests of Dylan, that Dylan came within the meaning of § 43-247(3)(a). The evidence indicated that Roy had not had any contact with Dylan; had not provided any support, financial or emotional, for Dylan; and had provided no parental care for Dylan. Roy's assertions that he was not aware Dylan was his child and that his lack of such knowledge explains his failure to contact or provide for Dylan, although pertinent to our consideration of Roy's rights in the termination phase of the proceedings, do not preclude us from concluding that the preponderance of the evidence indicates that Dylan is a child within the meaning of § 43-247(3)(a). In the adjudication phase, the juvenile court's only concern is whether the conditions in which the juvenile finds himself or herself fit within § 43-247. See *In re Interest of Monique H., supra.* As such, we

find that that portion of the juvenile court's order which adjudicated Dylan to be within the meaning of § 43-247(3)(a) should be affirmed.

3. Termination of Parental Rights

[9-11] The right of parents to maintain custody of their child is a natural right, subject only to the paramount interest which the public has in the protection of the rights of the child. *In re Interest of Mainor T. & Estela T.*, 267 Neb. 232, 674 N.W.2d 442 (2004). See, also, *In re Interest of Aaron D.*, 269 Neb. 249, 691 N.W.2d 164 (2005) (parent's interest in accuracy and justice of decision to terminate parental rights is commanding one). The fundamental liberty interest of natural parents in the care, custody, and management of their child is afforded due process protection. *In re Interest of Mainor T. & Estela T., supra.* State intervention to terminate the parent-child relationship must be accomplished by fundamentally fair procedures meeting the requisites of the Due Process Clause. See *In re Interest of Mainor T. & Estela T., supra.*

[12,13] In order to terminate parental rights, the State must prove by clear and convincing evidence that one of the statutory grounds enumerated in § 43-292 exists and that termination is in the child's best interests. *In re Interest of Stacey D. & Shannon D.*, 12 Neb. App. 707, 684 N.W.2d 594 (2004). See *In re Interest of Aaron D., supra.* Clear and convincing evidence means that amount of evidence which produces in the trier of fact a firm belief or conviction about the existence of a fact to be proven. *In re Interest of Aaron D., supra*; *In re Interest of Stacey D. & Shannon D., supra.*

In the instant case, the juvenile court found that the State had proven by clear and convincing evidence the grounds for termination of parental rights specified in § 43-292(1), (2), and (7) and that termination of Roy's parental rights was in the best interests of Dylan. Section 43-292(1) requires a finding that a parent has abandoned the juvenile for 6 months or more immediately prior to the filing of the petition. Section 43-292(2) requires a finding that a parent has substantially and continuously or repeatedly neglected and refused to give the juvenile necessary parental care and protection. Section 43-292(7)

requires a finding that the juvenile has been in an out-of-home placement for 15 or more months of the most recent 22 months. We conclude that the State failed to prove by clear and convincing evidence that Roy's parental rights should be terminated.

(a) Abandonment

The first statutory ground for the juvenile court's termination of Roy's parental rights was that Roy had abandoned Dylan for 6 months or more immediately prior to the filing of the petition. See § 43-292(1). Because we conclude that the record lacks clear and convincing evidence to support a finding that Roy intentionally abandoned Dylan, we find that the juvenile court erred in finding that this statutory ground was proven.

[14] The crucial time period for purposes of determining whether a parent has intentionally abandoned a child for purposes of § 43-292(1) is determined by counting back 6 months from the date the petition was filed. See *In re Interest of Crystal C.*, 12 Neb. App. 458, 676 N.W.2d 378 (2004). As such, the crucial time period for purposes of determining whether Roy had intentionally abandoned Dylan is the 6 months prior to the filing of the supplemental petition against Roy on February 10, 2004, or the period of time between August 2003 and February 2004.

[15-17] For purposes of § 43-292(1), abandonment has been described as a parent's *intentionally withholding* from a child, *without just cause or excuse*, the parent's presence, care, love, protection, maintenance, and opportunity for the display of parental affection for the child. *In re Interest of Dustin H. et al.*, 259 Neb. 166, 608 N.W.2d 580 (2000); *In re Interest of Crystal C., supra*; *In re Interest of Andrew M., Jr., & Marceleno M.*, 9 Neb. App. 947, 622 N.W.2d 697 (2001). The question of abandonment is largely one of intent, to be determined in each case from all the facts and circumstances. *In re Interest of Andrew M., Jr., & Marceleno M., supra.* To sustain a finding of abandonment under § 43-292(1), such a finding must be based on clear and convincing evidence that the parent has demonstrated an intention to withhold parental care and maintenance, not on the parent's failure to provide such care and maintenance as a result of impediments which are not attributable to the parent. See *In re Interest of B.J.M. et al.*, 1 Neb. App.

851, 510 N.W.2d 418 (1993) (abandonment not proven where failure to connect with children was due to systematically created series of impediments and not to indifference).

This court has conducted a de novo review of the facts and circumstances of this entire case. The record indicates that Roy and Dylan's mother were no longer together when Dylan was born, that Roy was not present at Dylan's birth, and that Roy was not named on any birth certificate as Dylan's father. The record indicates that Roy was aware that Dylan's mother had been involved with another man approximately 9 or 10 months prior to Dylan's birth, in addition to being involved with Roy. Roy was aware that Dylan's mother had given birth, because he saw a newspaper account of the birth and the fact that the State had taken custody of Dylan. Roy made an effort to determine if he was Dylan's father by contacting a mutual friend who was also a relative of Dylan's mother. That person specifically informed Roy that he was not Dylan's father.

The record indicates that the protection safety worker was aware in August 2002 that Dylan's mother had named Roy as Dylan's father. Between August 2002 and February 2004, when the supplemental petition against Roy was filed, the protection safety worker made approximately two attempts to contact Roy and inform him that Dylan was his child, through attempted telephone calls to a telephone number provided by Dylan's mother. The protection safety worker never spoke to Roy, but claimed to have left messages on both occasions. We note that neither occasion was during the relevant 6 months prior to the filing of the petition; according to the record, the protection safety worker's attempts to reach Roy by telephone were between August and December 2002. Roy presented evidence indicating that the telephone number used by the protection safety worker was not the correct telephone number, that his telephone number had been changed several months prior to the protection safety worker's first attempt to contact him, and that he was entirely unaware that he was Dylan's father until February 2004 when he was served with the supplemental petition. The protection safety worker never attempted to contact Roy by mail or personal visit at the location she had been informed he was living, nor did she attempt to contact Roy during a period of time when she was

aware that he was incarcerated in Omaha. When Roy was served with the supplemental petition, he immediately demonstrated an interest in Dylan by contacting the protection safety worker and requesting visitation. DHHS denied Roy's request to have contact with Dylan.

The record presented to this court does not contain clear and convincing evidence that Roy intentionally abandoned Dylan. Rather, the record indicates that Roy's lack of contact with Dylan was directly attributable to Roy's lack of knowledge that he was Dylan's father. Although Roy had no contact with Dylan, there was no evidence presented indicating that such lack of contact was intentional. In fact, the record further demonstrates that DHHS and the protection safety worker made no attempts to contact Roy in the relevant 6-month time period prior to filing the supplemental petition against Roy. As such, we conclude that Roy's failure to connect with Dylan during the requisite time period was due to just cause and excuse and not to indifference or intentional abandonment. See *In re Interest of B.J.M. et al.*, 1 Neb. App. 851, 510 N.W.2d 418 (1993). The juvenile court erred in finding that this statutory ground for termination of Roy's parental rights was proven by clear and convincing evidence.

(b) Neglect

The second statutory ground for the juvenile court's termination of Roy's parental rights was that Roy had substantially and continuously or repeatedly neglected and refused to give Dylan necessary parental care and protection. See § 43-292(2). Because we conclude that the record lacks clear and convincing evidence to support a finding that Roy intentionally neglected Dylan, we find that the juvenile court erred in finding that this statutory ground was proven.

As noted above, the record in this case fails to demonstrate by clear and convincing evidence that Roy's failure to parent Dylan was the result of indifference or intention on Roy's part to abandon or neglect Dylan. Rather, the record indicates that Roy was unaware Dylan was his child, that minimal efforts of DHHS to contact Roy were unsuccessful, and that Roy made attempts to contact DHHS and secure visitation with Dylan immediately upon being served with the supplemental petition. The record does not support a finding by clear and convincing evidence that

Roy refused to give Dylan necessary parental care and protection. The juvenile court erred in finding that this statutory ground for termination of Roy's parental rights was proven by clear and convincing evidence.

(c) Out-of-Home Placement

The last statutory ground for the juvenile court's termination of Roy's parental rights was that Dylan has been in an out-of-home placement for 15 or more of the most recent 22 months. See § 43-292(7). Because we conclude that it would be fundamentally unfair to attribute the period of Dylan's out-of-home placement to Roy on the facts of this case, we find that the juvenile court erred in finding that this statutory ground was proven.

[18] Our research has revealed no cases, and the State has cited us to none, where § 43-292(7) was used as a ground for termination of parental rights in a situation such as the present one where the parent was unaware that the child at issue was his child. Although we recognize that the plain language of § 43-292(7) provides for termination of parental rights when the juvenile has been in an out-of-home placement for 15 or more of the most recent 22 months, we are also cognizant that there is abundant Nebraska case law indicating that proceedings to terminate parental rights must comport with fundamental fairness. See, e.g., *In re Interest of Mainor T. & Estela T.*, 267 Neb. 232, 674 N.W.2d 442 (2004); *In re Interest of Rebecka P.*, 266 Neb. 869, 669 N.W.2d 658 (2003).

In *In re Interest of K.M.S.*, 236 Neb. 665, 463 N.W.2d 586 (1990), the Nebraska Supreme Court noted that proceedings to terminate parental rights must employ fundamentally fair procedures. In that case, the State sought to terminate the parental rights of a juvenile's biological father. Although the father alleged that he had been unaware that he had any parental rights in the child, the record indicated that he was aware he was the child's biological father, that he had been present at the child's birth, and that the father had spoken with legal counsel about securing parental rights. The Supreme Court, sua sponte, addressed whether the father had been afforded due process where he was not made a party to the initial proceedings to adjudicate the juvenile. The Supreme Court found no due process violation.

In the present case, we conclude that it would be fundamentally unfair to allow Roy's parental rights to be terminated based on Dylan's having been in an out-of-home placement for 15 or more of the most recent 22 months when the record fails to indicate that Roy was aware that Dylan is his child. Although Dylan has been in an out-of-home placement for the requisite period of time, it would be fundamentally unfair to charge that time period against Roy prior to his knowledge that Dylan is his child. As such, we find that the juvenile court erred in finding that this statutory ground for termination of Roy's parental rights was proven.

(d) Best Interests

Roy also asserts that the juvenile court erred in finding that termination of his parental rights was in Dylan's best interests. In order to terminate parental rights, the State must prove by clear and convincing evidence that one of the statutory grounds enumerated in § 43-292 exists and that termination is in the child's best interests. *In re Interest of Stacey D. & Shannon D.*, 12 Neb. App. 707, 684 N.W.2d 594 (2004). We conclude that the record does not support a finding by clear and convincing evidence that termination of Roy's parental rights is in Dylan's best interests.

The only evidence suggesting that termination of Roy's parental rights would be in Dylan's best interests was provided during the testimony of the protection safety worker. She testified that she "believe[d] it would be in Dylan's best interest[s] for [Roy's] parental rights to be terminated." She testified that her opinion on Dylan's best interests was based upon four factors: Dylan's "special needs," the amount of time that Dylan had been in the same foster home, Roy's "living conditions," and a previous incident occurring with another child of Dylan's mother while residing with Roy. We conclude that the record does not support a finding by clear and convincing evidence that these factors indicate that termination of Roy's parental rights is in Dylan's best interests.

(i) Dylan's Special Needs

The first factor upon which the protection safety worker based her opinion on best interests is Dylan's "special needs." The record indicates that after Dylan's birth, he had some special needs because of his mother's drug use during pregnancy. However, the testimony indicated that at the time of trial, Dylan had no

particular special needs other than perhaps symptoms similar to asthma.

The State did not present evidence indicating how Dylan's "special needs" made termination of Roy's parental rights in Dylan's best interests. There was no evidence presented indicating that Roy was unable or unwilling to provide for any special needs of Dylan. Rather, the protection safety worker acknowledged that she had never discussed any of Dylan's needs with Roy and had never investigated Roy's ability to provide for Dylan's "special needs." Specifically, the protection safety worker testified that she had never talked to Roy "at any great length" about Dylan's needs, that she had not explored with Roy what would be required to care for Dylan, and that she had not performed any evaluations to determine whether Roy could handle Dylan's needs. Roy testified that in order to care for Dylan, Roy is willing to learn and understand whatever needs Dylan might have, and Roy further testified that he had cared for his nephew who has asthma.

We conclude that the record before us does not support a finding by clear and convincing evidence that Dylan's special needs require termination of Roy's parental rights. The record fails to indicate that Dylan still has significant special needs, fails to indicate that Roy is unable or unwilling to meet any such special needs, and fails to indicate that any investigation was ever made into Roy's ability to provide for any such special needs.

(ii) Dylan's Foster Home

The second factor upon which the protection safety worker based her opinion on best interests is the amount of time that Dylan has been in his current foster home. As noted above, the record indicates that Dylan was placed in foster care in July 2002. Dylan has remained in the same foster care from that time throughout the pendency of these proceedings. The evidence presented at trial indicates that the foster home is a suitable placement and that Dylan receives appropriate care in the foster home.

Nonetheless, there was no evidence presented indicating why the fact that Dylan has been in one foster home for this length of time makes termination of Roy's parental rights in Dylan's best interests. Indeed, for the same reasons we have concluded that

the record does not support a finding that the statutory grounds for termination of Roy's parental rights exist, we find that the record also does not indicate why Dylan's having been in this foster home while Roy was unaware Dylan was his child supports a finding of best interests. Although it is fortunate that Dylan has been able to be in what appears to be a successful foster care placement, this factor does not support a finding that termination of Roy's parental rights is in Dylan's best interests.

(iii) Roy's Living Conditions

The third factor upon which the protection safety worker based her opinion on best interests is "[Roy's] living conditions at [the time of trial]." The record indicates that Roy was living with his mother at the time of trial, but reveals nothing else about the suitability of Roy's housing situation. The protection safety worker acknowledged that she had never visited the home or otherwise investigated Roy's living conditions, other than to note that he did not have "independent" housing. There was no evidence presented concerning the quality, size, or location of Roy's home. There was no evidence presented indicating why "independent" housing on Roy's part would be more appropriate than living with relatives, in terms of his parental rights. In short, there was no evidence presented which indicates that Roy's "living conditions" would support terminating his parental rights.

(iv) Previous Incident

The final factor upon which the protection safety worker based her opinion on best interests is the previous incident involving the other child of Dylan's mother while the child and Dylan's mother were residing with Roy. The record does not contain much information concerning the previous incident. The record indicates that Roy owned a pit bull and that the pit bull bit the child and "removed" portions of the child's genitalia. The record does not indicate whether Roy was present during the incident or what happened to lead to the incident, but does indicate that Roy was convicted and incarcerated on a charge of harboring a dangerous animal. The record also indicates that the child was not Roy's.

Although this prior incident does not weigh in Roy's favor, the record presented also does not support a finding that this incident alone mandates termination of Roy's parental rights. There was

no evidence presented concerning Roy's involvement in the incident. There was no evidence presented to indicate that it was an incident which could or would be likely to happen again. On the record before us, the most that can be said is that this incident was unfortunate and that Roy was criminally punished for owning the dog. Beyond that, however, the record does not support a finding that this incident requires termination of Roy's parental rights.

(v) Resolution on Best Interests

Our de novo review of the entire record leads us to conclude that the record does not support a finding that termination of Roy's parental rights is in Dylan's best interests at this time. Each of the reasons given by the protection safety worker in support of her opinion that termination of Roy's parental rights would be in Dylan's best interests fails, on the record presented to us, to clearly and convincingly support such a finding. As such, we conclude that the juvenile court erred in finding that termination of Roy's parental rights is in Dylan's best interests.

4. Relevancy of Prior Incident

Roy's final assignment of error is that the juvenile court erred in overruling his objection to testimony presented by the State concerning the prior incident involving the other child of Dylan's mother when the child and Dylan's mother were residing with Roy. Roy argues on appeal that the testimony was not relevant to determining Dylan's best interests. Roy urges us to not consider the testimony in reviewing this appeal. Inasmuch as we have already concluded that the juvenile court erred in terminating Roy's parental rights, and inasmuch as we have already concluded that the testimony about the prior incident was insufficient to support the best interests determination made by the juvenile court, we need not further address the propriety of this testimony's being admitted or relied upon.

V. CONCLUSION

We conclude that the State presented sufficient evidence to support a finding by a preponderance of the evidence that Dylan is a child within the meaning of § 43-247(3)(a), and therefore, we affirm the juvenile court's adjudication of Dylan. We conclude that the State failed to present sufficient evidence to support a

finding by clear and convincing evidence that Roy's parental rights should be terminated or that termination of Roy's parental rights is in Dylan's best interests, and therefore, we reverse the juvenile court's termination of Roy's parental rights.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED.

C & L INDUSTRIES, INC., DOING BUSINESS AS CELEBRITY STAFFING, A NEBRASKA CORPORATION, APPELLANT AND CROSS-APPELLEE, V. VIRGINIA KIVIRANTA, APPELLEE AND CROSS-APPELLANT.

698 N.W.2d 240

Filed June 14, 2005. No. A-03-630.

1. **Injunction: Damages: Evidence: Appeal and Error.** In an action seeking both injunctive relief and monetary damages, the appellate court tries factual questions de novo on the record and reaches a conclusion independent of the findings of the trial court, and when 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 judge heard and observed the witnesses and accepted one version of the facts rather than another.
2. **Restrictive Covenants: Employer and Employee.** To determine whether a covenant not to compete is valid, a court must determine whether a restriction is reasonable in the sense that it is not injurious to the public, that it is not greater than is reasonably necessary to protect the employer in some legitimate interest, and that it is not unduly harsh and oppressive on the employee.
3. ____: ____. An employer has a legitimate business interest in protection against a former employee's competition by improper and unfair means, but is not entitled to protection against ordinary competition from a former employee.
4. **Restrictive Covenants: Employer and Employee: Goodwill: Words and Phrases.** To distinguish between "ordinary competition" and "unfair competition," courts and commentators have frequently focused on an employee's opportunity to appropriate the employer's goodwill by initiating personal contacts with the employer's customers.
5. **Restrictive Covenants: Employer and Employee: Goodwill.** Where an employee has substantial personal contact with the employer's customers, develops goodwill with such customers, and siphons away the goodwill under circumstances where the goodwill properly belongs to the employer, the employee's resultant competition is unfair, and the employer has a legitimate need for protection against the employee's competition.
6. **Restrictive Covenants: Employer and Employee.** A covenant not to compete in an employment contract may be valid only if it restricts the former employee from

working for or soliciting the former employer's clients or accounts with whom the former employee actually did business and has personal contact.

7. **Restrictive Covenants: Employer and Employee: Words and Phrases.** In a covenant not to compete in an employment contract, the plain meaning of the term "clients" is current, existing clients. The term does not, without a modifier such as "former" or "future," encompass all clients past, present, or future.
8. **Restrictive Covenants: Employer and Employee.** A balancing test is applied in determining whether the restraint of a postemployment covenant not to compete is unduly harsh or oppressive and, therefore, unenforceable.
9. ____: ____. In applying the balancing test to a postemployment covenant not to compete, the harshness and oppressiveness on the covenantor-employee is weighed against the protection of a valid business interest of the covenantee-employer.

Appeal from the District Court for Douglas County: GARY B. RANDALL, Judge. Reversed and remanded for further proceedings.

Christopher R. Hedican and Randy J. Stevenson, of Baird, Holm, McEachen, Pedersen, Hamann & Strasheim, L.L.P., for appellant.

Steven E. Achelpohl for appellee.

INBODY, Chief Judge, and IRWIN and SIEVERS, Judges.

IRWIN, Judge.

I. INTRODUCTION

C & L Industries, Inc. (C&L), appeals from an order of the district court finding that a covenant not to compete signed by C&L's former employee, Virginia Kiviranta, is unenforceable as written because it is overly broad as well as unduly harsh and oppressive. On appeal, C&L asserts that the district court erred in finding the covenant unenforceable and in making various evidentiary rulings. Kiviranta cross-appeals and asserts that the district court erred in not granting Kiviranta's motions for directed verdict. We find that the covenant is properly limited to clients or customers of C&L with whom Kiviranta actually did business and had personal contact and that accordingly, the covenant is not overly broad as written. We also do not find the covenant to be unduly harsh and oppressive. Because of our resolution concerning the enforceability of the covenant, we need not discuss the alleged evidentiary errors. We find no merit to Kiviranta's assertion on cross-appeal. We reverse the judgment of the district court and remand the case for further proceedings.

II. BACKGROUND

C&L provides recruiting services for companies in the Omaha, Nebraska, area. C&L supports businesses with human resource issues by providing temporary employees and by identifying individuals to be hired by the company. According to testimony presented at trial, there are more than 40 businesses in the Omaha area which provide services comparable to those provided by C&L. Kiviranta worked for C&L for approximately 7 years, ending her employment with C&L on April 26, 2001. Kiviranta had never worked in the staffing industry prior to working for C&L, and "everything [she] learned about the staffing industry [she] learned from the people that [she] worked with" at C&L. During the course of her employment with C&L, Kiviranta held different job titles and responsibilities, but for approximately the last 3 years of her employment with C&L, Kiviranta was a senior staffing supervisor.

The most important responsibility of a senior staffing supervisor for C&L is developing relationships with potential clients and building sales within the senior staffing supervisor's accounts. Good personal relationships between the senior staffing supervisor and the clients lay the foundation for future business and increased business with the clients. Development of such relationships requires the senior staffing supervisor to discuss with the client that client's business, business trends, future growth possibilities, and business changes which could impact C&L's business with that client. Senior staffing supervisors develop good personal relationships with clients by personally contacting the clients, delivering gifts, taking clients out to lunch, and working to build a trust factor to foster future business between the senior staffing supervisor and the clients.

Kiviranta was very effective as a senior staffing supervisor for C&L. In each of the years 1998, 1999, and 2000, Kiviranta was C&L's top producer. Kiviranta earned approximately $115,000 in 2000 and approximately $100,000 in 1999, which earnings included a base salary and commissions.

C&L requires all employees to sign covenants not to compete. Employees are periodically required to sign new covenants not to compete, and the record indicates that employees are required to sign such covenants at the time of hire, during

performance reviews, and whenever there is a change in the employee's position or salary. On August 9, 2000, Kiviranta signed a new covenant not to compete during a performance review; Kiviranta also received an increase in her base salary as a result of her performance review. The covenant provided, in pertinent part, as follows:

> THIS EMPLOYMENT AGREEMENT ("Agreement") is entered into on the 9 day of August 2000, between Virginia Kiviranta ("Employee") and [C&L] ("Employer"), the consideration for which is employment or continued employment of Employee with Employer. The parties agree as follows:
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> 1. *Contacts.* Employee agrees that during the period of employment and for one (1) year thereafter, he will not, directly or indirectly, (i) solicit . . . a client of Employer or its affiliates . . . if Employer's client was one with whom Employee actually did business and had direct personal contact during his period of employment . . . .

On April 26, 2001, Kiviranta tendered her resignation to C&L. Kiviranta began working for Noll Human Resources (Noll) on April 30. Kiviranta's job title and responsibilities were the same at Noll as they were at C&L. Kiviranta testified that after she began working at Noll, she contacted at least 70 percent of the clients she had serviced while working for C&L. Kiviranta acknowledged that it was "possible" that she had previously, in a deposition, indicated that she contacted 85 or 90 percent of the clients she had serviced while working for C&L. Kiviranta further testified that since she began working for Noll, she has actually made job placements with a number of those clients.

On May 11, 2001, C&L filed a petition seeking damages and injunctive relief, alleging that Kiviranta had breached the covenant not to compete. On June 26, Kiviranta filed an answer in which she alleged that the covenant was unenforceable. On August 21, Kiviranta filed an amended answer and included a counterclaim for past wages due.

On December 6, 2001, the district court entered an order finding that the covenant not to compete was not ambiguous, but that the covenant was overbroad and unenforceable. The court denied C&L's request for temporary injunctive relief. On May 9, 2002,

the district court entered a judgment denying permanent injunctive relief, but "stay[ing]" resolution of the issue of monetary damages. On May 16, C&L filed a notice of appeal. On August 16, this court dismissed the appeal because the district court's order was not a final, appealable order.

On March 28, 2003, the parties entered into a written stipulation to bifurcate the trial in this case so that the issue of liability would be resolved first and that the issue of remedy, whether monetary damages or injunctive relief, would be resolved separately. In the stipulation, Kiviranta dismissed her counterclaim without prejudice. On May 6, the district court entered a judgment on the issue of liability, finding that the covenant not to compete was impermissibly overbroad as written and that the covenant was unduly harsh and oppressive to Kiviranta. As such, the district court found that the covenant not to compete was unenforceable as written and dismissed C&L's claim. This appeal and cross-appeal followed.

III. ASSIGNMENTS OF ERROR

On appeal, C&L asserts, renumbered and restated, that the district court erred (1) in finding that the covenant not to compete is unenforceable as written, (2) in failing to receive and consider evidence proffered by C&L, (3) in receiving and considering evidence proffered by Kiviranta, and (4) in "denying [C&L's] Motion for Temporary and Permanent Injunction and its claim for damages on its breach of contract and unfair competition claim." On cross-appeal, Kiviranta asserts that the district court erred in failing to grant Kiviranta's motions for directed verdict at the close of C&L's case in chief and at the close of all the evidence.

IV. ANALYSIS

1. Standard of Review

[1] C&L brought this action seeking both injunctive relief and monetary damages. In such a proceeding, the appellate court tries factual questions de novo on the record and reaches a conclusion independent of the findings of the trial court, and when 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 judge heard and observed the witnesses and accepted one version of the facts rather than another. See, *Stephens v. Pillen*, 12 Neb. App. 600, 681 N.W.2d 59 (2004). See, also, *Goeke v. National Farms, Inc.*, 245 Neb. 262, 512 N.W.2d 626 (1994); *Thomsen v. Greve*, 4 Neb. App. 742, 550 N.W.2d 49 (1996).

2. C&L's Appeal

C&L asserts that the district court erred in finding that the covenant not to compete is unenforceable as written, in failing to receive and consider certain evidence proffered by C&L, in receiving and considering certain evidence proffered by Kiviranta, and in failing to award C&L any remedy. We find merit to C&L's assertion concerning the enforceability of the covenant as written; as a result, we need not specifically address C&L's assertions concerning the district court's evidentiary rulings. However, because the parties stipulated to bifurcate the trial in this matter, our finding that the covenant is enforceable does not cause us to also find merit to C&L's assertion that the court erred in not granting a remedy.

(a) Enforceability of Covenant as Written

C&L first asserts that the district court erred in finding that the covenant not to compete is unenforceable as written. The district court found that the covenant is unenforceable for being overly broad and for being unduly harsh and oppressive on Kiviranta. The relevant portion of the covenant not to compete provides as follows:

> THIS EMPLOYMENT AGREEMENT ("Agreement") is entered into on the 9 day of August 2000, between Virginia Kiviranta ("Employee") and [C&L] ("Employer"), the consideration for which is employment or continued employment of Employee with Employer. The parties agree as follows:
>
> 1. *Contacts*. Employee agrees that during the period of employment and for one (1) year thereafter, he will not, directly or indirectly, (i) solicit . . . a client of Employer or its affiliates . . . if Employer's client was one with whom Employee actually did business and had direct personal contact during his period of employment . . . .

We find that the covenant was properly limited in scope and that the covenant is not unduly harsh and oppressive when balanced against C&L's interest in protecting goodwill.

[2] In *Professional Bus. Servs. v. Rosno*, 268 Neb. 99, 110, 680 N.W.2d 176, 184 (2004) (*Rosno II*), the Nebraska Supreme Court stated:

> "To determine whether a covenant not to compete is valid, a court must determine whether a restriction is reasonable in the sense that it is not injurious to the public, that it is not greater than is reasonably necessary to protect the employer in some legitimate interest, and that it is not unduly harsh and oppressive on the employee."

Quoting *Professional Bus. Servs. v. Rosno*, 256 Neb. 217, 589 N.W.2d 826 (1999) (*Rosno I*). Accord, *Mertz v. Pharmacists Mut. Ins. Co.*, 261 Neb. 704, 625 N.W.2d 197 (2001); *Moore v. Eggers Consulting Co.*, 252 Neb. 396, 562 N.W.2d 534 (1997); *Whitten v. Malcolm*, 249 Neb. 48, 541 N.W.2d 45 (1995); *Vlasin v. Len Johnson & Co.*, 235 Neb. 450, 455 N.W.2d 772 (1990); *Polly v. Ray D. Hilderman & Co.*, 225 Neb. 662, 407 N.W.2d 751 (1987); *American Sec. Servs. v. Vodra*, 222 Neb. 480, 385 N.W.2d 73 (1986). There is no indication or claim that enforcement of the covenant not to compete in this case will be injurious to the public. Accordingly, what must be determined is whether the covenant is overly broad because it is greater than is reasonably necessary to protect C&L in some legitimate interest or whether the covenant is unduly harsh and oppressive on Kiviranta.

(i) Not Overly Broad

The district court first found that the covenant not to compete is overly broad "in that it makes no distinction between current or former clients of [C&L] with whom [Kiviranta] had contact, covering nearly 8 years and approximately 913 [clients]." The court found that C&L "has no legitimate interest in protecting each and every [client] which [Kiviranta] contacted throughout her 8 years of employment with [C&L]." We disagree with the district court's interpretation of the covenant and find that the covenant, as written, is properly limited in scope to be enforceable under current Nebraska law. C&L has a legitimate business interest in protecting client goodwill, and the restriction in the

covenant is not greater than reasonably necessary to protect that legitimate interest.

[3-5] It is fundamental in Nebraska that an employer has a legitimate business interest in protection against a former employee's competition by improper and unfair means, but is not entitled to protection against ordinary competition from a former employee. *Rosno II*; *Mertz v. Pharmacists Mut. Ins. Co., supra*; *Moore v. Eggers Consulting Co., supra*; *Vlasin v. Len Johnson & Co., supra*. To distinguish between "ordinary competition" and "unfair competition," courts and commentators have frequently focused on an employee's opportunity to appropriate the employer's goodwill by initiating personal contacts with the employer's customers. *Id.* Where an employee has substantial personal contact with the employer's customers, develops goodwill with such customers, and siphons away the goodwill under circumstances where the goodwill properly belongs to the employer, the employee's resultant competition is unfair, and the employer has a legitimate need for protection against the employee's competition. *Id.*

Additionally, some commentators have recognized the unique opportunity of a salesperson to appropriate customer goodwill of an employer and use that goodwill to the employer's disadvantage in a subsequent transaction. *American Sec. Servs. v. Vodra, supra*. " '[T]he possibility is present that the customer will regard, or come to regard, the attributes of the employee as more important in his business dealings than any special qualities of the product or service of the employer.' " *Id.* at 488, 385 N.W.2d at 78, quoting Harlan M. Blake, *Employee Agreements Not to Compete*, 73 Harv. L. Rev. 625 (1960). Further, " '[s]alesmen and solicitors are generally hired and paid a salary in order that they may help to build up custom, getting acquainted with customers and acquiring their good will.' " *Id.* at 488, 385 N.W.2d at 79, quoting 6A Arthur Linton Corbin, Corbin on Contracts § 1394 (1962).

In the present case, substantial testimony was presented highlighting the importance of Kiviranta's personal relationship with the clients of C&L with whom she did business and had personal contact. Kiviranta herself testified that her most important duties

as senior staffing supervisor for C&L were to develop and maintain consistent personal relationships with the clients. Thus, C&L certainly has a legitimate business interest in protecting its existing client base from unfair competition from Kiviranta, a former employee. But a determination that C&L has a legitimate business interest in client goodwill does not automatically validate the covenant not to compete; the restriction in the covenant must still be no greater than necessary to protect that legitimate business interest.

[6] The Nebraska Supreme Court has repeatedly noted that a covenant not to compete in an employment contract "'"may be valid only if it restricts the former employee from working for or soliciting the former employer's clients or accounts with whom the former employee actually did business and has personal contact."'" *Rosno II*, 268 Neb. at 105, 680 N.W.2d at 181, quoting *Rosno I*. Accord, *Mertz v. Pharmacists Mut. Ins. Co.*, 261 Neb. 704, 625 N.W.2d 197 (2001); *Moore v. Eggers Consulting Co.*, 252 Neb. 396, 562 N.W.2d 534 (1997); *Whitten v. Malcolm*, 249 Neb. 48, 541 N.W.2d 45 (1995); *Vlasin v. Len Johnson & Co.*, 235 Neb. 450, 455 N.W.2d 772 (1990); *Polly v. Ray D. Hilderman & Co.*, 225 Neb. 662, 407 N.W.2d 751 (1987). As such, the Nebraska Supreme Court has found that covenants not to compete are unenforceable if they are not so limited, but, rather, are written to prohibit future solicitation of clients with whom the former employee never did business or had personal contact. See, *Rosno II* (covenant overly broad where it prohibited former employee from soliciting or contacting any of former employer's clients and where former employer could not establish that former employee had done business with and had personal contact with substantially all of former employer's clients); *Mertz v. Pharmacists Mut. Ins. Co., supra* (covenant overly broad where it prohibited selling or soliciting insurance to pharmacists, pharmacies, or current customers of former employer and was not limited to those clients former employee did business with or personally contacted); *Moore v. Eggers Consulting Co., supra* (covenant overly broad where it prohibited soliciting or accepting business opportunities with any client of former employer with whom former employee worked or had knowledge of, including those clients whom former employee did not personally work

with and had never met); *Whitten v. Malcolm, supra* (covenant overly broad where it prohibited practicing dentistry within geographic location and was not limited to former employer's existing customer base); *Vlasin v. Len Johnson & Co., supra* (covenant overly broad where it prohibited former employee from entering insurance business within geographic location and was not limited to former employer's clients with whom former employee did business and had personal contact); *Polly v. Ray D. Hilderman & Co., supra* (covenant overly broad where it prohibited soliciting or working for former employer's clients with whom former employee did not work and did not even know).

In the present case, C&L argues that the covenant not to compete specifically employs the language required by the litany of cases cited above. The covenant in this case is specifically limited to prohibiting Kiviranta from soliciting "client[s] of [C&L] with whom [Kiviranta] actually did business and had direct personal contact during [her] period of employment." Nonetheless, the district court found that the covenant was overly broad, because the court concluded that the covenant was not limited to "current" clients of C&L. The district court went on to reason that C&L had no legitimate interest in protecting goodwill associated with "former" clients who were no longer considered clients of C&L. We disagree with the district court's conclusion that the plain language of the covenant included former clients. We find that the plain meaning of the term "clients" is current clients and does not include former clients.

[7] Two Nebraska Supreme Court opinions illustrate our conclusion that the plain meaning of the term "clients" is current, existing clients and that the term does not, without a modifier such as "former" or "future," encompass all clients past, present, or future. See, *Philip G. Johnson & Co. v. Salmen*, 211 Neb. 123, 317 N.W.2d 900 (1982); *American Sec. Servs. v. Vodra*, 222 Neb. 480, 385 N.W.2d 73 (1986). This conclusion is not impacted by the two cases' contrary holdings on the merits raised in each case. In *Philip G. Johnson & Co. v. Salmen*, 211 Neb. at 129, 317 N.W.2d at 904, the Nebraska Supreme Court found unenforceable a covenant not to compete which undertook to prohibit the former employee from earning fees from "clients or former clients" of the former employer. The Supreme Court noted that

the former employer "certainly can have [no interest] in its former clients." *Id.* Contrarily, in *American Sec. Servs. v. Vodra*, 222 Neb. at 482, 385 N.W.2d at 75, the Nebraska Supreme Court found enforceable a covenant not to compete, which covenant provided that the former employee would not solicit " 'any customer or former customer' " of the former employer and which covenant was limited only to current or former customers where the former employee had worked physically upon the customer's premises, had acted in a supervisory capacity with respect to the premises, and had acted as a salesman for the former employer in soliciting the customer's business. Both of these cases serve to illustrate our conclusion that the plain meaning of the term "clients" is current, existing clients and that the term does not, without the modifier "former" or "future," encompass all clients past, present, or future. Similarly, the term "client" denotes a current, existing relationship in the following definition: "A person or entity that employs a professional for advice or help in that professional's line of work." Black's Law Dictionary 271 (8th ed. 2004).

As written, the covenant not to compete in this case specifically prohibits Kiviranta from soliciting only those business entities which were current or existing clients of C&L at the termination of Kiviranta's employment and with whom Kiviranta had personally done business and had personal contact. As written, the provision specifically complies with the requirements for enforceability espoused by the Nebraska Supreme Court over the past 18 years, since the court decided the case of *Polly v. Ray D. Hilderman & Co.*, 225 Neb. 662, 407 N.W.2d 751 (1987). We need not even decide whether C&L might have had a legitimate interest in protecting goodwill associated with former clients such that the phrase "clients or former clients" might have been enforceable. The district court erred in determining that the covenant was overly broad and that it provided a restriction on Kiviranta that was greater than reasonably necessary to protect C&L's legitimate interest in protecting its goodwill.

(ii) Not Unduly Harsh and Oppressive

The district court also found that the covenant not to compete is unduly harsh and oppressive to Kiviranta. The court did not

specify the basis for its finding that the covenant, as well as being overbroad, is unduly harsh and oppressive; rather, the court based such finding on "the reasons set forth above." The reasons "set forth above" in the district court's order are those discussed above in this opinion concerning the breadth of the covenant and the applicability of its restriction to former clients of C&L. Inasmuch as we have already concluded that the district court misinterpreted the plain language of the covenant in finding that the restriction applied to former clients as well as current clients, and because the protection of C&L's goodwill outweighs any hardship which enforcement of the covenant may have on Kiviranta, the district court's finding that the covenant is unduly harsh and oppressive on Kiviranta is likewise incorrect.

[8,9] The Nebraska Supreme Court has recognized a balancing test to be applied in determining whether the restraint of a postemployment covenant not to compete is unduly harsh or oppressive and, therefore, unenforceable. The factors or considerations involved in such balancing test are

> "the degree of inequality in bargaining power; the risk of the covenantee losing customers; the extent of respective participation by the parties in securing and retaining customers; the good faith of the covenantee; the existence of sources or general knowledge pertaining to the identity of customers; the nature and extent of the business position held by the covenantor; the covenantor's training, health, education, and needs of his [or her] family; the current conditions of employment; the necessity of the covenantor changing his [or her] calling or residence; and the correspondence of the restraint with the need for protecting the legitimate interests of the covenantee."

American Sec. Servs. v. Vodra, 222 Neb. 480, 490-91, 385 N.W.2d 73, 80 (1986), quoting *Philip G. Johnson & Co. v. Salmen*, 211 Neb. 123, 317 N.W.2d 900 (1982). The harshness and oppressiveness on the covenantor-employee is weighed against the protection of a valid business interest of the covenantee-employer. *Id.* However, in the balancing test, there is no arithmetical computation or formula required in a court's consideration of the factors. The factors are not weighted, and there is no prescribed method by which more or less weight is assigned to each factor. *Id.*

Applying the balancing test to the present case, protection of C&L's goodwill outweighs any hardship which enforcement of the covenant may have on Kiviranta. Application of the factors in this case is remarkably similar to application of the factors in *American Sec. Servs. v. Vodra, supra*. Kiviranta had no training or experience in the industry prior to employment with C&L. Any knowledge acquired by Kiviranta concerning the industry was gained through on-the-job training as a C&L employee. Kiviranta is 33 years old, and the record does not indicate any health problems. Kiviranta testified that there are "thousands" of companies in the Omaha area whom she can solicit on behalf of her new employer, Noll, and who are potential clients for Noll, and she testified that Noll has assured her that she will not be forced to give up her job with Noll if the covenant is enforced. As such, enforcement of the covenant will not require Kiviranta to move from her home in Omaha, nor will enforcement absolutely and totally restrict Kiviranta's activities within this geographic location. We conclude that C&L acted in good faith in drafting a narrow covenant not to compete which restricted for a period of 1 year Kiviranta's solicitation of existing clients of C&L with whom Kiviranta did business and had personal contact. Kiviranta acknowledged that notwithstanding having signed the covenant not to compete, she had solicited as much as 90 percent of the clients of C&L with whom she had done business and had personal contact; Kiviranta began capitalizing on the relationship with the clients which she developed while working for C&L immediately upon starting employment with Noll, one of C&L's competitors.

The restriction imposed upon Kiviranta by the covenant not to compete is not unduly harsh and oppressive on Kiviranta and is therefore reasonable. The district court's finding to the contrary is erroneous.

(b) Evidentiary Rulings

C&L next asserts that the district court erred in finding that certain evidence proffered by C&L should not be admitted and considered and in finding that certain evidence proffered by Kiviranta should be admitted and considered. In light of our finding above that the district court erred in finding that the covenant

not to compete was overly broad as well as unduly harsh and oppressive, we need not further address the alleged errors concerning the admissibility of specific evidence. See *Eisenhart v. Lobb*, 11 Neb. App. 124, 647 N.W.2d 96 (2002) (appellate court not obligated to engage in analysis not necessary to adjudicate case and controversy before it). Independent of the evidentiary matters challenged by C&L, we have found sufficient evidence to find the covenant enforceable.

(c) Denial of Remedy

C&L next asserts that the district court erred in denying C&L injunctive relief and damages. As noted above, the parties entered into a written stipulation that the case be bifurcated so that the issue of liability would be tried to the court independently of the issue of damages. The stipulation specifically provided that "[i]f the [c]ourt finds that Kiviranta is liable to [C&L] on some or all of [C&L's] causes of action, the parties shall have 90 days within which to complete discovery, after which period the [c]ourt will schedule and hold a trial on the issue of [C&L's] damages." As such, it is apparent to this court that the issue of damages was not even properly before the district court and that evidence of damages should not even have been presented to the district court. The court therefore could not properly have awarded C&L any remedy yet. Rather, after the case is remanded, pursuant to the parties' written stipulation, the issue of damages is yet to be litigated.

3. Kiviranta's Cross-Appeal

Kiviranta has filed a cross-appeal which asserts that the district court erred in denying Kiviranta's requests for directed verdict at the conclusion of C&L's evidence and at the conclusion of all the evidence. Not only did Kiviranta waive any challenge to the ruling at the conclusion of C&L's evidence by presenting evidence on her own behalf, see *Home Pride Foods v. Johnson*, 262 Neb. 701, 634 N.W.2d 774 (2001), but our resolution of C&L's appeal above also necessitates a finding that Kiviranta was not entitled to a directed verdict on the issue of the enforceability of the covenant not to compete. Kiviranta seeks apparent relief in the cross-appeal for the same reasons she seeks to have the district court's judgment affirmed.

Moreover, we are at a loss to understand why Kiviranta has cross-appealed this issue. Had we found the covenant not to compete unenforceable and affirmed the district court's judgment, the cross-appeal would not be necessary. However, inasmuch as the basis for the cross-appeal is precisely the same as the basis for Kiviranta's argument that the district court's judgment be affirmed, a finding by us that the covenant not to compete is enforceable and the district court's judgment needs to be reversed would, by necessity, render success on the cross-appeal by Kiviranta unachievable. In short, the outcome of the cross-appeal necessarily is dictated by the outcome of the direct appeal, and Kiviranta either wins on the direct appeal and does not need relief by way of a cross-appeal or Kiviranta loses on the direct appeal and cannot possibly win on the cross-appeal. We find the cross-appeal to be without merit.

V. CONCLUSION

We find that the district court erred in interpreting the plain language of the covenant not to compete. As written, the covenant is properly limited in scope and is not overly broad or unduly harsh and oppressive on Kiviranta. For that reason, the judgment of the district court is reversed and the case is remanded for further proceedings. The cross-appeal by Kiviranta is meritless.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

IN RE GUARDIANSHIP OF BRENDA B. ET AL., CHILDREN UNDER 18 YEARS OF AGE. LINDA W., APPELLANT, V. HUGO B. AND RAYNE B., APPELLEES.

698 N.W.2d 228

Filed June 14, 2005. No. A-04-617.

1. **Guardians and Conservators: Appeal and Error.** Appeals of matters arising under the Nebraska Probate Code, Neb. Rev. Stat. §§ 30-2201 through 30-2902 (Reissue 1995 & Cum. Supp. 2004), are reviewed for error on the record.

2. **Judgments: Appeal and Error.** When reviewing a judgment for errors appearing on the record, the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable.
3. **Child Custody: Parental Rights.** Under the principle of parental preference, a court may not properly deprive a biological or adoptive parent of the custody of the minor child unless it is affirmatively shown that such parent is unfit to perform the duties imposed by the relationship or has forfeited that right.
4. **Guardians and Conservators.** A guardianship is no more than a temporary custody arrangement established for the well-being of a child.
5. **Guardians and Conservators: Parental Rights.** The appointment of a guardian is not a de facto termination of parental rights, which results in a final and complete severance of the child from the parent and removes the entire bundle of parental rights.
6. **Evidence: Words and Phrases.** Clear and convincing evidence means that amount of evidence which produces in the trier of fact a firm belief or conviction about the existence of a fact to be proved.
7. **Child Custody: Words and Phrases.** Parental unfitness involves personal deficiency or incapacity which has prevented, or will probably prevent, performance of a reasonable parental obligation in child rearing and which has caused, or probably will result in, detriment to a child's well-being.
8. **Appeal and Error.** An appellate court is not obligated to engage in an analysis which is not needed to adjudicate the controversy before it.

Appeal from the County Court for Douglas County: CHRISTOPHER KELLY, Separate Juvenile Court Judge. Reversed and remanded with directions.

Deborah A. Sanwick for appellant.

Jeffrey A. Wagner, of Schirber & Wagner, L.L.P., for appellees.

Thomas K. Harmon, guardian ad litem.

IRWIN, CARLSON, and MOORE, Judges.

MOORE, Judge.

INTRODUCTION

Linda W., formerly known as Linda H., filed an application in the county court for Douglas County, seeking to terminate Hugo B. and Rayne B.'s guardianship of Linda's three biological children. The court denied Linda's application, and Linda appealed. We conclude that the denial of the application to terminate the guardianship was not supported by clear and convincing evidence, and we reverse, and remand with directions.

BACKGROUND

Linda is the biological mother of Brenda B., born February 8, 1990; Samantha B., born February 27, 1992; and Richard R., born March 17, 1995. Brenda and Samantha's father was deported to Bolivia in approximately October 1999 and is not a party to the present proceedings. Likewise, Richard's father is not a party to these proceedings. We observe that Hugo and Rayne, the children's coguardians, are husband and wife and that Hugo is Brenda and Samantha's paternal uncle.

In approximately July 2000, the juvenile court system acquired jurisdiction over the children and the children were removed from Linda's custody. At the time, Linda was involved with Christopher H., whom she eventually married and has since divorced. The family was reunified in April 2001, but the children were again removed from Linda's care in August 2001. A motion to terminate Linda's parental rights was filed in approximately February 2002. The present guardianship was established in exchange for dismissal of the termination of parental rights proceedings.

Hugo and Rayne filed a petition in the county court on August 30, 2002, seeking appointment as the children's coguardians. Hugo and Rayne alleged that the children were then under the jurisdiction of the separate juvenile court of Douglas County and that the children had been in the principal care and custody of the Nebraska Department of Health and Human Services (the Department) and Hugo and Rayne during the preceding 60 days. Hugo and Rayne alleged that their appointment as the children's coguardians was for the children's welfare and in the children's best interests.

On March 13, 2003, the county court held a hearing and entered an order appointing Hugo and Rayne as the children's coguardians. The March 13 order shows that at the guardianship appointment hearing, Hugo and Rayne were present with their attorney, Linda was present with her attorney, and the children were present. In its order, the court found that venue in Douglas County was proper, that notice had been given as required by law, and that jurisdiction was proper in "this court." The court found that it was in the children's best interests that coguardians be appointed and that Hugo and Rayne were proper and competent

persons to serve as coguardians, since there were no other persons having priority for or interested in such appointment. While there is nothing in the court's March 13 order reflecting Linda's consent to the guardianship or any stipulation of the parties to that effect, Linda stated in her application to terminate the guardianship that she had consented to the appointment of coguardians for her children and her testimony at the hearing on her application is consistent with this assertion. The court did note, in its March 13 order, the parties' agreement that it was in the best interests of the children to maintain contact with Linda and, accordingly, awarded Linda reasonable rights of visitation "as agreed to by the parties." The court found that this visitation might include unsupervised, overnight, and extended visitation when the parties agreed such visitation was in the children's best interests.

On September 5, 2003, Linda filed an application seeking to terminate the guardianship. Linda stated that after she consented to the appointment of Hugo and Rayne as the children's coguardians, the separate juvenile court of Douglas County dismissed the motion to terminate Linda's parental rights. Linda alleged that she had removed herself from the abusive relationship with her husband, Christopher, and had filed a dissolution of marriage action against him. Linda alleged that she was a stable, fit parent and that it was in the children's best interests to have them returned to her care. Linda also stated her belief that the coguardians "would agree to dismiss the guardianship."

On April 20, 2004, the court heard testimony and received evidence on Linda's application. Linda testified that she was divorced from Christopher, which dissolution of marriage was finalized March 22, 2004. Linda had resided alone in a three-bedroom house since October 1, 2003. Linda was working 6:45 a.m. to 2:45 p.m. Monday through Friday and earning $13.12 per hour at a company where she had worked for the previous 6 years. Linda testified that she pays $50 a month in child support for the children, an amount that was ordered "over four years ago."

Regarding visitation, Linda testified that when the guardianship was first established, Hugo and Rayne (hereinafter collectively the Appellees) agreed that Linda could see the children

"whenever [she] wanted to." Linda indicated that she saw the children first weekly and then every other week. The Appellees apparently stopped Linda's visitation with the children near the end of September or first part of October 2003 until approximately December 28. Linda testified that Hugo stopped her visitations because Linda had called Brenda's school to talk to her. Linda called Brenda at school because Linda often got no answer or a busy signal when she called Brenda at the Appellees' residence. Linda also testified that on several occasions, the Appellees had punished the children by not allowing them to have visitation with her, and that since resuming visitation at the end of December 2003, the Appellees had allowed Linda to visit with the children only in the Appellees' home in their presence. According to Linda, the Appellees have never provided her with any reason for supervising her visits.

Linda testified that she saw the children every other weekend in January 2004. Linda received from the Appellees a letter dated February 1, 2004, setting visitation for the last Sunday of each month at noon. The letter states that after discussion with the children, the Appellees determined that the children were comfortable with seeing Linda once every 4 weeks or about once a month. Linda testified that the visits now last approximately 2 hours, that the children "get bored" at the house, that she and the children play games occasionally or she asks them about school, but that "there's just not a lot to do."

Linda testified that Richard's father sexually abused the children "over six years ago" while the family was living in Missouri. Linda testified that she terminated her relationship with Richard's father in March 1998, once she learned of the abuse, and that she has had no contact with him since that time. Linda testified that the children did have some behavioral problems because of this abuse but that she was unaware whether they continued to have problems related to the abuse. Linda later became involved with and eventually married Christopher. When asked if Christopher was abusive to the children, Linda responded, "No." But, given the preceding questions concerning the sexual abuse by Richard's father, which Linda described as "a one-time issue," it is unclear from the record if Linda was denying sexual or physical abuse on the part of Christopher.

The record does show that the children were removed from Linda's home on two occasions. Linda was asked about allegations made in the juvenile proceedings that she disciplined the children by making them eat jalapeno peppers and by putting jalapeno hot sauce on their tongues. Linda testified that Christopher had done this to the children while she was at work and that she did not continue to leave the children in his care after this happened. Linda specifically testified that the children ended up in juvenile court "[b]ecause [the court] had the allegations of that happening," after which time she "had to go to parenting classes." Linda testified that she "got [her] son back five weeks after [the children] were taken the first time." Linda testified that she attended parenting classes as ordered in the juvenile court proceedings and that she learned "[d]ifferent ways of disciplining the children." Linda testified that she attended a special class for children with "ADHD, bipolar, and other learning disabilities which helped [her] a lot."

Linda indicated that the children were removed from her home a second time after Christopher spanked Samantha. Linda denied that there were marks or bruises on Samantha from this spanking. Linda testified that the spanking occurred after she intervened in a fight between Samantha and Richard, which led to Samantha's striking Linda with a belt. Linda testified that she was upstairs taking care of Richard at the time Samantha's spanking occurred. Linda testified that information about Christopher's spanking Samantha "had gotten back to the therapist" and that the children "never made it home that day from school." Linda testified that they "went to court on the ticket that my ex-husband was issued," that "[c]harges had been dropped from that case," and that the juvenile court system "stepped in." Linda indicated that Christopher was not abusive to her "until after [she] started fighting so hard to get the children back," at which point he "became very abusive" toward her. Because of this abuse, Linda filed a protection order against Christopher, had him removed from the house, and filed for divorce.

Linda testified that she was revoking her consent to the guardianship and was asking the court to return the children to her custody. Linda testified that if the children were returned to her care, she would be able to make arrangements for suitable

daycare and she planned to use timeouts and short-term removals of "personal possessions that they adore" as her primary methods of punishment. Linda testified that it "ha[d] not been [her] way" to physically abuse the children. Linda testified that she would be agreeable to Brenda's remaining with the Appellees if Brenda chose to do so and that she would not "force" Brenda to do something, because that would damage their mother-daughter relationship. Linda testified that based on "what we've talked [about] in the past" (apparently referring to conversations she had had with the children before the Appellees imposed more restrictive visitation arrangements), it would be in the children's best interests to live with her. Linda indicated, however, that she was not certain how the children felt about her, due to her restricted contact with them under the new visitation arrangements.

During the course of Linda's testimony, the court took judicial notice of "all matters contained within the file under the juvenile court file [in the previous proceeding that initiated the guardianship case]." However, no portion of such juvenile court file was admitted into evidence.

The court appointed Thomas Harmon as the children's substitute guardian ad litem in January 2004. Following Harmon's appointment, he visited with the Appellees, Brenda, and Linda and reviewed the "rather extensive report" prepared by his predecessor as guardian ad litem. The report of Harmon's predecessor is not included in the record before us. Harmon did not visit Linda's home but had three visits with her in his office. Harmon testified that during those visits, Linda appeared very articulate in her position, identified issues she wished him to be aware of, and identified concerns with respect to each of the children. Harmon testified that Linda had informed him that she lived in a three-bedroom home where each child could have a room of his or her own. Linda advised Harmon that the Appellees had punished the children by canceling visits with Linda. Harmon did not ask the Appellees about this allegation. Harmon reported that with respect to school, Linda's children were "like all children"—they were doing well in some subjects and not necessarily so well in other subjects. Harmon did not find anything unusual about the children's behavior noted in their school records.

The court overruled Linda's objections to Harmon's opinion testimony regarding termination of the guardianship and allowed Harmon to testify that "there is no legal basis that [he could] see at this juncture to terminate the guardianship." The court overruled further objections by Linda and allowed Harmon to testify that it was in the children's best interests "at this stage" to remain with the Appellees and that he had seen nothing "from an objective standpoint" to indicate that the guardianship was no longer appropriate. Harmon also testified that Brenda had indicated to him that she did not wish to return to Linda's home "at this point in time."

A friend of Linda testified on Linda's behalf. The friend had last seen Linda together with the children approximately 2 to 2½ years before the hearing. At that time, the friend "didn't see anything wrong with [Linda's] parenting." The friend had occasion to visit Linda's home at the time and observed the home to be cluttered but clean. The friend had trusted Linda to babysit the friend's children on occasion.

Sherry Elliott became acquainted with Linda through Linda's involvement in the juvenile court system. Elliott was Linda's family support worker for 2 years, provided one-on-one advice on parenting techniques, transported the children to Linda's home for visits, and supervised those visits with Linda. Linda's one-on-one sessions with Elliott occurred once a week for 3 hours, and the visitations occurred three times per week for 4 hours. Elliott testified that Linda responded positively to the information learned during one-on-one sessions and that Linda appropriately applied during visitation sessions the parenting techniques she was being taught. Elliott described Linda's interactions with the children during visitations as "very good" and testified that she saw nothing in Linda's behavior that "alarmed" her. Elliott's last involvement with Linda and the children was prior to the commencement of the guardianship.

Kelli Mitchell, a child protection and safety worker with the Department at the time of Linda's involvement with the juvenile court system, assumed case management of Linda's case on February 14, 2001. Mitchell testified that the juvenile case was adjudicated initially in approximately July 2000 for inappropriate discipline, Linda's failure to obtain therapy or keep mental

health appointments for the children in relation to the sexual molestation, and Linda's failure to see the "severity in the children's need for mental health appointments." The children were apparently removed from Linda's home at some point in 2000, but the timing of this first removal and the children's placement following that removal are not clear from the record. Given certain testimony from Hugo, however, it is likely that the children were placed in foster care with the Appellees.

While reunification occurred in April 2001, the children were removed from Linda's care a second time in August 2001. Again, the children's placement is not clear without reference to the juvenile court record, but given certain testimony from Hugo, it is likely that the children were placed with the Appellees upon the children's second removal from Linda's care. Mitchell testified that after the children were removed a second time, she observed "marks and bruises" on Samantha. Mitchell testified Linda ultimately admitted before the juvenile court that Samantha sustained the bruises because Christopher hit her with a plastic ruler and that Linda had failed to protect the children from this abuse. Mitchell testified that after August 2001, she had concerns with Linda's parenting. Specifically, Mitchell had concerns with, among other things, Linda's disputing "allegations that were adjudicated" and Linda's need to be "redirected" at times during visits. Mitchell testified that Linda "[s]ometimes" took responsibility for previously adjudicated allegations and "[s]ometimes" recognized her shortcomings in parenting. Mitchell testified that she was concerned by the "great minimization" on Linda's part. Mitchell was present during therapy sessions "at times" and attended three or four visitations over the course of 2 years.

Mitchell testified that the State of Nebraska filed a motion to terminate Linda's parental rights in February 2002. At that time, Mitchell discussed with Linda the possibility of a guardianship. Mitchell felt that a guardianship would be in the children's best interests and would provide the children with "permanency." Mitchell informed Linda that termination of her parental rights was a possibility if she did not agree to the guardianship.

The Appellees reside together with their own two biological children and Linda's three children. Hugo testified that Linda's

children have resided with the Appellees "[o]ff and on" for about 4 years and consistently for about 3 years prior to the hearing. Hugo testified that Linda had visitations with the children prior to the guardianship and that the Appellees allowed the visitations to continue after they were appointed as coguardians for the children. Hugo testified that Linda would take the children home with her for "a few hours at a time on the weekends." Hugo testified that after visits with Linda, the Appellees observed that the children would "start acting up," be unresponsive, not talk, be mad, or be upset. The Appellees spoke with the children and then discussed certain concerns with Linda. Hugo stated that Linda was dating a man from her workplace after Christopher "left the picture" and that Hugo asked Linda not to let this man have contact with the children. Hugo testified that Linda agreed to his request but that she allowed this man to be present during a couple of visits and instructed the children each time not to tell the Appellees. Hugo testified that he was concerned about this man because of issues arising out of some of Linda's previous relationships. Hugo testified that the Appellees stopped Linda's visits with her children for a period during the fall of 2003 "due to the lies and telling the children to lie." Hugo testified that after discussing this concern with Linda, she "was angry and continued to lie about it." Hugo testified that he thought it was in the children's best interests at that time to stop the visits. Hugo testified that at some point, the Appellees spoke with the children and agreed to restrict visits to once a month in the Appellees' home. Hugo testified that he believed the present visitation schedule was in the children's best interests. Hugo stated that he no longer really noticed the same behavioral problems previously observed in the children after visits with Linda. Hugo requested to continue to serve as the children's coguardian and testified that it would be in the children's best interests for him to continue in this capacity.

On cross-examination, Hugo testified that the children had been undergoing therapy until about a month before the hearing. Hugo indicated the children's therapy was stopped because the children were not "getting [any]thing out of it." The Appellees receive $500 per month in Social Security benefits for Richard and $1,200 or $1,300 in benefits from the State for

the three children. Hugo admitted that the Appellees have punished the children for "[p]robably continuous behavior" by not allowing them to have visitation with Linda. Hugo testified that he did not have any specific concerns about the man Linda was currently involved with but that he was simply concerned about Linda "bringing a new man into her life and trying to make the children a part of it."

On April 21, 2003, the court entered an order denying Linda's application to terminate the guardianship. The court determined, upon considering the evidence and the applicable law, that Linda's application "[wa]s, in all things, denied." The court also found that the Appellees should continue to serve as legal guardians for the children. Linda subsequently perfected her appeal to this court.

ASSIGNMENTS OF ERROR

Linda asserts, consolidated and restated, that the court erred in (1) denying her application to terminate the guardianship without an affirmative showing that she was unfit as a parent or had forfeited her parental rights, (2) allowing opinion testimony of the guardian ad litem, and (3) summarily dismissing her application without making any findings of fact or conclusions of law.

STANDARD OF REVIEW

[1,2] Appeals of matters arising under the Nebraska Probate Code, Neb. Rev. Stat. §§ 30-2201 through 30-2902 (Reissue 1995 & Cum. Supp. 2004), are reviewed for error on the record. *In re Guardianship of D.J.*, 268 Neb. 239, 682 N.W.2d 238 (2004). When reviewing a judgment for errors appearing on the record, the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable. *Id.*

ANALYSIS

Jurisdiction.

Before addressing the merits of this appeal, we deem it necessary to first comment on the procedural background of this case as it relates to the jurisdiction of the county court over the guardianship proceeding. The allegations in the guardianship petition and the motion to terminate the guardianship, as well as

the testimony presented at the hearing on the motion to terminate the guardianship, all indicate that the children herein had previously been adjudicated in the separate juvenile court. There is no indication that the juvenile court had discharged the children from its jurisdiction; however, the exact status of the juvenile court proceeding is not clear from this record. At this juncture, we note that at the hearing on the motion to terminate the guardianship, the court took "judicial notice" of the entire juvenile court record. However, none of that record was placed into evidence in the present case, a fact that complicates our review of this appeal unnecessarily. In the past, this court has noted the confusion in appellate review caused by the county court, sitting as a probate court, taking judicial notice of a body of proceedings from a juvenile case, "the breadth of which is unknowable on appeal and which technique has been criticized, especially in juvenile cases." See *In re Interest of Justin C. et al.*, 7 Neb. App. 251, 261, 581 N.W.2d 437, 443 (1998). The Nebraska Supreme Court has held:

> "Papers requested to be noticed must be marked, identified, and made a part of the record. Testimony must be transcribed, properly certified, marked and made a part of the record. Trial court's ruling . . . should state and describe what it is the court is judicially noticing. Otherwise, a meaningful review is impossible."

In re Interest of C.K., L.K., and G.K., 240 Neb. 700, 709, 484 N.W.2d 68, 73 (1992), quoting *In re Interest of Adkins*, 298 N.W.2d 273 (Iowa 1980).

The guardianship petition was filed in the county court and docketed in the probate division. The order establishing the guardianship was signed by a separate juvenile court judge. The bill of exceptions from the hearing on the motion to terminate the guardianship contains reference to the hearing being heard in the separate juvenile court before the juvenile court judge. However, the juvenile court judge, in his opening remarks, states that the matter is denoted as being in the county court, under the probate division case number, and that "[t]his Court enjoys continuing jurisdiction over this matter pursuant to its earlier jurisdiction over this family and these children in [the previous juvenile court proceeding that initiated the guardianship case]." The

order denying Linda's motion to terminate the guardianship is signed by the separate juvenile court judge.

Neb. Rev. Stat. § 43-247(10) (Cum. Supp. 2002), the version in effect at the time the various petitions were filed, provided that the juvenile court has concurrent original jurisdiction with the county court over guardianship proceedings for a child over which the juvenile court already has jurisdiction. Neb. Rev. Stat. § 30-2608(e) (Cum. Supp. 2004) provides in part:

> The petition and all other court filings for a guardianship proceeding shall be filed with the clerk of the county court. The party shall state in the petition whether such party requests that the proceeding be heard by the county court or, in cases in which a separate juvenile court already has jurisdiction over the child in need of a guardian under the Nebraska Juvenile Code, such separate juvenile court. Such proceeding is considered a county court proceeding even if heard by a separate juvenile court judge and an order of the separate juvenile court in such guardianship proceeding has the force and effect of a county court order.

We conclude that under the foregoing statutes, the guardianship proceeding was properly docketed in the county court and heard by a separate juvenile court judge. Since this guardianship is considered a county court proceeding, we review the order appealed from pursuant to the standard set forth above for matters arising under the Nebraska Probate Code.

Denial of Application to Terminate Guardianship.

Linda asserts that the court erred in denying her application to terminate the guardianship without an affirmative showing that she was unfit as a parent or had forfeited her parental rights. Linda argues that the Appellees did not meet their burden of proving by clear and convincing evidence that she was unfit or had forfeited her parental rights.

The Nebraska Supreme Court has recently discussed the standards governing termination of guardianships in *In re Guardianship of D.J.*, 268 Neb. 239, 682 N.W.2d 238 (2004). At the time that D.J.'s natural parents' marriage was being dissolved, they instituted guardianship proceedings and nominated D.J.'s maternal grandparents as his guardians. The grandparents

served as guardians for approximately 3 years, at which time the natural mother filed a petition to remove the grandparents as guardians and terminate the guardianship pursuant to Neb. Rev. Stat. § 30-2616 (Reissue 1995), which petition was denied by the county court. In reversing the county court's decision, the Supreme Court concluded that in guardianship termination proceedings involving a biological or adoptive parent, the parental preference principle serves to establish a rebuttable presumption that the best interests of a child are served by reuniting the child with his or her parent. *In re Guardianship of D.J., supra.*

[3] In reaching this conclusion, the Supreme Court discussed the two competing principles found in child custody jurisprudence. First, the court noted that the paramount concern in child custody disputes is the best interests of the child. *In re Guardianship of D.J., supra.* See *Tremain v. Tremain*, 264 Neb. 328, 646 N.W.2d 661 (2002). See, also, § 30-2616(a) ("[a]ny person interested in the welfare of a ward . . . may petition for removal of a guardian on the ground that removal would be in the best interest of the ward"). The court also noted that under the principle of parental preference, a court may not properly deprive a biological or adoptive parent of the custody of the minor child unless it is affirmatively shown that such parent is unfit to perform the duties imposed by the relationship or has forfeited that right. *In re Guardianship of D.J., supra.* See, also, § 30-2608(a) ("father and mother are the natural guardians of their minor children and are duly entitled to their custody . . . being themselves competent to transact their own business and not otherwise unsuitable").

[4-6] In determining that a parent's superior right to custody should be taken into account during guardianship termination proceedings, the Supreme Court recognized that a guardianship is no more than a temporary custody arrangement established for the well-being of a child. *In re Guardianship of D.J., supra.* The Supreme Court also recognized that the appointment of a guardian is not a de facto termination of parental rights, which results in a final and complete severance of the child from the parent and removes the entire bundle of parental rights. *Id.* Rather, the court stated that "guardianships give parents an opportunity to temporarily relieve themselves of the burdens involved in raising

a child, thereby enabling parents to take those steps necessary to better their situation so they can resume custody of their child in the future." *Id.* at 248, 682 N.W.2d at 246. The court concluded that an individual who opposes the termination of a guardianship bears the burden of proving by clear and convincing evidence that the biological or adoptive parent either is unfit or has forfeited his or her right to custody. Clear and convincing evidence means that amount of evidence which produces in the trier of fact a firm belief or conviction about the existence of a fact to be proved. *In re Interest of Michael B. et al.*, 258 Neb. 545, 604 N.W.2d 405 (2000). Absent such proof, the constitutional dimensions of the relationship between parent and child require termination of the guardianship and reunification with the parent. *In re Guardianship of D.J., supra.*

In the present case, the court denied Linda's application to terminate the guardianship without making a finding either that she was unfit or that she had forfeited her right to custody. Although *In re Guardianship of D.J.*, 268 Neb. 239, 682 N.W.2d 238 (2004), did not involve a minor previously adjudicated under the juvenile code, we believe that the dictates of that case are equally applicable in a case where children have previously been adjudicated. Accordingly, we must review the evidence in the present case to determine whether, at the time of the hearing on the motion to terminate the guardianship, it was clearly and convincingly established that Linda either was unfit or had forfeited her right to custody of the children.

Parental rights may be forfeited by substantial, continuous, and repeated neglect of a child and a failure to discharge the duties of parental care and protection. *In re Guardianship of D.J., supra.* We see no competent evidence in the record to support a conclusion that Linda has forfeited her right to custody of the children. To the contrary, Linda has continued to provide some financial support for the benefit of her children and has maintained consistent contact with them to the extent allowed by the Appellees.

[7] We next review the record to determine whether the evidence would support a finding of unfitness. The Nebraska Supreme Court has stated that parental unfitness involves personal deficiency or incapacity which has prevented, or will probably

prevent, performance of a reasonable parental obligation in child rearing and which has caused, or probably will result in, detriment to a child's well-being. *Gomez v. Savage*, 254 Neb. 836, 580 N.W.2d 523 (1998). The "fitness" standard applied in a guardianship appointment under § 30-2608 is analogous to a juvenile court finding that it would be contrary to a juvenile's health, safety, and welfare to return home. See, *In re Guardianship of Rebecca B. et al.*, 260 Neb. 922, 621 N.W.2d 289 (2000); Neb. Rev. Stat. § 43-284 (Reissue 2004).

The record does not contain any previous finding that Linda is unfit. While the Appellees suggested at oral argument that the previous adjudications of the children (which are not contained in the record) equate with a finding of parental unfitness on the part of Linda, we decline to leap to such an inference; nor do we believe that such a position is legally correct. However, we do agree that the juvenile court history is relevant in our determination of whether Linda is presently unfit to regain custody of her children. Since the juvenile court proceedings are not contained in the bill of exceptions, we are left only with the witnesses' testimony concerning the juvenile court proceeding. We have little concrete information about the actual allegations against Linda in the juvenile court and what progress, if any, Linda had made toward resolving those allegations at the time the guardianship was established. From the record before us, it is apparent that prior to the time the guardianship was established in March 2003, the children had not lived continuously in Linda's home since August 2001, and that sufficient concern existed about Linda's parental fitness for the State to have filed a motion seeking to terminate her parental rights. The concerns about Linda's parental fitness appear to have involved her inability to protect the children from physical abuse by Christopher, her inadequate recognition of therapy needed to address the sexual abuse of the children by Richard's father, and her minimization of the severity of the abuse by both individuals. In the March 13, 2003, order establishing the guardianship, the county court made no finding about Linda's fitness, but, rather, the court simply found that it was in the best interests of the children for the Appellees to be appointed coguardians and that the Appellees were proper and competent persons to serve in such capacity. Although the

March 13 order does not so state, the record before us indicates that Linda agreed to the establishment of the guardianship.

The question before us is whether Linda is presently unfit to have custody of her children. To the extent that any alleged parental deficiency at the time the guardianship was established related to Linda's inability or refusal to protect the children specifically from Christopher, Linda has made great strides in overcoming that particular obstacle to reunification with her children. Since March 2003, Linda has dissolved her marriage to Christopher, and at the time of the hearing on her application to terminate the guardianship, Linda lived alone in a three-bedroom house. Linda also has maintained steady employment and appears to have maintained regular contact with her children to the extent allowed by the Appellees.

As to issues relating to Richard's father, the record shows that Linda has not had contact with him since his abuse of the children was discovered. While Linda may not have addressed her children's therapy needs properly in relation to this sexual abuse, the record does indicate that the children began receiving counseling at some point and continued to do so up until about a month prior to the hearing on Linda's application to terminate guardianship. The record shows that the counseling was stopped because the Appellees and the children felt that the children were no longer benefiting from the counseling. The record does little to reveal whether this was an appropriate decision, but we cannot fault Linda for a decision that was not under her control.

Hugo expressed concerns about Linda's exposing the children to a man she was dating at some point after ending her relationship with Christopher. The record is not clear as to whether Linda's relationship with this man continued at the time of the hearing, but the record is clear that no affirmative allegations of abuse or inappropriate behavior had been raised against him. Given Linda's past association with abusive individuals, Hugo's caution in exposing the children to yet another man in Linda's life is understandable, although we see nothing in the record about Linda's relationship with this man to imply that Linda should be considered "unfit" to have custody of her children for choosing to associate with him. Linda's introducing this man to her children against the Appellees' wishes and instructing her

children to lie to the Appellees about having met this man are of concern, but, again, these actions do not compel us to find Linda unfit. Finally, our review of the record has left us with a sense that Linda continues to minimize the circumstances that brought her family into the juvenile court system and led to the establishment of the guardianship; however, this minimization is difficult to evaluate with certainty, given our lack of access to the actual juvenile court file.

[8] In sum, we conclude in our review that the record does not support a finding of unfitness by competent, clear, and convincing evidence. We are mindful that competent evidence of unfitness may have existed in the juvenile court record which is not before us. On the record before us, the Appellees have not met their burden of proving by clear and convincing evidence that Linda presently suffers from a personal deficiency or incapacity which continues to prevent her performance of reasonable parental obligations in child rearing and which will result in detriment to her children's well-being, or that it would be contrary to the children's welfare to return home. Accordingly, we must reverse the order denying Linda's application to terminate the guardianship. The cause is remanded with directions to terminate the guardianship and to reinstate in Linda the care, custody, and control of her children. Because of our resolution of Linda's first assignment of error, we need not consider Linda's other assigned errors. An appellate court is not obligated to engage in an analysis which is not needed to adjudicate the controversy before it. *Burke v. McKay*, 268 Neb. 14, 679 N.W.2d 418 (2004).

CONCLUSION

We reverse the order denying Linda's application to terminate the guardianship and remand the cause with directions to terminate the guardianship and to reinstate in Linda the care, custody, and control of her children.

REVERSED AND REMANDED WITH DIRECTIONS.

IN RE INTEREST OF JOSEPH S., A CHILD UNDER 18 YEARS OF AGE. STATE OF NEBRASKA, APPELLEE, V. JOSEPH S., APPELLANT.

698 N.W.2d 212

Filed June 14, 2005. Nos. A-04-989, A-04-1177.

1. **Juvenile Courts: Appeal and Error.** Juvenile cases are reviewed de novo on the record, and an appellate court is required to reach a conclusion independent of the juvenile court's findings.
2. **Statutes.** Statutory interpretation presents a question of law.
3. **Appeal and Error.** With regard to questions of law, the appellate court is obligated to reach a conclusion independent of the trial court's conclusion.
4. **Statutes.** Statutory language is to be given its plain and ordinary meaning.
5. **Words and Phrases.** Neb. Rev. Stat. § 28-1213 (Cum. Supp. 2004) generally applies the exceptions to the definition of "destructive device" to all of the types of destructive device.
6. **Juvenile Courts: Proof.** Neb. Rev. Stat. § 43-279(2) (Reissue 2004) requires proof beyond a reasonable doubt to adjudicate a juvenile as a person described by Neb. Rev. Stat. § 43-247(1), (2), (3)(b), or (4) (Cum. Supp. 2002).
7. **Appeal and Error.** An appellate court is not obligated to engage in an analysis which is not needed to adjudicate the case and controversy before it.

Appeal from the Separate Juvenile Court of Lancaster County: THOMAS B. DAWSON, Judge. Reversed and remanded with directions.

Scott E. Sidwell, of Legal Aid of Nebraska, for appellant.

Michelle Sayers, Deputy Lancaster County Attorney, and Micah I. Shirts, Senior Certified Law Student, for appellee.

INBODY, Chief Judge, and SIEVERS and CASSEL, Judges.

CASSEL, Judge.

INTRODUCTION

This case involves two appeals consolidated for our review: the appeal of an adjudication of Joseph S., a child under 18 years of age, pursuant to Neb. Rev. Stat. § 43-247(2) (Cum. Supp. 2002), for attempted possession of a destructive device and the appeal from a subsequent order entered while the adjudication was pending appeal. For the reasons set forth herein, we reverse, and remand with directions.

BACKGROUND

In case No. A-04-989, the State filed a petition in the separate juvenile court of Lancaster County, Nebraska, on February 12, 2004, alleging that Joseph was a juvenile as defined by § 43-247(2) for the reason that on or about January 23, 2004, Joseph intentionally engaged in conduct which constituted a substantial step in a course of conduct intended to culminate in his commission of the crime of possession of a destructive device as defined in Neb. Rev. Stat. § 28-1213(7) (Cum. Supp. 2004), in violation of Neb. Rev. Stat. §§ 28-201 (Cum. Supp. 2004) and 28-1220(1) (Reissue 1995).

The juvenile court held an adjudication hearing on July 29, 2004. The parties stipulated to Joseph's date of birth, said date showing him to be under 18 years of age at the time of the hearing. Four male friends and schoolmates of Joseph, including Sean H. and Corey C., were with Joseph on the evening of January 23. After obtaining dry ice from a grocery store, acquiring plastic pop bottles from a recycling bin, and filling the bottles with water at the house of one of the boys, the boys proceeded in two cars to the open and unoccupied parking lot of a church located near 84th and Holdrege Streets in Lincoln, Nebraska, "[t]o do dry ice bombs." Though Joseph did not testify, the other boys each testified that they did not intend to use the dry ice bombs to harm any person or property and that the parking lot location was picked because it was in an area where no one would be disturbed and no property would be damaged. For example, Sean testified that they selected such location because "it'd be safe and it was an open space." Sean explained that by "safe," he meant that other people would not be around, "so no one else would get hurt," and that no property would be damaged.

When they arrived at the parking lot, Sean, Corey, and Joseph prepared to put dry ice in the bottles after dumping half the water out of each. Sean testified that after they had put the ice in one of the bottles and Joseph had put the cap on it, the boys "waited for it to explode and it didn't. So we moved it out of the way and then we got out another bottle and we — Corey, Jo[seph] and me put dry ice in it . . . except we didn't put the cap on." No explosions occurred. They did not "complete" the second bottle because a

police officer arrived. Sean testified, "We expected them to explode," and he explained that he and Joseph had "done it before."

At the adjudication hearing, a police officer testified that on the evening in question, he had happened upon the area of 84th and Holdrege Streets while doing routine checks of businesses and residences in the area. The officer described the location of the church as having a line of trees on the east side and an open field on the south side; he testified that the west side was just starting to be developed and that there was "still significant space between the church and the residences that [were] being built." While driving around the south side of the church, the officer had noticed in the parking lot a 2-liter pop bottle that was "smoking" and chunks of a white substance which he later determined to be dry ice. He did not see anyone in the area at that time. After parking his vehicle, advising dispatch of the situation, and checking a shed on the southeast corner of the parking lot, the officer noticed two occupied vehicles parked at the northeast corner of the church. The officer testified that after he had made contact with the occupants—the boys—one of them, Joseph, told him what the boys were doing and that the particular location was selected by them because "it was a remote location, away from the city, away from any type of property that can be damaged." The officer confirmed that no bottles had exploded.

A fire inspector for the city of Lincoln was dispatched to the area of 84th and Holdrege Streets on January 23, 2004, based upon the above-described incident involving dry ice. He testified that he there observed three "devices, one of which had" a cap screwed onto it and was larger than normal or misshapen. The inspector later fired a BB gun at that device but was unable to penetrate it. He testified that after he fired a pellet gun at it, "it jumped approximately ten foot" and "[i]t exploded in an upward manner." The inspector explained at the adjudication hearing that an explosion is caused when the dry ice releases some carbon dioxide gas and rapidly expands inside the vessel. He did not believe that dry ice was an incendiary device or an explosive by itself, but testified that the plastic bottle becomes a destructive device when the combination of certain amounts of water and dry ice is placed in the bottle and the bottle's cap is sealed

in place. The inspector testified that "[t]he only purpose for putting dry ice in water in a container like that and sealing it would [be] to make that thing go boom or to explode it, to detonate it, to make it disrupt."

The court overruled Joseph's motion to dismiss at the close of the State's evidence. The defense called as its only witness a biology science teacher employed by Lincoln Public Schools. The teacher testified that the chemical composition of dry ice is carbon dioxide and that dry ice "undergoes no chemical reaction because through the process of sublimation it goes from solid carbon dioxide to a gas." Joseph did not renew his motion to dismiss at the close of all the evidence.

In an order filed on August 3, 2004, the juvenile court found the allegations of the petition true beyond a reasonable doubt, adjudicated Joseph as a juvenile as defined by § 43-247(2), and set a date for disposition proceedings. Joseph filed an appeal on August 23.

Case No. A-04-1177 arises out of the September 15, 2004, proceedings scheduled by the juvenile court on August 3 and the order stemming from those proceedings. On September 15, the court held a hearing and noted, "[T]his matter is on appeal and as such the Court is not in a position to make disposition, but the Court can make interim orders. And the Court would look at making some interim orders." In its order of the same date, the court found that it would be in the best interests of Joseph for him to be placed on home detention in the custody of his parents pending resolution of the appeal. The court imposed conditions requiring, inter alia, that Joseph complete 10 hours of community service by January 1, 2005, and complete an education class through the Lincoln Fire Department on the potential dangers of explosive devices. The order stated that it would continue in full force and effect until the next hearing, on November 3, 2004. Joseph timely appealed.

ASSIGNMENTS OF ERROR

Joseph asserts that the juvenile court erred (1) in overruling his motion to dismiss, (2) in finding that the device he was attempting to possess was a destructive device as defined and prohibited by statute, (3) in adjudicating him when such determination was

contrary to law and not supported by the evidence, and (4) in entering its "Order of Home Detention" while the adjudication appeal was pending in this court.

STANDARD OF REVIEW

[1] Juvenile cases are reviewed de novo on the record, and an appellate court is required to reach a conclusion independent of the juvenile court's findings. *In re Interest of Joshua R. et al.*, 265 Neb. 374, 657 N.W.2d 209 (2003).

[2,3] Statutory interpretation presents a question of law. *Mathews v. Mathews*, 267 Neb. 604, 676 N.W.2d 42 (2004). With regard to questions of law, the appellate court is obligated to reach a conclusion independent of the trial court's conclusion. See *In re Interest of Ty M. & Devon M.*, 265 Neb. 150, 655 N.W.2d 672 (2003).

ANALYSIS

Because it is dispositive of the issues on appeal, we begin our analysis with an examination of the destructive device statute and a determination as to whether the facts of this case supported the adjudication. The pertinent part of § 28-1213 states:

> (7)(a) Destructive devices shall mean:
>
> (i) Any explosive, incendiary, chemical or biological poison, or poison gas (A) bomb, (B) grenade, (C) rocket having a propellant charge of more than four ounces, (D) missile having an explosive or incendiary charge of more than one-quarter ounce, (E) mine, (F) booby trap, (G) Molotov cocktail, (H) bottle bomb, (I) vessel or container intentionally caused to rupture or mechanically explode by expanding pressure from any gas, acid, dry ice, or other chemical mixture, or (J) any similar device, the primary or common purpose of which is to explode and to be used as a weapon against any person or property; or
>
> (ii) Any combination of parts either designed or intended for use in converting any device into a destructive device as defined in subdivision (7)(a)(i) of this section from which a destructive device may be readily assembled.
>
> (b) The term destructive device shall not include (i) any device which is neither designed nor redesigned for use as

> a weapon to be used against person or property, (ii) any device, although originally designed for use as a weapon, which is redesigned for use as a signaling, pyrotechnic, line-throwing, safety, or similar device, (iii) surplus ordnance sold, loaned, or given by the Secretary of the Army pursuant to 10 U.S.C. 4684(2), 4685, or 4686, as such sections existed on July 20, 2002, (iv) any other device which the Nebraska State Patrol finds is not likely to be used as a weapon or is an antique, or (v) any other device possessed under circumstances negating an intent that the device be used as a weapon against any person or property.

[4] Focusing primarily on the word "explosive" in § 28-1213(7)(a)(i), Joseph first argues that the dry ice bombs regarding which he was charged were not destructive devices because they did not incorporate any explosive, incendiary, chemical or biological poison, or poison gas. We disagree. The fire inspector and the science teacher each testified that dry ice and water individually are not explosive, incendiary, chemical or biological poisons, or poison gases. The teacher emphasized the absence of a chemical reaction in the process of sublimation, where dry ice goes from solid carbon dioxide to a gas. However, the inspector testified that "when you add the water and the dry ice combined, that all makes an explosive device." Statutory language is to be given its plain and ordinary meaning. *State v. Johnson*, 269 Neb. 507, 695 N.W.2d 165 (2005). Webster's Encyclopedic Unabridged Dictionary of the English Language 502 (1989) defines "explosive" as: "1. tending or serving to explode . . . 2. pertaining to or of the nature of an explosion . . . 4. an explosive agent or substance, as dynamite." (Emphasis omitted.) To the extent the Legislature categorized a dry ice bomb as an explosive, it obviously considered that term in its ordinary and plain meaning rather than a technical definition based upon the specific chemical process utilized. Indeed, the Legislature referred to a "container intentionally caused to . . . *mechanically explode* by expanding pressure from . . . dry ice." (Emphasis supplied.) § 28-1213(7)(a)(i)(I). By using the term "mechanically explode," the Legislature implicitly acknowledged that a dry ice device "explodes" without a chemical process.

Moreover, it appears that in 1999, when the Legislature thus amended § 28-1213(7)(a) (Reissue 1995), as it was then structured, the Legislature simply added "bottle bomb" and "vessel or container intentionally caused to rupture or mechanically explode by expanding pressure from any gas, acid, dry ice, or other chemical mixture" as additional items expressly defined as destructive devices. See § 28-1213 (Cum. Supp. 2000). The Legislature obviously considered such devices as "explosives" within the plain and ordinary meaning of the word.

A review of the legislative history supports our determination that the Legislature intended to include such "dry ice bombs" as destructive devices. The introducer of the legislation noted that the bill "adds to the definition of destructive devices" the two additional types of device and explained that the then-existing statute "does not specifically address the current trend of filling bottles with acids, gas, dry ice and other chemical mixtures to be used as a bomb." Introducer's Statement of Intent, L.B. 131, Judiciary Committee, 96th Leg., 1st Sess. (Feb. 17, 1999). In support of the bill, a captain with the Nebraska State Patrol testified:

> During the 1980s, there was a trend for pipe and liquid bombs that seemed to diminish. But today we're seeing a large increase in those types of bombs that include the liquid and gas bombings. Numerous cases are never investigated because there's no injury or damage. However, a time delay device that lies in a public area for a short period of time has devastating possibilities. For under about $5 and less than five minutes these small bombs are being constructed with enough force to blow a mailbox onto the roof of a residence.

Judiciary Committee Hearing, L.B. 131, 96th Leg., 1st Sess. 104 (Feb. 17, 1999).

Joseph next argues that the dry ice bombs in this case were excluded from being destructive devices under § 28-1213(7)(b) (Cum. Supp. 2004). Specifically, he argues that they were excluded under § 28-1213(7)(b)(i) as "any device which is neither designed nor redesigned for use as a weapon to be used against person or property" or § 28-1213(7)(b)(v) as "any other device possessed under circumstances negating an intent that the device be used as a weapon against any person or property." The

evidence is undisputed that Joseph and the other boys wanted to see whether the dry ice bombs would make "a boom sound" and burst the bottles and that the location at issue was chosen because it was an open space where no one would be injured and no property would be damaged. The State asserts that for policy reasons and based upon Nebraska case law, the dry ice bombs in this case did not fit within the above exceptions.

Although we find no Nebraska case law considering the application of § 28-1213(7) specifically to dry ice bombs, the Nebraska Supreme Court has considered the destructive device statute on at least three occasions. However, all of these cases arose prior to the 2002 amendment that we discuss below.

In *State v. Casados*, 193 Neb. 28, 225 N.W.2d 267 (1975), the defendant was charged with possession of concealed weapons and of a combination of parts intended for use in converting a device into a destructive device—a Molotov cocktail—and convicted on the destructive device charge. The items constituting the combination of parts for a destructive device were found in his vehicle and consisted of candles, rope, pieces of cloth, gallon jugs, and gasoline. One issue addressed by the Nebraska Supreme Court was that of intent. The Supreme Court stated:

> It is evident that simple possession of a completed destructive device designed for use as a weapon is unlawful regardless of intent unless it is one referred to in section 28-1011.22, subdivision (7) (b), R. S. Supp., 1972, possessed under circumstances negating an intent that it should be used as a weapon.

193 Neb. at 30-31, 225 N.W.2d at 269.

In reversing and remanding for a new trial, the *Casados* court concluded:

> The jury should have been instructed in each case that intent is a material element of the offense charged and that before a verdict of guilty could be returned, it was necessary for the State to prove beyond a reasonable doubt that the defendant intended to convert the various items found in his possession into a destructive device. A showing as to where and when the destructive device was to be used is not essential. The failure to clarify the issue of intent was prejudicial.

193 Neb. at 32, 225 N.W.2d at 270.

In his concurring opinion, Justice McCown stated:

> We have now held, however, that an intent to use such combination of parts by converting or assembling them into a destructive device is a material element of the crime here. Under that holding and under the statutory definition of destructive device, a combination of otherwise innocent parts is not a destructive device within the meaning of the statutory presumption unless and until it is found that the defendant had an intent to use such combination of parts by converting or assembling them into a destructive device.

Id. at 33, 225 N.W.2d at 270-71.

In a separate concurring opinion, in which Justices Clinton and Brodkey joined, Justice Boslaugh wrote:

> Intent is an element of the offense only where the defendant is charged with unlawful possession of a combination of parts intended for use in creating a destructive device. Where the statutory presumption is relied on the jury should be instructed that the evidence must show the defendant intended to use the parts to create a destructive device or knew that some other party present in the vehicle had such an intent.

Id. at 40-41, 225 N.W.2d at 271.

In a dissenting opinion, Justice Spencer stated:

> I agree, intent is irrelevant when an assembled device falls within subdivision (7) (a) of section 28-1011.22, R. S. Supp., 1972. As set out in United States v. Tankersley[, 492 F.2d 962 (7th Cir. 1974)], intent is irrelevant: ". . . when an assembled device falls 'within (1) or (2),' because: the parts are clearly 'designed' to convert the device into a destructive device. When it is equally clear that the end product does not fall within one of those categories, the same is true. When, however, the components are capable of conversion into both such a device and another object not covered by the statute, intention to convert the components into the 'destructive device' may be important." Here, however, the components were not capable of conversion into any object *except* a destructive device, as the testimony set out above clearly indicates.

State v. Casados, 193 Neb. 28, 36, 225 N.W.2d 267, 272 (1975).

We observe that the statute in effect at the time *Casados* was decided differed in structure from the statute before us. The relevant portions of the statute in effect at that time, Neb. Rev. Stat. § 28-1011.22 (Cum. Supp. 1972), stated:

> (7) Destructive devices shall mean:
>
> (a) Any explosive, incendiary, or poison gas (i) bomb, (ii) grenade, (iii) rocket having a propellant charge of more than four ounces, (iv) missile having an explosive or incendiary charge of more than one-quarter ounce, (v) mine, (vi) booby trap, (vii) Molotov cocktail, or (viii) any similar device, the primary or common purpose of which is to explode and to be used as a weapon against any person or property; or
>
> (b) Any combination of parts either designed or intended for use in converting any device into a destructive device as defined in subdivision (7) (a) of this section and from which a destructive device may be readily assembled. The term destructive device shall not include any device which is neither designed nor redesigned for use as a weapon to be used against persons or property; any device, although originally designed for use as a weapon, which is redesigned for use as a signaling, pyrotechnic, line throwing, safety, or similar device; surplus ordinance sold, loaned, or given by the Secretary of the Army pursuant to the provisions of Section 4684(2), 4685, or 4686 of Title 10 of the United States Code; or any other device which the State Fire Marshal finds is not likely to be used as a weapon, or is an antique; or any other device possessed under circumstances negating an intent that the device be used as a weapon against any person or property.

Thus, the language excluding certain devices was contained only in subsection (7)(b)—the same subsection as that discussing "combination of parts"—strongly suggesting, as the concurring and dissenting opinions in *Casados* recognize, that devices listed in subsection (7)(a) as it then existed would not be affected by the exclusionary language.

[5] In 2002, the statute, already recodified as § 28-1213, was restructured to include the "combination of parts" language under subsection (7)(a)—thereby separating that phrase from the exceptions language (the Legislature had also previously amended

the statute to itemize the exceptions to the definition of "destructive device" in subsection (7)(b), see § 28-1213 (Cum. Supp. 1988)). Prior to the 2002 restructuring, it could be persuasively argued that the exceptions Joseph now cites applied only to the "combination of parts" portion of the definition of "destructive device." See § 28-1213(7)(b) (Cum. Supp. 2000). However, the current statute generally applies the exceptions to all of the types of "destructive device," thereby encompassing within such exceptions the itemized list of devices which includes a "container intentionally caused to . . . mechanically explode by expanding pressure from . . . dry ice." See § 28-1213(7) (Cum. Supp. 2004).

In *State v. Walton*, 246 Neb. 893, 523 N.W.2d 699 (1994), another case decided before the 2002 amendment, the defendant appealed his conviction, claiming in part that there was no evidence to show (1) either that the jars he possessed were designed to be used as weapons or that the primary purpose of the jars was their use as weapons or (2) that the defendant intended to use the jars as weapons. As to the defendant's claims that no evidence was adduced to show that the jars were to be used as weapons, the Nebraska Supreme Court cited to statements by a deputy State Fire Marshal investigator that the jars fit the definition of a Molotov cocktail when filled with gasoline and that a Molotov cocktail is a makeshift incendiary bomb constructed to do harm to individuals or to damage property. The *Walton* court stated, "This testimony is sufficient to meet the standards required by the statute." 246 Neb. at 896, 523 N.W.2d at 701. In support of the defendant's contention that the evidence did not show that he intended to use the jars as weapons, he referred to the testimony of one of his companions on the relevant night who claimed that the jars were to be used as Halloween pranks rather than as weapons. The Supreme Court then cited to *State v. Russell*, 243 Neb. 106, 497 N.W.2d 393 (1993), for the propositions that an appellate court will not set aside a finding of guilty in a criminal case where the finding is supported by relevant evidence and that only where the evidence lacks sufficient probative force as a matter of law may the appellate court set aside a finding of guilty as unsupported by the evidence beyond a reasonable doubt. The Supreme Court stated, "In this case, a jury, by considering the evidence of theft and vandalism, could have found that [the

defendant] intended to use the jars as weapons against property. The evidence of the State was sufficient to sustain the verdict." *State v. Walton*, 246 Neb. at 896, 523 N.W.2d at 701.

Section 28-1213 as it existed prior to the 2002 amendment was again at issue in *State v. Spurgin*, 261 Neb. 427, 623 N.W.2d 644 (2001). In that case, the defendant admitted to police that the items in his possession were bombs or grenades, explained that he was " 'pissed off at the world,' " 261 Neb. at 434, 623 N.W.2d at 650, and yelled his displeasure with people in the city talking about him. Although the defendant argued that he did not want to hurt anyone, the Nebraska Supreme Court stated that the issue regarding for what purpose or intent the devices were constructed was for the jury to determine and that there was sufficient evidence to sustain the defendant's convictions.

Webster's Encyclopedic Unabridged Dictionary of the English Language 1616 (1989) defines "weapon" as follows: "1. any instrument or device for use in attack or defense in combat, fighting, or war, as a sword, rifle, cannon, etc. 2. anything used against an opponent, adversary, or victim . . . ." (Emphasis omitted.) Contrary to *Walton* and *Spurgin*, there is no evidence in the case before us to support a finding that Joseph intended to use the dry ice bombs as weapons. At Joseph's adjudication hearing, the fire inspector testified, "The only purpose for putting dry ice in water in a container like that and sealing it would [be] to make that thing go boom or to explode it, to detonate it, to make it disrupt." This certainly did not amount to evidence that Joseph intended to use the dry ice bombs as weapons.

A similar situation is found in *A.H. v. State*, 794 N.E.2d 1147 (Ind. App. 2003). In that case, a juvenile and others mixed aluminum foil and toilet bowl cleaner inside a plastic 2-liter bottle, placed the bottle into a hole in the juvenile's backyard, went a safe distance from the bottle, and waited for the bottle to explode. A neighbor heard a loud sound and eventually called the police. Police and fire personnel found a melted 2-liter bottle at the scene. A sheriff's deputy called it an " 'acid type bomb' " and explained that when the ingredients are mixed and the cap is placed on the bottle, the bottle will burst due to a buildup of pressure inside the bottle. No people or animals were hurt, and no property, other than the bottle, was destroyed. The State of

Indiana charged the juvenile with possession of a destructive device, and the allegation was found to be true following a delinquency hearing. The relevant statute in that case, Indiana Code Ann. § 35-47.5-2-4 (Lexis 2004), states:

> (a) "Destructive device" means:
>
> (1) an explosive, incendiary, or overpressure device that is configured as a:
>
> (A) bomb;
>
> (B) grenade;
>
> (C) rocket with a propellant charge of more than four (4) ounces;
>
> (D) missile having an explosive or incendiary charge of more than one-quarter (¼) ounce;
>
> (E) mine;
>
> (F) Molotov cocktail; or
>
> (G) device that is substantially similar to an item described in clauses (A) through (F);
>
> (2) a type of weapon that may be readily converted to expel a projectile by the action of an explosive or other propellant through a barrel that has a bore diameter of more than one-half (½) inch; or
>
> (3) a combination of parts designed or intended for use in the conversion of a device into a destructive device.
>
> (b) The term does not include the following:
>
> (1) A pistol, rifle, shotgun, or weapon suitable for sporting or personal safety purposes or ammunition.
>
> (2) A device that is neither designed nor redesigned for use as a weapon.
>
> (3) A device that, although originally designed for use as a weapon, is redesigned for use as a signaling, pyrotechnic, line throwing, safety, or similar device.
>
> (4) A surplus military ordnance sold, loaned, or given by authority of the appropriate official of the United States Department of Defense.

The juvenile argued that the evidence did not establish that the bottle was a bomb or that it was designed as a weapon. The Indiana appellate court concluded that the bottle used by the juvenile qualified as an overpressure device under the statute defining an overpressure device because it was a container filled

with chemicals that generated an expanding gas. Thus, the court reasoned that the Indiana General Assembly had chosen to regulate, in some manner, the type of device used by the juvenile, but expressed concern with regard to whether the general assembly intended that the bottle actually used by the juvenile be categorized as a " 'destructive device.' " *A.H. v. State*, 794 N.E.2d 1147, 1150 (Ind. App. 2003).

For the sake of argument, the court assumed that the bottle was a bomb, but it stated that the bomb would not be a " 'destructive device' " if it was not designed or redesigned as a weapon. *Id.* The court stated:

> In this case, the evidence is clear that the boys did not intend that the bottle be used against another person or an animal. While it is possible that the bottle could have potentially been used to combat or contend against another person or animal, an item may only be classified as a destructive device if it was designed or redesigned for that purpose. Here, there is no evidence from which the juvenile court could have concluded that the bottle was designed to be used against a person or animal. Rather, the evidence established that the bottle was not a weapon because the boys took precautions to make sure that no one was hurt and that nothing was damaged other than the bottle itself. Because the device was not designed or redesigned for use as a weapon, it cannot be held to be a "destructive device" and consequently, the possession and use of the bottle could not properly result in a violation of [the Indiana Code].

(Emphasis omitted.) *Id.* at 1150-51. The Indiana court also cautioned:

> This is not to say that the self-serving testimony from a party that he did not intend to use a device as a weapon precludes the consideration that it was a weapon and could be a destructive device. In this case, the facts established that the boys were not using this bottle as a weapon. Had the facts shown that they attempted to injure someone with it, or were it of such a size or nature that someone was most likely to be hurt through its use, that action would be viewed differently.

Id. at 1151 n.6.

Another juvenile case considering a destructive device statute is *In Interest of T.C.*, 573 So. 2d 121 (Fla. App. 1991). In that case, the juvenile was arrested for possession of a hoax bomb after an officer discovered a brass pipe with one brass cap and one plastic cap in the juvenile's automobile along with two taped bundles of firecrackers and a dozen shotgun shells. Although the bomb was not a destructive device, the officers testified that they thought the pipe might be a bomb and that the juvenile stated that it looked like a pipe bomb. The *In Interest of T.C.* court set forth the statute defining a " 'destructive device,' " 573 So. 2d at 122, which statute included a provision that a destructive device does not include a device not designed, redesigned, used, or intended for use as a weapon. See Fla. Stat. Ann. § 790.001(4) (West 2000). The Florida appellate court stated:

> In order to be a hoax bomb, the device in question must be an imitation of a destructive device. Thus, it must imitate a device which is *intended* to be a weapon. In other words, the maker or possessor of a hoax bomb must *intend* the device to be perceived as a weapon or the imitation must be used or designed to be used and perceived as a weapon. Contrary to the state's position in the trial court, the intention of the perpetrator is an essential element of the crime.

573 So. 2d at 123. The court therefore held that "a violation of the statute requires that the perpetrator design, intend or use the imitation destructive device in such a way as to [make it] appear to be a weapon." *Id.* at 124.

The term "destructive device" is used in two statutes of the U.S. Code: in a provision of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. § 921(a)(4) (Supp. II 2002), and in the National Firearms Act, as amended by the Gun Control Act of 1968, 26 U.S.C. § 5845(f) (2002). Section 921(a)(4) provides in pertinent part:

> The term "destructive device" means—
>
> (A) any explosive, incendiary, or poison gas—
>
> (i) bomb,
>
> (ii) grenade,
>
> (iii) rocket having a propellant charge of more than four ounces,

(iv) missile having an explosive or incendiary charge of more than one-quarter ounce,

(v) mine, or

(vi) device similar to any of the devices described in the preceding clauses;

(B) any type of weapon (other than a shotgun or a shotgun shell which the Attorney General finds is generally recognized as particularly suitable for sporting purposes) by whatever name known which will, or which may be readily converted to, expel a projectile by the action of an explosive or other propellant, and which has any barrel with a bore of more than one-half inch in diameter; and

(C) any combination of parts either designed or intended for use in converting any device into any destructive device described in subparagraph (A) or (B) and from which a destructive device may be readily assembled.

The term "destructive device" shall not include any device which is neither designed nor redesigned for use as a weapon; any device, although originally designed for use as a weapon, which is redesigned for use as a signaling, pyrotechnic, line throwing, safety, or similar device; surplus ordnance sold, loaned, or given by the Secretary of the Army pursuant to the provisions of section 4684(2), 4685, or 4686 of title 10; or any other device which the Attorney General finds is not likely to be used as a weapon, is an antique, or is a rifle which the owner intends to use solely for sporting, recreational or cultural purposes.

Section 5845(f) sets forth:

The term "destructive device" means (1) any explosive, incendiary, or poison gas (A) bomb, (B) grenade, (C) rocket having a propellant charge of more than four ounces, (D) missile having an explosive or incendiary charge of more than one-quarter ounce, (E) mine, or (F) similar device; (2) any type of weapon by whatever name known which will, or which may be readily converted to, expel a projectile by the action of an explosive or other propellant, the barrel or barrels of which have a bore of more than one-half inch in diameter, except a shotgun or shotgun shell which the

> Secretary finds is generally recognized as particularly suitable for sporting purposes; and (3) any combination of parts either designed or intended for use in converting any device into a destructive device as defined in subparagraphs (1) and (2) and from which a destructive device may be readily assembled. The term "destructive device" shall not include any device which is neither designed nor redesigned for use as a weapon; any device, although originally designed for use as a weapon, which is redesigned for use as a signaling, pyrotechnic, line throwing, safety, or similar device; surplus ordnance sold, loaned, or given by the Secretary of the Army pursuant to the provisions of section 4684(2), 4685, or 4686 of title 10 of the United States Code; or any other device which the Secretary finds is not likely to be used as a weapon, or is an antique or is a rifle which the owner intends to use solely for sporting purposes.

The federal courts have come to a number of different results concerning the definition of "destructive device" and the issue of intent. See Annot., 126 A.L.R. Fed. 597 (1995).

Early on, the Fourth Circuit Court of Appeals stated that whether commercial explosives were covered by the federal statutes was to be determined by the use for which the explosives were intended. *United States v. Morningstar*, 456 F.2d 278 (4th Cir. 1972), *cert. denied* 409 U.S. 896, 93 S. Ct. 135, 34 L. Ed. 2d 153. That court did not view § 5845(f)(3) "as simply creating an affirmative defense," but instead stated that the government would have the burden to prove beyond a reasonable doubt both that the sticks of black powder pellet explosive and the blasting caps at issue in *Morningstar* could have been readily assembled into a bomb and that the defendant intended to convert those materials into a bomb. *Id.* at 281.

The device at issue in *United States v. Dalpiaz*, 527 F.2d 548 (6th Cir. 1975), was a ground-burst projectile simulator which was used primarily by the military in training infantry troops. The defendant argued that it was not a destructive device because it was neither designed nor redesigned for use as a weapon. An expert for the government testified that upon detonation, the device would expel only the cardboard of which it was composed; that it would make a shallow depression in the ground if

detonated on the ground; and that it would probably take off most of a person's hand if detonated while held. This expert further testified that the device was not designed or intended to be used against people or property. In *Dalpiaz*, the Sixth Circuit stated that the evidence was uncontested that the device was not designed as a weapon, that the device was thereby specifically excluded by the relevant statute as being a " 'destructive device,' " and that what the defendant intended to do with the device was irrelevant for the purpose of determining whether it came within the statutory exclusion. 527 F.2d at 551. The court noted that the U.S. House of Representatives' version of the pertinent legislation originally included language about "both design and intent of the user," but that the language concerning the intent of the user was struck from the final version of the bill. *Id.* That court further stated, "The legislative history of the section reveals that the exception is a matter of affirmative defense." *Id.* at 552.

The Ninth Circuit takes a somewhat different stance. In *U.S. v. Fredman*, 833 F.2d 837, 839 (9th Cir. 1987), where the allegedly destructive device was components of commercial explosives, the court stated that "mere components of commercial explosives, absent proof of intent to use such components as a weapon, fail to qualify as a 'destructive device' within the meaning of 26 U.S.C. § 5845. Intent is a necessary element, absent proof of original design or redesign for use as a weapon." The court further stated, "We have adhered to one interpretation of the intent requirement in all prior cases. That interpretation focuses on 'intent to use' rather than on 'intent to convert' for use." *Fredman*, 833 F.2d at 839. In *U.S. v. Ruiz*, 73 F.3d 949 (9th Cir. 1996), *cert. denied* 519 U.S. 845, 117 S. Ct. 130, 136 L. Ed. 2d 79, a case involving stun grenades, the court distinguished the situation from that in *Fredman, supra*, on the basis that § 5845(f)(3) was applicable to components and not to fully assembled devices. The Ninth Circuit reasoned:

> Since "parts" aren't necessarily a weapon, the statute requires intent to use them as a weapon. By contrast here, there is no dispute that the stun grenade is a fully assembled "grenade," § 5845(f)(1)(B); the only question is whether it is, or is not, designed for use as a weapon. We therefore hold that the defendant's intent to use the fully

> assembled stun grenades as a weapon is not a necessary element.

Ruiz, 73 F.3d at 951.

In *U.S. v. Lussier*, 128 F.3d 1312 (9th Cir. 1997), *cert. denied* 523 U.S. 1131, 118 S. Ct. 1824, 140 L. Ed. 2d 960 (1998), the Ninth Circuit had to determine whether homemade explosive devices were fully assembled devices similar to explosive bombs, grenades, and the like under § 921(a)(4)(A) or were unassembled component parts under § 921(a)(4)(C). Subsection (a)(4)(C) requires that the combination of parts be "designed or intended" to be used in converting something into a bomb or similar device, whereas subsection (a)(4)(A) contains no intent requirement. The court concluded that the homemade devices were fully assembled devices similar to bombs, grenades, et cetera; that they were not socially useful items that could be converted into destructive devices only by intent to use them as weapons; and that proof of intent was not required.

In an 11th Circuit case, *U.S. v. Hammond*, 371 F.3d 776 (11th Cir. 2004), the defendant was charged with making a firearm without first registering, paying tax on, and obtaining the federal Secretary of the Treasury's approval to make the firearm. The " 'firearm' " consisted of a tube approximately 13 inches long, 1½ inches in diameter, and made of 10 layers of industrial grade cardboard. *Id.* at 778. The inside of the tube was filled with smokeless gunpowder and another explosive powder. The ends of the tube were crimped and dipped in liquid candle wax, and the entire tube was reinforced with three layers of tape. A fuse was placed through one of the ends and ran to the center of the tube. Witnesses testified that the defendant had made numerous similar, but smaller, devices and that these devices rarely exploded with more than a " 'pop' " and a minor puff of smoke, but that occasionally, they created a small explosion. *Id.* One of the government's expert witnesses opined that the defendant designed the device, which that witness characterized as a " 'bomb,' " as a weapon based upon the facts that the device was designed to explode and that upon explosion, " '[a]nyone within direct proximity of this device could sustain serious injury or death.' " *Id.* The defendant moved for a judgment of acquittal at the close of the government's case and again at the

close of the evidence, and the court reserved ruling on the motion each time. The case was submitted to a jury, and the jury returned a verdict of guilty. The trial court subsequently ruled on the reserved motion for a judgment of acquittal, and it granted the motion.

On appeal, the 11th Circuit stated, "[A] device that explodes is not covered by the statute merely because it explodes. Statutory coverage depends upon proof that a device is an explosive *plus* proof that it was designed as a weapon." *Id.* at 780. The court recognized that one of the government's experts opined that the device was constructed as a weapon, but it stated:

> [H]e offered no insight as to how he arrived at this conclusion other than that the device would explode and cause damage. It is clearly insufficient proof under the statute to opine that an explosive device is a [sic] designed as a weapon because it is an explosive device. Without some other evidence that a device was specifically designed as a weapon—the plus factor—the statutory requirement that a device be so designed is reduced to surplusage.

Id.

The court reasoned that unlike the case if a pipe bomb made of galvanized metal or a cardboard tube filled with nails were to be detonated, there was no evidence that had the defendant's device exploded, anything other than bits of cardboard would have been propelled. Further, the defendant's device was not designed to expel projectiles; nor did it contain incendiary material, poison gas, radioactive material, et cetera. The court stated that "the critical inquiry is whether the device, as designed, has any value other than as a weapon" and cautioned that "the presence of design features that eliminate any claimed entertainment or other benign value supports a finding that the device was designed as a weapon." *U.S. v. Hammond*, 371 F.3d 776, 781 (11th Cir. 2004), citing *U.S. v. Johnson*, 152 F.3d 618 (7th Cir. 1998). The defendant's argument was that he constructed a firecracker and not a weapon, and the 11th Circuit quoted *Johnson, supra*, for support that a firecracker has a useful social and commercial purpose. The *Hammond* court therefore concluded that "no reasonable juror could have found beyond a reasonable doubt from the evidence that [the defendant's] device was not

designed for its pyrotechnic qualities, but rather was designed as a weapon." 371 F.3d at 782.

We include the above sampling of various federal court cases to demonstrate the difficulty among the federal courts in handling "destructive device" cases. Incidentally, the structure of the federal statutes remains very similar to that of § 28-1213 as it existed prior to the 2002 amendment; e.g., the provisions of § 5845(f) addressing intent are included only in the section thereof relating to "combination of parts." Cf. § 921(a)(4). Because, as we discussed above, the Nebraska Legislature restructured § 28-1213 —which restructuring in effect allowed for the exemptions to be applied to devices described in both subsection (7)(a)(i) and subsection (7)(a)(ii) thereof—we must assume that the Legislature intended to do so and must apply the statute accordingly. Thus, we must look to see whether the circumstances surrounding a device as defined in § 28-1213(7)(a)(i) or (ii) negate an intent that such device be used as a weapon, or whether the devices at issue in the instant case were designed or redesigned for use as weapons.

We observe that legislative bodies from other states have found ways to criminalize dry ice bombs without necessitating an inquiry concerning the possessor's intent. The California Penal Code defines " 'destructive device' " to include "[a]ny sealed device containing dry ice . . . or other chemically reactive substances assembled for the purpose of causing an explosion by a chemical reaction." Cal. Penal Code Ann. § 12301(a)(6) (West 2000). The South Carolina statute providing definitions for terms included in that state's chapter on offenses promoting civil disorder reads:

> (4) "Destructive device" means:
>
> (a) a bomb, incendiary device, or any thing that can detonate, explode, be released, or burn by mechanical, chemical, or nuclear means, or that contains an explosive, incendiary, poisonous gas, or toxic substance (chemical, biological, or nuclear materials) including, but not limited to, an incendiary or over-pressure device, or any other device capable of causing damage, injury, or death;
>
> (b) a bacteriological weapon or biological weapon; or

> (c) a combination of any parts, components, chemical compounds, or other substances, either designed or intended for use in converting any device into a destructive device which has been or can be assembled to cause damage, injury, or death.
>
> . . . .
>
> (11) "Over-pressure device" means a container filled with an explosive gas or expanding gas or liquid which is designed or constructed so as to cause the container to break, fracture, or rupture in such a manner which is capable of causing death, bodily harm, or property damage, and includes, but is not limited to, a chemical reaction bomb, an acid bomb, a caustic bomb, or a dry ice bomb.

S.C. Code Ann. § 16-8-10 (West 2003 & Cum. Supp. 2004).

In Tennessee, the statutory meaning of the term "[e]xplosive weapon" includes, inter alia, "[a]ny sealed device containing dry ice or other chemically reactive substances for the purposes of causing an explosion by a chemical reaction." Tenn. Code Ann. § 39-17-1301(3)(B)(ii) (2003). As a final example, Arizona law provides:

> "Prohibited weapon" means, but does not include fireworks imported, distributed or used in compliance with state laws or local ordinances, any propellant, propellant actuated devices or propellant actuated industrial tools that are manufactured, imported or distributed for their intended purposes or a device that is commercially manufactured primarily for the purpose of illumination, including any of the following:
>
> (a) Explosive, incendiary or poison gas:
>
> (i) Bomb.
>
> (ii) Grenade.
>
> (iii) Rocket having a propellant charge of more than four ounces.
>
> (iv) Mine.
>
> . . . .
>
> (f) Breakable container that contains a flammable liquid with a flash point of one hundred fifty degrees Fahrenheit or less and that has a wick or similar device capable of being ignited.

> (g) Chemical or combination of chemicals, compounds or materials, including dry ice, that are placed in a sealed or unsealed container for the purpose of generating a gas to cause a mechanical failure, rupture or bursting of the container.
>
> (h) Combination of parts or materials that is designed and intended for use in making or converting a device into an item set forth in subdivision (a) or (f) of this paragraph.

Ariz. Rev. Stat. Ann. § 13-3101(A)(7) (West Cum. Supp. 2004).

[6,7] Neb. Rev. Stat. § 43-279(2) (Reissue 2004) requires proof beyond a reasonable doubt to adjudicate a juvenile as a person described by § 43-247(1), (2), (3)(b), or (4). We have reviewed the issues utilizing our de novo standard. But, even viewing the evidence in the light most favorable to the State, there is nothing in the circumstances to suggest that Joseph intended to use the dry ice bombs as weapons against persons or property or designed or redesigned the devices as weapons. The State failed to prove the allegations of the petition beyond a reasonable doubt, and thus, we must remand the cause with directions to dismiss the petition. Of course, the interim order must also be reversed. Because of our resolution of this issue, we need not address Joseph's remaining assignments of error. See *State v. King*, 269 Neb. 326, 693 N.W.2d 250 (2005) (appellate court is not obligated to engage in analysis not needed to adjudicate case and controversy before it).

CONCLUSION

The decisions of the separate juvenile court adjudicating Joseph and imposing interim requirements are reversed, and the matter is remanded to the lower court with directions to dismiss the juvenile petition against Joseph in this case.

REVERSED AND REMANDED WITH DIRECTIONS.

IN RE INTEREST OF ANTHONY P., A CHILD UNDER 18 YEARS OF AGE. STATE OF NEBRASKA, APPELLEE, V. ANTHONY P., APPELLANT.

698 N.W.2d 457

Filed June 14, 2005. No. A-04-1178.

1. **Juvenile Courts: Appeal and Error.** The standard of review for juvenile proceedings involving an adjudication is de novo on the record, although the findings of fact made by the juvenile court will be accorded great weight because it heard and observed the witnesses.
2. **Judgments: Appeal and Error.** When reviewing a question of law, an appellate court reaches a conclusion independent of the lower court's ruling.
3. **Criminal Law.** Any person who has in his possession a destructive device as defined in Neb. Rev. Stat. § 28-1213(7) (Cum. Supp. 2004) commits the offense of possession of a destructive device, a Class IV felony.
4. **Criminal Law: Statutes.** Penal statutes are to be strictly construed against the government and are to be given a sensible construction in the context of the object sought to be accomplished, the evils and mischiefs sought to be remedied, and the purpose sought to be served.
5. **Statutes: Appeal and Error.** In the absence of anything to the contrary, statutory language is to be given its plain and ordinary meaning; an appellate court will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous.
6. **Criminal Law.** No person shall be punished for an offense which is not made penal by the plain import of the words, upon pretense that he has offended against the spirit of the written law.
7. **Criminal Law: Intent.** The intent with which an act is done is a mental process and, as such, generally remains hidden within the mind where it is conceived and is rarely if ever susceptible of proof by direct evidence, but may be inferred or gathered from the outward manifestations—by the words or acts of the party and the facts or circumstances surrounding the crime.
8. **Appeal and Error.** An appellate court is not obligated to engage in an analysis which is not needed to adjudicate the case and controversy before it.

Appeal from the Separate Juvenile Court of Lancaster County: THOMAS B. DAWSON, Judge. Affirmed in part, and in part reversed.

Dennis R. Keefe, Lancaster County Public Defender, and Matthew G. Graff for appellant.

Gary Lacey, Lancaster County Attorney, Lori A. Maret, Michelle Sayers, and Ross Luzum, Senior Certified Law Student, for appellee.

INBODY, Chief Judge, and SIEVERS and CASSEL, Judges.

SIEVERS, Judge.

After a hearing on August 17, 2004, in the separate juvenile court of Lancaster County, the court found that on March 12, Anthony P. had in his possession a destructive device as defined in Neb. Rev. Stat. § 28-1213(7) (Cum. Supp. 2004) in violation of Neb. Rev. Stat. § 28-1220(1) (Reissue 1995), a Class IV felony. Accordingly, the court adjudicated Anthony to be a child meeting the definition of Neb. Rev. Stat. § 43-247(1) (Reissue 2004).

This appeal presents the question of whether the homemade device which Anthony admittedly constructed is a destructive device under Nebraska statutes.

FACTUAL BACKGROUND

On March 12, 2004, Officer Jeffrey Hahne of the Lincoln Police Department was dispatched to the 3900 block of North 13th Street to investigate a report by a neighbor of a "big explosion" which was "terribly loud" and had produced a "big cloud of blue smoke." Officer Hahne discovered a grayish mark in a driveway in that block and a pill bottle wrapped in 2-inch wide, clear plastic tape lying in the street. After cutting away some of the tape, Officer Hahne could make out that the bottle originally contained a prescription for Anthony, which prescription, as it turned out, was for his acne medicine. Officer Hahne's investigation revealed that Anthony had access to a number of fireworks left over from the previous Fourth of July, which fireworks his father had purchased in Waverly and would be illegal in Lincoln under its city ordinances. Anthony had used a pencil to punch out the bottom of the artillery shells and emptied the black powder into the pill bottle. He had taped the pill bottle and inserted a fuse from one of the fireworks. On March 12, Anthony had shown the device to at least one friend at school, and while Anthony denied that he lit the device, circumstantial evidence suggests that he did, because there was evidence that he was the only youth in the street at the time the device went off. There was no damage either to person or to property.

PROCEDURAL BACKGROUND

The Lancaster County Attorney charged Anthony with count I, disturbing the peace and quiet under Neb. Rev. Stat. § 28-1322 (Reissue 1995) and with count II, possession of a device "as

defined by sub[sect]ion (7) of [§] 28-1213, in violation of the provisions of [§] 28-1220(1)." As said, the separate juvenile court of Lancaster County found the allegations of count II true beyond a reasonable doubt. No issue is raised in this appeal concerning count I.

ASSIGNMENTS OF ERROR

Anthony assigns two errors: (1) The court erred in adjudicating him as a child meeting the definition of § 43-247(1), and (2) the court erred in finding sufficient evidence to conclude that Anthony had committed the offense as alleged in count II.

STANDARD OF REVIEW

[1,2] The standard of review for juvenile proceedings involving an adjudication is de novo on the record, although the findings of fact made by the juvenile court will be accorded great weight because it heard and observed the witnesses. See *In re Interest of Aufenkamp*, 214 Neb. 297, 333 N.W.2d 681 (1983). However, in the instant case, there are no disputed facts of consequence. When reviewing a question of law, an appellate court reaches a conclusion independent of the lower court's ruling. *State v. Bachelor*, 6 Neb. App. 426, 575 N.W.2d 625 (1998).

ANALYSIS

[3] Any person who has in his possession a destructive device as defined in § 28-1213(7) commits the offense of possession of a destructive device, a Class IV felony. § 28-1220. Section 28-1213(7) provides:

> (a) Destructive devices shall mean:
>
> (i) Any explosive, incendiary, chemical or biological poison, or poison gas (A) bomb, (B) grenade, (C) rocket having a propellant charge of more than four ounces, (D) missile having an explosive or incendiary charge of more than one-quarter ounce, (E) mine, (F) booby trap, (G) Molotov cocktail, (H) bottle bomb, (I) vessel or container intentionally caused to rupture or mechanically explode by expanding pressure from any gas, acid, dry ice, or other chemical mixture, or (J) any similar device, the primary or common purpose of which is to explode and to be used as a weapon against any person or property; or

> (ii) Any combination of parts either designed or intended for use in converting any device into a destructive device as defined in subdivision (7)(a)(i) of this section from which a destructive device may be readily assembled.
>
> (b) The term destructive device shall not include (i) any device which is neither designed nor redesigned for use as a weapon to be used against person or property, (ii) any device, although originally designed for use as a weapon, which is redesigned for use as a signaling, pyrotechnic, line-throwing, safety, or similar device, (iii) surplus ordnance sold, loaned, or given by the Secretary of the Army pursuant to 10 U.S.C. 4684(2), 4685, or 4686, as such sections existed on July 20, 2002, (iv) any other device which the Nebraska State Patrol finds is not likely to be used as a weapon or is an antique, or (v) any other device possessed under circumstances negating an intent that the device be used as a weapon against any person or property.

[4-6] Penal statutes are to be strictly construed against the government and are to be given a sensible construction in the context of the object sought to be accomplished, the evils and mischiefs sought to be remedied, and the purpose sought to be served. *State v. Banes*, 268 Neb. 805, 688 N.W.2d 594 (2004). In the absence of anything to the contrary, statutory language is to be given its plain and ordinary meaning; an appellate court will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous. *Green Tree Fin. Servicing v. Sutton*, 264 Neb. 533, 650 N.W.2d 228 (2002). No person shall be punished for an offense which is not made penal by the plain import of the words, upon pretense that he has offended against the spirit of the written law. *State v. Douglas*, 222 Neb. 833, 388 N.W.2d 801 (1986).

With these principals in mind, we return to the relevant statutory provisions and note that § 28-1213(7)(a)(i) defines a number of specific destructive devices, such as bombs, grenades, rockets, Molotov cocktails, bottle bombs, or "any similar device, the primary or common purpose of which is to explode and to be used as a weapon against any person or property." However, § 28-1213(7)(b) contains an over-arching qualification on the statute by providing that "[t]he term destructive device shall not

include (i) any device which is neither designed nor redesigned for use as a weapon to be used against person or property."

Therefore, under the plain language of the statute, even if the pill bottle filled with the powder from fireworks and then taped and equipped with a fuse is considered one of the enumerated devices in § 28-1213(7)(a)(i), such pill bottle is not a destructive device if it was neither designed nor redesigned for use as a weapon to be used against person or property. Stated otherwise, it is clear that the intent with which a device—in this case the pill bottle—was designed is crucial, because in order for there to be a crime, it must have been designed for use as a weapon to be used against person or property. See *State v. Casados*, 193 Neb. 28, 225 N.W.2d 267 (1975) (in prosecution for possession of combination of parts intended to be converted into destructive device, jury should have been instructed that intent is material element and that it was necessary for State to prove beyond reasonable doubt that defendant intended to convert various items found in his possession into destructive device).

[7] In the instant case, Anthony did not testify, nor did any other witness recount anything Anthony said which shows his intent in configuring the pill bottle as he did by using explosive powder from fireworks. This leaves us with the rule that the intent with which an act is done is a mental process and, as such, generally remains hidden within the mind where it is conceived and is rarely if ever susceptible of proof by direct evidence, but may be inferred or gathered from the outward manifestations—by the words or acts of the party and the facts or circumstances surrounding the crime. See *State v. McDaniels*, 145 Neb. 261, 16 N.W.2d 164 (1944).

While a number of Nebraska statutes discuss and criminalize the possession or use of certain weapons, no statute is really on point for this case. For example, Neb. Rev. Stat. § 28-1202 (Reissue 1995) criminalizes the carrying of a "weapon or weapons concealed on or about [one's] person such as a revolver, pistol, bowie knife, dirk or knife with a dirk blade attachment, brass or iron knuckles, or any other deadly weapon." Neb. Rev. Stat. § 28-109 (Cum. Supp. 2004) defines a deadly weapon as "any firearm, knife, bludgeon, or other device, instrument, material, or substance . . . which in the manner it is used or intended to be

used is capable of producing death or serious bodily injury." The common meaning of the word "weapon" from Black's Law Dictionary 1587 (7th ed. 1999) is "[a]n instrument used or designed to be used to injure or kill someone."

We have no doubt that the taped pill bottle containing both explosive powder and a fuse from fireworks is susceptible of being a weapon. Thus, we return to the matter of Anthony's intent. The issue is simply whether the State proved beyond a reasonable doubt that the pill bottle was designed for use as a weapon to be used against person or property. This is a conjunctive test. First, the item must be designed as a weapon and, second, to be used against person or property. Anthony's pill bottle, as he redesigned it, could indeed be a weapon. However, there is no evidence that it was designed or redesigned to be used against a person or property. This conclusion comes from the absence of any affirmative evidence of his intent and the inferences which can be drawn from his conduct. He made no threats against any person, and he placed it in an open area on a driveway away from persons and property so that its percussive effect would be minimized. Had the device been placed against an object such as a house, one could readily infer the intent to cause property destruction. Likewise, had it been placed near a person, an intent to injure could be inferred. Moreover, the container used—a plastic pill bottle—is not likely to cause such personal injury or property destruction as would be likely with a metal container, i.e., a pipe. Arguably, the taping of the pill bottle was designed to prevent fragments from flying about when the device was detonated. Therefore, given these facts, we cannot say the State has proved beyond a reasonable doubt that the pill bottle was a destructive device, because by statute, such a device does not include any device which is neither designed nor redesigned for use as a weapon to be used against person or property. The State's proof on this point is insufficient.

[8] Anthony assigns as error the court's adjudication of him as a child meeting the definition of § 43-247(1) on count II of the petition, because such statute only gives the juvenile court jurisdiction over juveniles who have committed misdemeanors or infractions, whereas count II was a felony. However, our finding of insufficiency of the evidence with respect to count II renders

further discussion of this assignment of error unnecessary, because we are not obligated to engage in an analysis which is not needed to adjudicate the case and controversy before us. See *State v. Mata*, 266 Neb. 668, 668 N.W.2d 448 (2003).

CONCLUSION

We reverse and vacate the adjudication of Anthony on count II of the amended petition filed against him by the Lancaster County Attorney on March 30, 2004. The adjudication on count I is affirmed.

AFFIRMED IN PART, AND IN PART REVERSED.

IN RE INTEREST OF GENEVIEVE C., A CHILD UNDER 18 YEARS OF AGE. STATE OF NEBRASKA, APPELLEE, V. GENEVIEVE C., APPELLANT.

698 N.W.2d 462

Filed June 21, 2005. No. A-04-1112.

1. **Judgments: Appeal and Error.** With regard to questions of law, an appellate court is obligated to reach a conclusion independent from the trial court's conclusion.
2. **Juvenile Courts: Appeal and Error.** Juvenile cases are reviewed de novo on the record, and an appellate court is required to reach a conclusion independent of the juvenile court's findings.
3. **Municipal Corporations: Ordinances.** A city of the primary class has authority to enact ordinances not inconsistent with the general laws of the state.
4. **Constitutional Law: Municipal Corporations.** The Nebraska Constitution permits a city having a population of more than 5,000 inhabitants to frame a charter for its own government, consistent with and subject to the constitution and laws of the state.
5. **Municipal Corporations.** The purpose of a home rule charter is to render the city as nearly independent as possible from state interference.
6. **Statutes: Legislature: Municipal Corporations.** A provision of a municipality's home rule charter takes precedence over a conflicting state statute in instances of local municipal concern, but when the Legislature enacts a law affecting municipal affairs which is of statewide concern, the state law takes precedence over any municipal action taken under the home rule charter.
7. **Statutes: Ordinances.** When an ordinance is inconsistent with statutory law, it is unenforceable.
8. ____: ____. A city ordinance is inconsistent with a statute if it is contradictory in the sense that the two legislative provisions cannot coexist.
9. ____: ____. In testing the validity of a city ordinance challenged as "inconsistent" with a state statute, that word does not mean mere lack of uniformity in detail.

10. **Courts: Statutes: Ordinances.** A court has a duty to harmonize state and municipal legislation on the identical subject.
11. **Statutes: Ordinances.** The fact that a local ordinance does not expressly conflict with the statute will not save it when the legislative purpose in enacting the statute is frustrated by the ordinance.

Appeal from the Separate Juvenile Court of Douglas County, DOUGLAS F. JOHNSON, Judge, on transfer thereto from the Separate Juvenile Court of Lancaster County, THOMAS B. DAWSON, Judge. Judgment of Separate Juvenile Court of Douglas County affirmed.

Lynnette Z. Boyle, of Tietjen, Simon & Boyle, for appellant.

Stuart J. Dornan, Douglas County Attorney, Jennifer Chrystal-Clark, and Anne Armitage, Senior Certified Law Student, for appellee.

INBODY, Chief Judge, and SIEVERS and CASSEL, Judges.

CASSEL, Judge.

INTRODUCTION

Genevieve C. appeals from a juvenile court decision adjudicating Genevieve pursuant to Neb. Rev. Stat. § 43-247(1) (Cum. Supp. 2002) for making a false statement to a police officer in violation of a city ordinance. We must consider whether the ordinance conflicts with Neb. Rev. Stat. § 28-907(1)(a) (Cum. Supp. 2004), because the ordinance does not require that the statement be material or that the speaker have a specific intent to impede or instigate an investigation. Finding no conflict, we affirm.

BACKGROUND

A petition filed May 27, 2004, in the separate juvenile court of Lancaster County alleged that Genevieve was a child as defined by § 43-247(1) because on or about April 5, Genevieve intentionally or knowingly made a false statement to a police officer concerning the subject of an investigation, in violation of a Lincoln ordinance. Genevieve filed a motion to dismiss, alleging that the petition failed to state a claim upon which relief could be granted because the city of Lincoln did not have the authority to enact criminal laws inconsistent with Nebraska's statutes.

On August 31, 2004, the petition and the motion to dismiss came on for hearing. The court received into evidence the ordinance at issue, heard arguments on the motion to dismiss, overruled the motion, and proceeded with the adjudication hearing. Michael Pratt, a Lincoln police officer, testified that on the afternoon of April 5, 2004, he approached a vehicle—occupied by the female later determined to be Genevieve—in the parking lot of a grocery store located at 66th and O Streets. Such vehicle matched the dispatcher's description of a vehicle which had been seen at another location in the chain of grocery stores operating under that name. Pratt identified himself as a police officer and informed the female that he was investigating counterfeit payroll checks that were being cashed at the other store's location. Pratt asked the female for her name and was given the name "Lindsay Lock." Pratt also obtained her address, telephone number, and date of birth. Pratt later determined the female's true identity to be Genevieve, and Genevieve subsequently admitted to Pratt that she had lied about her identity because she knew she was wanted as a runaway and because she did not want to go back to a group home, to become involved in the investigation, or to be taken into custody.

The court found the allegations of the petition to be true beyond a reasonable doubt and adjudicated Genevieve as a child within the meaning of § 43-247(1). Genevieve timely appeals.

ASSIGNMENTS OF ERROR

Genevieve asserts that the juvenile court erred (1) in failing to dismiss the petition pursuant to her claim that the city of Lincoln did not have the authority to enact a criminal ordinance inconsistent with state laws and (2) in finding that Genevieve was a child as defined by § 43-247(1).

STANDARD OF REVIEW

[1] With regard to questions of law, an appellate court is obligated to reach a conclusion independent from the trial court's conclusion. *Pipe & Piling Supplies v. Betterman & Katelman*, 8 Neb. App. 475, 596 N.W.2d 24 (1999).

[2] Juvenile cases are reviewed de novo on the record, and an appellate court is required to reach a conclusion independent of

the juvenile court's findings. *In re Interest of Joshua R. et al.*, 265 Neb. 374, 657 N.W.2d 209 (2003).

ANALYSIS

Validity of Ordinance.

[3-6] As a city of the primary class, Neb. Rev. Stat. § 15-101 (Reissue 1997), the city of Lincoln has authority to enact ordinances "not inconsistent with the general laws of the state," Neb. Rev. Stat. § 15-263 (Reissue 1997). The Nebraska Constitution also permits a city having a population of more than 5,000 inhabitants to "frame a charter for its own government, consistent with and subject to the constitution and laws of this state." Neb. Const. art. XI, § 2. Pursuant to Neb. Const. art. XI, § 5, the city of Lincoln adopted its charter as the home rule charter for the city. The purpose of a home rule charter is to render the city as nearly independent as possible from state interference. *In re Application of Lincoln Electric System*, 265 Neb. 70, 655 N.W.2d 363 (2003). A provision of a municipality's home rule charter takes precedence over a conflicting state statute in instances of local municipal concern, but when the Legislature enacts a law affecting municipal affairs which is of statewide concern, the state law takes precedence over any municipal action taken under the home rule charter. *Jacobberger v. Terry*, 211 Neb. 878, 320 N.W.2d 903 (1982).

The ordinance at issue states: "It shall be unlawful for any person to make a false statement known by such person to be false to any police officer concerning the subject of an investigation." Lincoln Mun. Code § 9.08.040 (1990). On the other hand, the statute provides that false reporting is committed when a person "[f]urnishes material information he or she knows to be false to any peace officer or other official with the intent to instigate an investigation of an alleged criminal matter or to impede the investigation of an actual criminal matter." § 28-907(1)(a).

[7-9] The issue is whether the ordinance is inconsistent with the statute. When an ordinance is inconsistent with statutory law, it is unenforceable. *State v. Loyd*, 265 Neb. 232, 655 N.W.2d 703 (2003). A city ordinance is inconsistent with a statute if it is contradictory in the sense that the two legislative provisions cannot

coexist. *Id.* Inconsistent does not mean mere lack of uniformity in detail. *Bodkin v. State*, 132 Neb. 535, 272 N.W. 547 (1937).

> "[W]here both an ordinance and a statute are prohibitory and the only difference between them is that the ordinance goes further in its prohibition, but not counter to the prohibition under the statute, and the municipality does not attempt to authorize by the ordinance what the legislature has forbidden or forbid what the legislature has expressly licensed, authorized, or required, there is nothing contradictory between the provisions of the statute and the ordinance because of which they cannot coexist and be effective."

Phelps Inc. v. City of Hastings, 152 Neb. 651, 657, 42 N.W.2d 300, 304 (1950) (quoting 37 Am. Jur. *Municipal Corporations* § 165 (1941)). See, also, *State v. Loyd, supra* (ordinance may not permit that which statute prohibits, and vice versa).

We look to Nebraska case law for guidance in determining when an inconsistency exists. In *Bodkin v. State*, 132 Neb. at 536, 272 N.W. at 548, the ordinance at issue stated:

> "No person shall, within the city, sell or give any alcoholic liquors to, or procure any such liquor for, or permit the sale or gift of any such liquor to, or the procuring of any such liquor for, any minor or any person who is mentally incompetent or any person who is physically or mentally incapacitated due to the consumption of such liquors." Municipal Code, 1936, sec. 19-203.

The relevant statute provided:

> "No person, who holds a license to sell alcoholic liquors as a retailer, manufacturer or distributor, shall permit the sale or gift to, or procuring for, any such liquors to any minors, to any person who is mentally incompetent, or to any person who is physically or mentally incapacitated due to the consumption of such liquors, knowing them to be such." Comp. St. Supp. 1935, sec. 53-338.

Bodkin v. State, 132 Neb. at 536, 272 N.W. at 548.

The Nebraska Supreme Court considered whether the difference between sales to minors " 'knowing them to be such' " and " 'sales to minors' " amounted to an inconsistency. *Id.* at 537, 272 N.W. at 548. The court recognized that the ordinance was more strict than the statute but that the public policy of the state and the

city and the evils at which the legislation was aimed were the same. The court determined that the ordinance was not inconsistent with the statute.

In *Phelps Inc. v. City of Hastings, supra*, the state law allowed holders of a particular liquor license to sell all liquors, including beer. The city ordinance prohibited the sale of both beer and other alcoholic liquors in the same room by any person. The court held:

> The ordinance of the city of Hastings merely imposes stricter regulations than the Liquor Control Act and, being such, it is not inconsistent with the act. The ordinance is therefore within the scope of the regulatory powers granted to the city and a valid exercise of the police power delegated to it by the Liquor Control Act.

Id. at 658, 42 N.W.2d at 304.

In *State v. Kubik*, 159 Neb. 509, 67 N.W.2d 755 (1954), the court found a conflict between an ordinance and a statute. The ordinance made it unlawful for a person to keep liquor on his premises without being licensed, whereas the Liquor Control Act explicitly stated, "nothing herein contained shall prevent the possession and transportation of alcoholic liquor for the personal use of the possessor, his family and guests," Neb. Rev. Stat. § 53-102 (1943). The court found that the two provisions could not coexist due to the express exemption in the state law.

Again, in *State v. Loyd*, 265 Neb. 232, 655 N.W.2d 703 (2003), an ordinance was found to be inconsistent with a statute, because the ordinance required a different punishment for a defendant placed on probation after being convicted of second-offense driving under the influence. The statute provided that a defendant placed on probation must pay a $500 fine, be ordered not to drive for 1 year, and either be confined for 5 days or serve 240 hours of community service. The ordinance did not provide for a fine for a defendant on probation; however, it did require that the defendant not drive for 6 months and that the defendant be confined for 48 hours. The *Loyd* court stated, "When two provisions require the trial court to impose different sentences, the provisions cannot coexist and the ordinance is unenforceable." *Id.* at 235-36, 655 N.W.2d at 706.

In the instant case, the key respects in which the statute and ordinance differ are that the statute requires (1) that the false

information be material information and (2) that the false information be furnished with the intent to either instigate or impede an investigation. The false reporting statute first emerged in Nebraska with the Legislature's passage of 1957 Neb. Laws, ch. 97, § 1, p. 357. As initially proposed, it began with the following language: "Any person who furnishes false information as to a material fact . . . ." L.B. 354, 68th Leg. (1957). The Judiciary Committee in its statement on L.B. 354 in 1957 indicated that there was currently no such law and that "a need for it is shown by the frequent false complaints which are made to the police." L.B. 354, 69th Leg. (Mar. 22, 1957). As amended, the final version eliminated the words "material fact" and set forth:

> Any person who furnishes information he knows to be false to any law enforcement officer who operates under the authority of the State of Nebraska or any political subdivision or court thereof, or other official, with the intent to instigate an investigation of an alleged criminal matter, or to impede an investigation of an actual criminal matter . . . .

Neb. Rev. Stat. § 28-744 (Reissue 1964). Notably, the Legislature later added the word "material" before the word "information." 1994 Neb. Laws, L.B. 907.

[10,11] A court has a duty to harmonize state and municipal legislation on the identical subject. *Gillis v. City of Madison*, 248 Neb. 873, 540 N.W.2d 114 (1995). " '[T]he fact that a local ordinance does not expressly conflict with the statute will not save it when the legislative purpose in enacting the statute is frustrated by the ordinance.' " *State ex rel. City of Alma v. Furnas Cty. Farms*, 266 Neb. 558, 569, 667 N.W.2d 512, 522 (2003) (quoting 5 Eugene McQuillin, The Law of Municipal Corporations § 15.20 (3d ed. 1996)). Although the Legislature thought it was important to clarify that the false information be material, we cannot say that the failure of the ordinance to explicitly provide that the information be material frustrates the purpose of the statute.

The potential for the Lincoln ordinance to criminalize more false statements than the statute does not make it inconsistent under the case law discussed above. Like in *Bodkin v. State*, 132 Neb. 535, 272 N.W. 547 (1937), where the absence of an intent element did not render the ordinance inconsistent, the public

policy of Lincoln and Nebraska in the instant case is the same and both provisions have a common purpose—seeking to dissuade the giving of false information to police officers regarding the subject of an investigation by making such conduct a crime. Further, the ordinance does not restrict anything expressly permitted by the statute. We conclude that the ordinance and the statute can coexist and are not contradictory and that the ordinance is therefore valid. Accordingly, the court did not err in overruling Genevieve's motion to dismiss.

Adjudication.

The juvenile court found the allegations of the petition to be true beyond a reasonable doubt and adjudicated Genevieve as a child as defined by § 43-247(1), which definition is "[a]ny juvenile who has committed an act other than a traffic offense which would constitute a misdemeanor or an infraction under the laws of this state, or violation of a city or village ordinance." The ordinance at issue made it unlawful for any person to make a false statement, known by such person to be false, to any police officer concerning the subject of an investigation. The facts show that Pratt, the police officer, was investigating the cashing of counterfeit payroll checks at a grocery store; that Genevieve occupied a vehicle matching the description of a vehicle observed earlier at another location in the same chain of stores; and that Genevieve lied to Pratt about her identity because she did not want to be taken into custody or to have any involvement in the crime being investigated. The State proved beyond a reasonable doubt that the allegations in the petition were true.

CONCLUSION

We conclude that the ordinance at issue was not inconsistent with the statute on false reporting and that the court did not err in adjudicating Genevieve as a child within the meaning of § 43-247(1). We therefore affirm the decision of the separate juvenile court adjudicating Genevieve as a juvenile as defined by § 43-247(1).

AFFIRMED.

IN RE INTEREST OF ELIZABETH S., A CHILD UNDER 18 YEARS OF AGE. STATE OF NEBRASKA, APPELLEE, V. ROBERT S. ET AL., APPELLEES, AND NEBRASKA DEPARTMENT OF HEALTH AND HUMAN SERVICES, APPELLANT.

698 N.W.2d 252

Filed June 21, 2005. Nos. A-04-1413, A-05-276.

1. **Juvenile Courts: Appeal and Error.** Neb. Rev. Stat. § 43-287.03 (Reissue 2004), provides for expedited review by a juvenile review panel when a two-part, conjunctive test is satisfied: (1) whether the contested dispositional order implements a different plan for the juvenile than proposed by the Nebraska Department of Health and Human Services and (2) whether the appealing party has a belief that the court-ordered plan is not in the best interests of the juvenile.
2. ____: ____. Neb. Rev. Stat. § 43-2,106 (Reissue 2004) provides that a trial court may exercise supervision over the juvenile during the pendency of the proceedings in an appellate court.
3. **Appeal and Error.** An appellate court is not obligated to engage in an analysis which is not needed to adjudicate the case and controversy before it.
4. ____. Plain error exists where there is error, plainly evident from the record but not complained of at trial, which prejudicially affects a substantial right of a litigant and is of such a nature that to leave it uncorrected would cause a miscarriage of justice or result in damage to the integrity, reputation, and fairness of the judicial process.
5. ____. Plain error may be asserted for the first time on appeal or be noted by an appellate court on its own motion.
6. **Judges.** A judge shall perform his or her duties impartially.
7. **Trial: Judges.** A judge shall not initiate, permit, or consider ex parte communications or consider other communications made to the judge outside the presence of the parties concerning a pending or impending proceeding except in specific circumstances.
8. **Trial: Judges: Recusal.** A judge who initiates or invites and receives an ex parte communication concerning a pending or impending proceeding must recuse himself or herself from the proceedings.
9. **Trial: Judges: Witnesses.** A judge's role as a witness in a trial before the judge is manifestly inconsistent with a judge's customary role of impartiality in the adversary system of trial.

Appeal in No. A-04-1413 from the County Court for Keith County: KENT D. TURNBULL, Judge. Judgment vacated, and cause remanded for further proceedings. Appeal in No. A-05-276 from the Juvenile Review Panel, THOMAS H. DORWART, PATRICK R. MCDERMOTT, and LAWRENCE D. GENDLER, Judges, on appeal thereto from the County Court for Keith County, KENT D. TURNBULL, Judge. Appeal dismissed.

Robert E. Wheeler, Special Assistant Attorney General, for appellant.

Gary J. Krajewski for appellee Robert S.

Jerrod M. Gregg, of McQuillan & McQuillan, P.C., for appellee Amy G.

SIEVERS, IRWIN, and CARLSON, Judges.

SIEVERS, Judge.

The child involved in these current appeals, Elizabeth S., has been the subject of a previous opinion by this court. See *In re Interest of Elizabeth S.*, Nos. A-04-385, A-04-680, 2004 WL 2446200 (Neb. App. Nov. 2, 2004) (not designated for permanent publication). While complete details may be found in that opinion, we resolved case No. A-04-385 on the ground of lack of jurisdiction because the matter raised by said appeal was a contested dispositional plan to be handled through the expedited juvenile review panel provided for in Neb. Rev. Stat. §§ 43-287.01 through 43-287.06 (Reissue 2004). With respect to case No. A-04-680, the appeal claimed that the juvenile review panel erred in reversing the order of the Keith County Court, sitting as a juvenile court, which ordered a dispositional plan other than the February 17, 2004, case plan that had been recommended by the Department of Health and Human Services (DHHS). We affirmed the April 9, 2004, decision of the juvenile review panel, which found that the disposition imposed by the county court was not in Elizabeth's best interests. The Keith County Court had allowed the removal of Elizabeth to the State of California to take up residence with her great-aunt, Linda M. This disposition was in direct opposition to the DHHS plan which proposed that the parental rights of the natural parents be terminated and that Elizabeth continue to reside with her foster family in Ogallala, Nebraska.

While our above-described decision of November 2, 2004, was pending in the Nebraska Supreme Court upon a petition for further review, the county court took up Linda's request for visitation with Elizabeth "during the Christmas holidays." Following a hearing, which the county court specifically provided was not an evidentiary hearing, the county court granted Linda physical

visitation with Elizabeth in Nebraska after December 25, 2004, as well as regular telephone contact. DHHS appealed such order to this court on December 16, also indicating in such notice its intention to appeal to a juvenile review panel. DHHS appealed to the juvenile review panel, which dismissed the case, finding that there was "no case plan to modify or substitute" and, apparently on the additional ground which it said it was informed of at oral argument, that the matter was already under appeal—presumably meaning the instant appeal to this court. One of the three judges on the panel filed an "Addendum" emphasizing his position that the lack of jurisdiction was due to the lack of a plan to review and that DHHS' appeal was "inane," "frivolous," and a waste of the taxpayers' money. Another of the three judges "concur[red] in [the] Addendum." Thus, we consider the "Addendum" as the opinion of the juvenile review panel. However, we recognize that all three judges on the panel found "no plan" and, thus, no jurisdiction.

We have called upon the parties to brief the jurisdictional issues presented. Additionally, we have pending before us the request of DHHS that we stay the county court's order announced December 10, 2004, and filed December 22, allowing Linda to have visitation with Elizabeth in Nebraska.

MOTION TO STAY

With respect to the motion of DHHS to stay the order of December 22, 2004, allowing Linda "physical visitation in Nebraska with the minor child after December 25, 2004," which visitation the court says shall be "similar to the visitation" that Linda had during October 2004, our decision which follows renders this request moot.

APPEAL IN CASE NO. A-05-276

[1] With respect to DHHS' appeal from the juvenile review panel, our case No. A-05-276, the pertinent statute, § 43-287.03, provides for such expedited review when a two-part, conjunctive test is satisfied. See *In re Interest of Jeffrey R.*, 251 Neb. 250, 557 N.W.2d 220 (1996). The law is that §§ 43-287.01 through 43-287.06 provide the sole method of reviewing juvenile court dispositional orders falling within the ambit of the expedited review process specified in such statutes. *In re Interest of Alex T.*

et al., 248 Neb. 899, 540 N.W.2d 310 (1995). These statutes provide that the reach of the juvenile review panel is determined by a two-part, conjunctive analysis: (1) whether the contested dispositional order implements a different plan for the juvenile than proposed by DHHS and (2) whether the appealing party has a belief that the court-ordered plan is not in the best interests of the juvenile.

[2,3] In the instant case, the only plan of DHHS before us is that of February 17, 2004, and it is silent on the matter of visitation between Elizabeth and Linda occurring in Nebraska. Therefore, while it can certainly be argued that the provision for contact with Linda is different from the DHHS plan and thus reviewable by a juvenile review panel, we recall that Neb. Rev. Stat. § 43-2,106 (Reissue 2004) provides for a trial court to exercise "supervision" over the juvenile during the pendency of the proceedings in an appellate court. At the time of the December 22 order, there were proceedings pending in the appellate courts because the Nebraska Supreme Court had our opinion before it upon a petition for further review, which petition was ultimately denied on February 9, 2005. However, after our thorough review of the December 10, 2004, proceedings held in the Keith County Court, we are convinced that the December 22 order resulting from that hearing must be vacated for plain error. Thus, it is unnecessary to decide the question of whether the order for visitation must first be passed upon by a juvenile review panel before an appeal may be taken to this court. See *Kelly v. Kelly*, 246 Neb. 55, 516 N.W.2d 612 (1994) (appellate court is not obligated to engage in analysis not needed to adjudicate case and controversy before it).

PROCEEDINGS ON DECEMBER 10, 2004

[4] Although DHHS does not assign any error to the fact that the proceedings of December 10, 2004, were expressly said by the trial judge not to be an evidentiary hearing, we apply the plain error doctrine, which is that plain error exists where there is error, plainly evident from the record but not complained of at trial, which prejudicially affects a substantial right of a litigant and is of such a nature that to leave it uncorrected would cause a miscarriage of justice or result in damage to the integrity, reputation,

and fairness of the judicial process. *Long v. Hacker*, 246 Neb. 547, 520 N.W.2d 195 (1994). Instead of having an evidentiary hearing, the trial judge conducted a rather free-ranging discussion on the record about visitation and other matters in this case, involving counsel; the court; Linda; and Elizabeth's counselor, foster father, and guardian ad litem. Such a record presents obvious difficulties for appellate review, as well as being fundamentally inappropriate as a basis for the court's decision.

In re Guardianship & Conservatorship of Trobough, 267 Neb. 661, 676 N.W.2d 364 (2004), exemplifies the difficulties that may arise when a trial court does not conduct an evidentiary hearing. In *In re Guardianship & Conservatorship of Trobough*, a conservatorship proceeding, the county court did not hold an evidentiary hearing and no exhibits were offered into evidence. Instead, as the Nebraska Supreme Court observed, the trial court "engaged in discussions with the parties without receiving any evidence to support or refute the issues raised in the pleadings." 267 Neb. at 665, 676 N.W.2d at 368. The Supreme Court held that without an evidentiary hearing, the county court had no basis upon which to enter its order and that such order was not supported by competent evidence. The Supreme Court vacated the order of the county court and remanded the cause with directions to hold an evidentiary hearing.

Here, instead of receiving evidence on the issue, the trial court merely engaged in discussions as to whether there should be physical visitation and telephone contact with Linda. Although the court invited discussion as to whether the hearing should be evidentiary, it was not an evidentiary hearing. Therefore, the trial court's order allowing visitation is not based on any competent evidence that such visitation is in Elizabeth's best interests, and the order must be vacated.

[5] Additionally, of considerable import is the fact that the bill of exceptions from the December 10, 2004, hearing clearly reveals that the trial judge engaged in an ex parte conversation with one Nancy Thompson, whom the judge described as either a child psychologist or child psychiatrist, about the subject of whether there should be visitation between Elizabeth and Linda. Moreover, his order of December 22 recites: "The Court stated that it had contacted a professional for help in this matter . . . ."

Although DHHS did not complain of the ex parte communication at the nonevidentiary hearing, the trial judge's conduct is the subject of a number of DHHS' assignments of error which may be addressed under the plain error doctrine. See *In re Interest of Mainor T. & Estela T.*, 267 Neb. 232, 674 N.W.2d 442 (2004) (plain error may be found on appeal when error unasserted or uncomplained of at trial, but plainly evident from record, prejudicially affects litigant's substantial right and, if uncorrected, would cause miscarriage of justice or result in damage to integrity, reputation, or fairness of judicial process). Plain error may be asserted for the first time on appeal or be noted by the appellate court on its own motion. *Id.*

[6-9] Neb. Code of Jud. Cond., Canon 3 (rev. 2000), provides that a judge shall perform his or her duties impartially, and Canon 3B(7) provides that a judge "shall not initiate, permit, or consider ex parte communications or consider other communications made to the judge outside the presence of the parties concerning a pending or impending proceeding except [in specific circumstances]." The Nebraska Supreme Court has said that a judge who initiates or invites and receives an ex parte communication concerning a pending or impending proceeding must recuse himself or herself from the proceedings. *State ex rel. Grape v. Zach*, 247 Neb. 29, 524 N.W.2d 788 (1994). Moreover, a judge's role as a witness in a trial before the judge is manifestly inconsistent with a judge's customary role of impartiality in the adversary system of trial. *State ex rel. Grape, supra.* In the case before us, the judge indicated that he had "tremendous respect" for Thompson and that Thompson favored visitation. It is apparent that the decision to allow visitation was based at least in part on prohibited ex parte communications occurring at a nonevidentiary hearing where there was a "discussion" rather than a formal hearing to enable the trial court to decide the matter then pending before it on the basis of evidence. It is plainly evident from the record that the ex parte communication and the manner in which the December 10, 2004, hearing was conducted prejudicially affect the parties' substantial rights and, if uncorrected, would damage the integrity, reputation, or fairness of the judicial process. Thus, under the plain error doctrine, we vacate the order of December 22.

RESOLUTION

All issues presented by these appeals are resolved without oral argument under Neb. Ct. R. of Prac. 11 (rev. 2005). We vacate the order of December 22, 2004, from which DHHS has appealed in our case No. A-04-1413, as an order improperly entered by the trial court. As a result, we do not need to decide DHHS' appeal from the juvenile review panel's declination to review such order, and therefore, we dismiss the appeal in our case No. A-05-276 as moot. Finally, we direct that the trial judge shall forthwith recuse himself from all further proceedings in this case. The cause is remanded for further proceedings.

JUDGMENT IN NO. A-04-1413 VACATED, AND CAUSE REMANDED FOR FURTHER PROCEEDINGS.
APPEAL IN NO. A-05-276 DISMISSED.

IN RE INTEREST OF KAYLA F. ET AL., CHILDREN UNDER 18 YEARS OF AGE. STATE OF NEBRASKA, APPELLEE, AND KRISTINA L., FORMERLY KNOWN AS KRISTINA F., APPELLANT, V. RICHARD F., APPELLEE.

698 N.W.2d 468

Filed June 28, 2005. No. A-05-442.

1. **Jurisdiction: Appeal and Error.** In a juvenile case, as in any other appeal, before reaching the legal issues presented for review, it is the duty of an appellate court to determine whether it has jurisdiction over the matter before it.
2. **Juvenile Courts: Appeal and Error.** Neb. Rev. Stat. § 43-2,106.01(1) (Reissue 2004) provides that any final order or judgment entered by a juvenile court may be appealed to the Court of Appeals in the same manner as an appeal from district court to the Court of Appeals.
3. **Appeal and Error.** The plain language of Neb. Rev. Stat. § 25-1914 (Cum. Supp. 2004) gives an appellate court discretion to dismiss an appeal on motion and notice if no bond has been given and certified in the transcript or within such additional time as may be fixed by the appellate court for good cause shown.
4. **Juvenile Courts: Time: Notice: Fees: Appeal and Error.** To perfect an appeal from a juvenile court to an appellate court, the appealing party must, within 30 days after the rendition of such judgment, (1) file a notice of appeal with the juvenile court and (2) deposit with the clerk of the juvenile court the docket fee required by law.
5. **Jurisdiction: Appeal and Error.** Neb. Rev. Stat. § 25-1912(4) (Cum. Supp. 2004) states, in part, that no step other than the filing of a notice of appeal and the depositing of a docket fee shall be deemed jurisdictional.

6. **Statutes.** Statutory interpretation presents a question of law.
7. **Statutes: Courts: Appeal Bonds: Appeal and Error.** When the procedures specified in the statutes governing appeals from the district court are applied in other special contexts except where the specific language of the special appeal statute provides otherwise, the "same manner" of taking an appeal includes the appeal bond requirement set forth in Neb. Rev. Stat. § 25-1914 (Cum. Supp. 2004).
8. **Appeal Bonds: Time: Appeal and Error.** Neb. Rev. Stat. § 25-1914 (Cum. Supp. 2004) authorizes an appellate court to grant additional time to file the appeal bond for good cause shown.

Appeal from the County Court for Hall County: DAVID A. BUSH, Judge. Motion for summary dismissal overruled.

Daniel J. Thayer for appellant.

Todd V. Elsbernd, of Bradley, Elsbernd, Emerton & Andersen, P.C., for appellee Richard F.

SIEVERS, CARLSON, and CASSEL, Judges.

CASSEL, Judge.

INTRODUCTION

Kristina L., formerly known as Kristina F. and the natural mother of the minor children herein, appealed from the order of the county court for Hall County, sitting as a juvenile court, dismissing her request for termination of the parental rights of Richard F., the natural father of the children. Richard filed a motion for summary dismissal pursuant to Neb. Ct. R. of Prac. 7B (rev. 2001), alleging, in what appears to be a matter of first impression, that this court lacks jurisdiction due to Kristina's failure to file a cost bond pursuant to Neb. Rev. Stat. § 25-1914 (Cum. Supp. 2004).

PROCEDURAL BACKGROUND

On December 17, 2003, Kristina filed a "Juvenile Complaint" seeking to have Richard's parental rights to the minor children terminated. Following a hearing and after finding the evidence to be insufficient, the court, in a journal entry filed on March 2, 2005, denied Kristina's motion to terminate Richard's parental rights.

On April 1, 2005, Kristina filed a notice of appeal and paid the statutory docket fee. On May 13, Richard filed a motion for summary dismissal alleging that Kristina failed to pay a cost

bond of $75 to the county court for Hall County as required by § 25-1914 and that this court therefore lacked jurisdiction to hear the matter.

ANALYSIS

Jurisdictional Requirement?

[1,2] In a juvenile case, as in any other appeal, before reaching the legal issues presented for review, it is the duty of an appellate court to determine whether it has jurisdiction over the matter before it. *In re Interest of Anthony R. et al.*, 264 Neb. 699, 651 N.W.2d 231 (2002). The procedure for appealing a final order entered by a juvenile court is set forth in Neb. Rev. Stat. § 43-2,106.01(1) (Reissue 2004), which provides in pertinent part: "Any final order or judgment entered by a juvenile court may be appealed to the Court of Appeals in the same manner as an appeal from district court to the Court of Appeals."

Richard's motion for summary dismissal is premised upon § 25-1914, which states:

> On appeal in any case taken from the district court to the Court of Appeals or Supreme Court, other than an appeal pursuant to section 71-6904, the appellant or appellants shall, within thirty days after the entry of the judgment, decree, or final order sought to be reversed, vacated, or modified or within thirty days after the entry of the order overruling a motion for a new trial in such cause, (1) file in the district court a bond or undertaking in the sum of seventy-five dollars to be approved by the clerk of the district court, conditioned that the appellant shall pay all costs adjudged against him or her in the appellate court, or (2) make a cash deposit with the clerk of at least seventy-five dollars for the same purpose. If a supersedeas bond is executed, no bond for costs shall be required. The giving of either form of bond or the making of such deposit shall be certified to by the clerk of the district court in the transcript for the appellate court. The appeal may be dismissed on motion and notice in the appellate court if no bond has been given and certified in the transcript or within such additional time as may be fixed by the appellate court for good cause shown.

In response, Kristina argues that the $75 appeal bond is not statutorily required and that "[t]he plain language of Neb. Rev. Stat. § 25-1912 [(Cum. Supp. 2004)] does not, in any interpretation, require an appeal bond to be paid from a county court trial to the Court of Appeals."

[3-5] In our examination of Nebraska case law involving appeals from juvenile matters, we were unable to find a single reference to § 25-1914. Moreover, the plain language of § 25-1914 gives this court discretion to dismiss an appeal on motion and notice "if no bond has been given and certified in the transcript or within such additional time as may be fixed by the appellate court for good cause shown." Our statutory law states, and our case law holds, that to perfect an appeal from a juvenile court to an appellate court, the appealing party must, within 30 days after the rendition of such judgment, (1) file a notice of appeal with the juvenile court and (2) deposit with the clerk of the juvenile court the docket fee required by law. *In re Interest of T.W. et al.*, 234 Neb. 966, 453 N.W.2d 436 (1990). See, Neb. Rev. Stat. § 25-1912 (Cum. Supp. 2004); *In re Interest of Noelle F. & Sarah F.*, 249 Neb. 628, 544 N.W.2d 509 (1996). Section 25-1912(4) states in part:

> [A]n appeal shall be deemed perfected and the appellate court shall have jurisdiction of the cause when such notice of appeal has been filed and such docket fee deposited in the office of the clerk of the district court, and after being perfected no appeal shall be dismissed without notice, and no step other than the filing of such notice of appeal and the depositing of such docket fee shall be deemed jurisdictional.

Kristina timely filed a notice of appeal and paid the docket fee. Under the law set forth above, she has done all that she must do to vest jurisdiction with this court.

Does § 25-1914 Apply to Juvenile Appeals?

However, the questions remain whether the requirement of an appeal bond in § 25-1914, although not jurisdictional, applies in a juvenile case, and if so, because Kristina has not filed such a bond, whether this court should exercise its discretion to dismiss the appeal. To answer the first question, we focus upon

the language of § 43-2,106.01(1) stating that judgments and final orders in juvenile cases "be appealed . . . in the same manner as an appeal from district court to the Court of Appeals."

[6] Statutory interpretation presents a question of law. *Rauscher v. City of Lincoln*, 269 Neb. 267, 691 N.W.2d 844 (2005). We find no previous instance in which a Nebraska appellate court has considered whether § 25-1914 applies in the appeal of a juvenile case. We think it is clear that § 43-2,106.01(1) contemplates the procedures for appeal set forth in § 25-1912, including, inter alia, requirements for the filing of a notice of appeal and the deposit of a docket fee. But we find the language in § 43-2,106.01(1) directing that an appeal be made "in the same manner" as an appeal from the district court to be ambiguous regarding the requirement set forth in § 25-1914 for an appeal bond.

We observe that Neb. Rev. Stat. § 30-1601 (Cum. Supp. 2004), which governs appeals arising under the Nebraska Probate Code and in all matters in county court arising under the Nebraska Uniform Trust Code, employs language nearly identical to that of § 43-2,106.01(1). However, § 30-1601(3) also contains an express requirement for a bond, but the bond contemplated by § 30-1601(3) clearly constitutes a supersedeas bond. That requirement is analogous to, but differs in certain respects from, the supersedeas bond contemplated by Neb. Rev. Stat. § 25-1916 (Cum. Supp. 2004). We do not consider that the provision in § 30-1601(3) for a supersedeas bond in appeals under the probate or trust codes speaks to the applicability of the appeal bond requirement set forth in § 25-1914.

We also observe that Neb. Rev. Stat. § 43-112 (Reissue 2004) provides for an appeal, in a matter involving an adoption, "from the county court to the Court of Appeals in the same manner as an appeal from district court to the Court of Appeals." Thus, like § 43-2,106.01(1), §§ 30-1601 and 43-112 provide for appeals "in the same manner as an appeal from district court to the Court of Appeals," but do not expressly address the requirement set forth in § 25-1914 for an appeal bond.

[7] We think the interpretation most consistent with the plain and ordinary meaning of the words used by the Legislature requires that the procedures specified in the statutes governing

appeals from the district court be applied in these other special contexts except where the specific language of the special appeal statute provides otherwise. For example, under this approach, the requirement for a supersedeas bond under § 30-1601(3) in probate and trust appeals would supplant the provisions of § 25-1916 in such appeals. Because the juvenile appeal statute, like the other specialized appeal statutes, does not specifically address the matter of an appeal bond, we conclude that the "same manner" of taking an appeal includes the appeal bond requirement set forth in § 25-1914.

[8] It then becomes necessary to consider whether the appeal should be dismissed because Kristina has not filed the required bond. Section 25-1914 also authorizes this court to grant additional time to file the bond "for good cause shown." Given the absence of any previous decision on this point, we believe that Kristina's argument that § 25-1914 does not apply to appeals in juvenile cases constitutes good cause for granting additional time to deposit the bond with the county court. We therefore allow Kristina a period of 14 days from the date of release of this opinion to accomplish such deposit. The clerk of the county court shall, by supplemental transcript and within 3 days after the expiration of the 14 days, certify to the clerk of this court concerning the deposit of such bond or the failure to do so. The dismissal of the appeal by this court will follow upon such failure.

CONCLUSION

We conclude that Kristina's failure to file an appeal bond does not deprive this court of jurisdiction, but may result in a dismissal of the appeal under § 25-1914. In our discretion, we grant Kristina an additional period of 14 days to deposit the bond and determine that failure to do so will result in dismissal of the appeal. Therefore, at this time, we overrule Richard's motion for summary dismissal.

MOTION FOR SUMMARY DISMISSAL OVERRULED.

JOYCE LYNETTE GOHL, APPELLEE AND CROSS-APPELLANT, V. GERALD LEE GOHL, APPELLANT AND CROSS-APPELLEE.
700 N.W.2d 625

Filed July 5, 2005. No. A-03-1102.

1. **Divorce: Appeal and Error.** Because appeals in domestic relations matters are heard de novo on the record, an appellate court is empowered to enter the order which should have been made as reflected by the record.
2. **Property Division: Alimony: Attorney Fees: Appeal and Error.** In its de novo review, an appellate court determines whether there has been an abuse of discretion by the trial court with respect to the division of property, the payment of alimony, and attorney fees.
3. **Evidence: Property Division: Alimony: Appeal and Error.** In conducting de novo review, when evidence is in conflict, an 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; this standard applies to the trial court's determination regarding the division of property and alimony.
4. **Parties: Records: Appeal and Error.** The party assigning error is obligated to produce a record supporting the assignment of error.
5. **Divorce: Property Division: Valuation: Time: Appeal and Error.** The valuation date in a divorce action must bear a rational relationship to the property to be divided, and the selected date is reviewed for an abuse of discretion.
6. **Property Division.** The ultimate test for determining the appropriateness of the division of property is reasonableness as determined by the facts of each case.
7. **Appeal and Error.** An appellate court has the power to enter the order which should have been made.
8. **Trial: Time.** Arbitrary time limits can easily become the enemy of justice in the courts' adversarial system, although trial courts can impose reasonable time constraints on the conduct of trials.

Appeal from the District Court for Red Willow County: JOHN P. MURPHY, Judge. Affirmed in part, and in part reversed and remanded for a new trial.

Michael E. Piccolo, of Dawson & Piccolo, for appellant.

Maurice A. Green, of Green Law Offices, P.C., for appellee.

INBODY, Chief Judge, and SIEVERS and CASSEL, Judges.

SIEVERS, Judge.

I. BACKGROUND

Joyce Lynette Gohl and Gerald Lee Gohl (Jerry) were married on July 25, 1969. At the time of the June 18, 2003, trial in this dissolution action, Joyce was employed as a business instructor

for the Wauneta Public Schools, having recently completed her first year of teaching. Jerry was involved with the company the parties founded, Golight, Inc., which grew from his idea for a portable rotating spotlight to become the manufacturer of such product and other lighting products which are manufactured overseas and marketed extensively, including by mail order.

Golight sued Wal-Mart Stores, Inc. (Wal-Mart), for infringement of Golight's patent—referred to in such litigation as the "989 patent"—for a portable rotating searchlight device that can be controlled by a wireless handheld device. As a result, on August 9, 2002, judgment was entered in the U.S. District Court for the District of Colorado in Golight's favor against Wal-Mart in the amount of $464,280 plus prejudgment and postjudgment interest. Additionally, the federal trial court made an award of attorney fees to Golight and set forth a procedure by which application for and proof of fees would be submitted to the court. If the federal court made an award of fees, it is not in our record. At the time of the divorce trial, the judgment against Wal-Mart was on appeal to the U.S. Court of Appeals for the Federal Circuit. Wayne Hildebrandt, the executive vice president of the Farmers State Bank in Maywood, Nebraska, testified that the bank has loaned Golight $400,000 for attorney fees for the patent litigation—out of a total amount loaned to Golight of $969,000. Hildebrandt testified that all of this debt was corporate debt and that Jerry had no personal loans with the bank, although he said Jerry was personally indebted to Golight in the amount of $160,000.

Golight is also the owner of a "bed and breakfast" at Johnson Lake, Nebraska, called the Waterfjord House, which, including purchase price, renovations, and furnishings, has involved the expenditure of over $700,000 by Golight.

Robert D. McChesney, a certified public accountant and "certified valuation analyst," offered his opinion on Jerry's behalf that the fair market value of Golight was $505,283 as of May 31, 2001. (We have rounded the financial figures to full dollar amounts throughout our opinion.) McChesney indicated that this was a weighted average using the adjusted net asset value of $447,381 and a capitalization of excess earnings value of $592,136, such values being weighted at 60 and 40 percent,

respectively. In contrast, Joyce offered an opinion of value from Dehn Renter, also a certified public accountant and certified valuation analyst, which put the valuation of Golight as of May 31, 2002, at $2,041,327.

Additionally, the marital estate includes Jerry's 25-percent interest in the Gohl Brothers partnership, which is involved in farming and oil leases in Hayes County, Nebraska. McChesney opined that the fair market value of Jerry's interest in Gohl Brothers was $383,614 as of May 31, 2001, and we treat that valuation as uncontested.

The parties each hold a bachelor of science degree in education. During the course of their marriage, a son and a daughter were born to them, both of which children are now well past the age of majority. While the record contains historical information about the various careers the parties had and the contributions they made to their marriage, to Golight, and to their overall financial success, we see little need to extensively detail that information. It is sufficient to say that both Joyce and Jerry are intelligent, hard-working people who contributed in various and substantial ways to a long-term marriage, to their children, and to the accumulation of a substantial marital estate.

II. TRIAL COURT DECISION

The trial court's decision began by rejecting Jerry's claim that because the idea for Golight was exclusively his, there should not be an equal division of the marital estate. The court found that the marital estate of the parties should be equally divided. The court accepted McChesney's valuation of $383,614 for Jerry's interest in Gohl Brothers as the only evidence of such value.

As for the valuation of Golight, the court noted that much of the value of Golight resides in its patent, which was confirmed in *Golight v. Wal-Mart, Inc., et al.*, 355 F.3d 1327 (2004), but that such decision was under appeal. The trial court stated in its divorce decree that Renter, Joyce's expert, included in his valuation of Golight's patent one-half of the value of the judgment Wal-Mart had been ordered to pay to Golight—whereas in his valuation report, Renter had actually added $232,000 to "earnings and to accounts receivable in the year 2001" as an adjustment to valuation data derived from Golight's internal financial

statements. However, the base judgment was $464,280, and the federal trial court also awarded Golight both prejudgment and postjudgment interest on such amount, plus costs and attorney fees. Thus, Renter included in his valuation a specific sum in earnings for 2001 from the litigation rather than "[giving] a value of [the patent confirmed in *Golight v. Wal-Mart, Inc., et al., supra,*] as one-half of the award to Golight," as said by the trial court. In contrast, Jerry's expert gave the patent no value, as he had testified that he could not determine a proper way to value such an award. The trial court opined in its decision that the value of the judgment from the U.S. District Court for the District of Colorado was "all or nothing," reasoning that either the value of the patent will be confirmed or it will not be, and if not, then "other large predatory companies such as Wal-Mart will market the same product at a lower price and devalue significantly the value of the patent." This is apparently the trial judge's opinion, as there is no evidence about the effect of a reversal of the judgment upon the prospects of Golight. This is perhaps an appropriate point to note that the founder of and "decisionmaker" at Golight, Jerry, did not testify. Because Jerry did not testify, the record does not contain any assessment by Golight's owner of what a reversal of the judgment would mean for the value of that company, or how loss of patent protection would impact it in the marketplace.

Returning to the trial court's decision, we observe that after setting forth several difficulties it had with Renter's appraisal of Golight, the trial court accepted McChesney's valuation of Golight of $505,283 and found that Jerry "ha[d] control over assets in the amount of [$888,897]" and that "[t]his amount should properly be divided between the parties." The trial court found the gross marital estate, after adding in other property and deducting debts, to be $957,699 and that Joyce was entitled to $478,849 as her share of the marital estate. The trial court then made specific awards of personal property, vehicles, bank accounts, life insurance, and retirement accounts, which we need not detail. The record reveals that 100 percent of Golight shares are in Jerry's name.

The court found that although Joyce was residing in the marital home, that house and the ground upon which it stands were

owned by the Gohl Brothers partnership. Reciting its inability to order the partnership to do anything, the court made an alternative award with respect to such property: If the partnership was willing to transfer the property to Joyce, she could receive it free and clear of any other claim. If not, then Jerry would pay Joyce the additional sum of $87,207—the amount the court found as the value of such property. Later, in ruling on a motion for new trial Joyce filed in response to the divorce decree, the court further ordered that if the partnership did not make such transfer within 30 days of the court's order with respect to Joyce's motion for new trial (which order it entered September 12, 2003), the $87,207 would become immediately due and subject to interest at the legal rate. Our transcript contains a postdecision "consent" of the partnership to the court's proposed transfer.

The trial court found that Joyce had been awarded property with a value of $111,430 and, therefore, ordered an equalizing judgment from Jerry to Joyce in the amount of $367,419 to be made in five equal yearly payments of $73,484, with the first payment being due December 31, 2003. However, in its September 12, 2003, ruling on the motion for new trial, the court found Jerry's argument concerning inadequate cashflow to be persuasive, and thus, a new due date of July 1, 2004, for the first of the five payments was ordered along with four more payments in a like amount due each succeeding July 1.

With respect to the judgment against Wal-Mart, the trial court characterized it as a "contingency that may only be dealt with in the future." Nonetheless, the court awarded Joyce, if the judgment were affirmed, one-half of the value of the judgment less the share "of the other person listed on the patent, costs, and any attorney fees that are contingent upon the success of the Appeal."

With respect to alimony, the trial court rejected Joyce's claim that she needed in excess of $5,450 per month to maintain herself, and it awarded her alimony in the amount of $1,900 per month, commencing August 1, 2003, and payable on the first day of each month thereafter for a period of 13 years.

Jerry appeals, and Joyce cross-appeals. After Jerry filed his appeal, he filed a motion to set a supersedeas bond and Joyce moved for temporary spousal support pending the appeal. The court ordered a supersedeas bond in an amount not less than the

"July 29, 2003, structured settlement payments," with the proviso that Jerry could submit a bank line of credit. With respect to spousal support, the trial court ordered such support in the monthly amount of $1,900 but ordered that such amount was contingent upon compliance with the terms for the transfer of the parties' residence, in which Joyce currently resides, to Joyce pursuant to the terms of the trial court's prior orders in the decree and in the order on the motion for new trial:

> In the event that the requisite steps are not taken pursuant to the orders of this court within the required time-frame, [Joyce] is entitled to spousal support pending appeal in the sum of [$3,000] per month . . . due and owing on the first day of each respective month, beginning August 1, 2003, and continuing . . . until the entry of the judgment on the mandate by any Nebraska appellate court.

III. ASSIGNMENTS OF ERROR

Jerry assigns that the trial court erred and abused its discretion in ordering only a 5-year payment plan of the money judgment to Joyce, that the court erred in awarding Joyce alimony of $1,900 per month for 13 years, and that the court erred in awarding Joyce temporary alimony in the amount of $1,900 per month pending the appeal.

On cross-appeal, Joyce asserts that the trial court erred in its "overall valuation" of Golight, in particular in disregarding the overseas properties, the failure to recognize Waterfjord House expenses over and above the valuation assigned, and the value of the patents. Second, Joyce claims error in the trial court's failure to award her any "separate part of the Golight . . . 3020 accounts payable."

Additionally, Joyce claims that the trial court erred (1) in failing to recognize the equity of the parties in a residence in McCook, Nebraska; (2) in finding that because the family residence had been transferred to the Gohl Brothers partnership, which is not a party to this action, the court could not transfer title to such property from the partnership to Joyce; (3) in awarding the family residence and 1 acre of land, which award was contrary to the zoning ordinances of Hayes County; and (4) in not deciding how the federal court's attorney fee award to Golight

was to be handled upon the conclusion of Golight's litigation with Wal-Mart.

Jerry's and Joyce's assignments of error lend themselves to consolidation for the purpose of discussion, and we will do so in our opinion where clarity and efficiency are served.

IV. STANDARD OF REVIEW

[1,2] Because appeals in domestic relations matters are heard de novo on the record, an appellate court is empowered to enter the order which should have been made as reflected by the record. *Shockley v. Shockley*, 251 Neb. 896, 560 N.W.2d 777 (1997). In our de novo review, we determine whether there has been an abuse of discretion by the trial court with respect to the division of property, the payment of alimony, and attorney fees. See *Davidson v. Davidson*, 254 Neb. 656, 578 N.W.2d 848 (1998).

[3] In conducting de novo review, when evidence is in conflict, an 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; this standard applies to the trial court's determination regarding the division of property and alimony. *Reichert v. Reichert*, 246 Neb. 31, 516 N.W.2d 600 (1994).

V. ANALYSIS

1. Valuation of Golight

Golight was formed in June 1993 as a Nebraska corporation to manufacture, distribute, and market a new product—a portable remote-controlled spotlight to be mounted temporarily on a variety of vehicles. Golight's product line has expanded since then, and as earlier detailed, at least through the federal trial court, Golight has been successful in a patent infringement lawsuit against Wal-Mart. Joyce's valuation expert, Renter, valued Golight at $2,041,327, after deduction of outstanding debt. Jerry's valuation expert, McChesney, placed the fair market value of Golight at $505,283. The trial court accepted McChesney's valuation. While neither party objects to the trial court's decision to equally divide the value of Golight, Joyce has raised a number of issues in her cross-appeal concerning the McChesney valuation, which the trial court wholly adopted.

(a) Valuation of Overseas Assets

Joyce's first complaint about the McChesney valuation of Golight is that such valuation excluded any value for the equipment located overseas. Examination of McChesney's evaluation does not reveal a separate asset category of overseas assets or equipment, and the record tells us very little about the nature and extent of the equipment.

We must note that this surprising lack of detail, given the complexity of the case, infects the entire record—an apparent result of time limitations imposed on trial counsel by the court. While the record reveals that the trial started at 8:30 a.m. on June 18, 2003, it also shows that when Jerry's counsel began his evidentiary presentation and inquired of the court about how much time he had, the court informed him, "At 12:10 I walk out the door." In response to our questions during oral argument on appeal, counsel for both parties indicated that they had been under a strict time limit of 2 hours per side, and Jerry's counsel asserted that there was no time for Jerry to testify—thus explaining the curious absence of any testimony from him. Neither party assigns error to how the trial was conducted. Nonetheless, we shall ultimately further discuss this matter.

Returning to the overseas equipment, we note that McChesney initially explained that his first determination was whether the equipment was located in the United States. He indicated that on equipment located in the United States, he added back "one-half of the depreciation that had been claimed on that equipment . . . approximately $62,000 of value." He was then asked whether he treated the "equipment off shore a little bit differently." Answering in the affirmative, McChesney stated:

> I did not adjust it at all, just left it on the books at its book value, whatever it is, less a cost of depreciation that has been written off. I think [that in] one year I looked at[,] it had a remaining value of some $35,000 still on the books, in other words, I just assume that's still a value . . . .

Joyce's brief on cross-appeal quotes the next phrase of McChesney's testimony, where he stated that "it is a vulnerable piece of equipment that's overseas, and does it have any real market value, I don't know, but I assume it does not." From this testimony, Joyce argues that McChesney failed to include any

valuation of the equipment Golight owned overseas. We do not claim to fully comprehend McChesney's testimony that we have quoted. We think McChesney is saying that "the equipment" was included at book value. But, we are uncertain what dollar amount was included for overseas equipment as part of McChesney's final valuation of Golight. His written report does not have a category or a specific value for overseas equipment, and the trial court made no findings in this regard.

Similarly, Renter's written report does not specifically address the overseas equipment or assign a specific value to it that we can discern. Renter testified that the overseas equipment would support a depreciation expense for tax purposes, but that "there's residual value that needs to be valued as well." That said, we find no followup question which would specifically delineate a particular value used by Renter for the overseas equipment, which value would demonstrate that Renter treated the issue differently than McChesney did. In short, both valuation experts apparently testified that the overseas equipment had some value which they included in their valuations, but from their reports and their testimony, we cannot discern a specific dollar figure from either expert for the overseas equipment as part of their overall valuation of Golight. We do note that Golight's banker, Hildebrandt, testified that he did not include any value for the overseas equipment in arriving at his testimony that Golight's collateral exceeded its loans by $315,000, which he said gave Farmers State Bank an acceptable equity position of 30 percent.

[4] It is well known that the party assigning error is obligated to produce a record supporting the assignment of error. See *Durkan v. Vaughan*, 259 Neb. 288, 609 N.W.2d 358 (2000). The bill of exceptions simply does not support the claim that the trial court erred in accepting McChesney's valuation of Golight because he did not include overseas assets.

(b) Date of McChesney's Report

Joyce complains that while McChesney's report has a cover page dated May 12, 2003, the most current financial figures utilized by McChesney were from Golight's fiscal year ending May 31, 2001. In contrast, Joyce's expert, Renter, utilized more current data by using the fiscal year-end figures from May 31, 2002.

Joyce concludes this argument by asserting, "This adds additional suspicion to the McChesney valuation." Brief for appellee on cross-appeal at 27.

McChesney's valuation of Golight is stale because the body of the report clearly states: "[I]t is our estimate that the fair market value of Golight . . . is [$505,283] as of May 31, 2001." In the testimony from McChesney, the fact that he was testifying about the valuation of Golight before the district court in June 2003 with a report fixing its value as of May 31, 2001—over 2 years earlier—was explored by the following exchange:

> [Counsel for Joyce:] When did you first prepare your written report[?]
>
> [McChesney:] The first draft was approximately two years ago in July or August, I guess.
>
> [Counsel for Joyce:] But the one that's entered into evidence is dated May 12th, 2003.
>
> [McChesney:] And May 12th would be the date that I typed that version and got it out of the draft stage.

However, there is no indication from McChesney's testimony that on May 12, 2003, he updated his information or changed his opinion of Golight's value to reflect data from a date other than May 31, 2001. For example, his last year of "Projected Earnings Calculation" is 2001, and the information on his historical balance sheet "For Year Ending May 31" is no more recent than 2001. Golight's fiscal or accounting year ends each May 31. The McChesney report's supporting data uses the years 1997 through 2001, and the report's specific conclusion on value is as of May 31, 2001, as we just referenced. McChesney's report is flawed because by the time of trial, 2 additional fiscal years of Golight would have passed during which significant events occurred.

[5] We have discussed the matter of the appropriate date to use in valuing marital assets in a divorce action. See *Walker v. Walker*, 9 Neb. App. 694, 618 N.W.2d 465 (2000). There is no "hard and fast" rule concerning valuation dates so long as the selected date bears a rational relationship to the property to be divided, and the selected date is reviewed for an abuse of discretion. See *id.* at 699, 618 N.W.2d at 470. Here, the trial judge, by his complete adoption of the McChesney report, implicitly selected May 31, 2001, as the valuation date for Golight. Given

that 15 months after that date, but before trial, Golight's patent was upheld and a nearly half-million-dollar judgment plus prejudgment and postjudgment interest and attorney fees was awarded against the nation's largest retailer, Wal-Mart, it is apparent to us that McChesney's valuation date of May 31, 2001, bears no rational relationship to the value of Golight, and the trial court's adoption of a May 31, 2001, valuation therefore constitutes an abuse of discretion. This conclusion alone would warrant reversal of the trial court's decision, but there are other valuation issues which we feel we must address for purposes of the remand, and our examination of those issues further buttresses our conclusion that the trial court erred in adopting the McChesney valuation.

(c) Valuation of Patents

Joyce also assails the McChesney valuation because of its alleged failure to include the Golight patents in its valuation of Golight. As support, Joyce argues that the trial court did not "use," or explain why it did not use, the federal district court's decision in the patent infringement suit against Wal-Mart, which decision valued the " 'royalty' interests in each unit at [$32]." Brief for appellee on cross-appeal at 28. We further quote from Joyce's brief on cross-appeal: "While we do not argue that this is direct and conclusive evidence of Golight share value, it does demonstrate that the patents of Golight, standing alone, have significant value, value that was not addressed by the trial court." *Id.*

Although Joyce has no complaint about the trial court's award to her of one-half of any final judgment in the federal patent infringement case, she asserts that the patents were not included in the McChesney valuation. There is no citation to the record to point us to any testimony by McChesney that he did or did not include the patents in arriving at his value for Golight. Nonetheless, we note that McChesney's "Adjusting Asset Valuation Summary" contains no specific listing, or valuation, for the patents. And, we quote the following "disclaimer" from McChesney's report:

> We were engaged to perform a valuation for Golight . . . with the intent of ascertaining an indication of value. If we

> were engaged to perform a more detailed analysis, matters may have come to our attention that could have a material impact on the indication of value contained in this report. *Accordingly, our level of assurance on the indication of value is reduced.*

(Emphasis supplied.)

Despite the foregoing written "disclaimer," McChesney testified that if he had issued an "opinion of value" rather than an "indication of value," his "valuation approaches and . . . conclusions would not be any different." McChesney explained that he uses an indication of value when doing litigation work and that the difference is that in an indication of value, he does not include all of the backup details in his report that "Renter has in his report." Apparently, McChesney believes that for litigation purposes, the presence of "all the backup details" is unnecessary. Such concept is obviously at odds with the written "disclaimer" in McChesney's report quoted above, where he admits that attention to more detailed information could have a "material impact" on his indication of value. Similarly, the lack of detail materially impacts our ability to conduct effective appellate review. In conclusion, while Joyce's argument that McChesney's valuation does not include the Golight patents lacks conclusive support in the record, the "disclaimer" by McChesney lends little overall confidence to McChesney's report and reinforces our earlier conclusion that the trial court's adoption of the McChesney report was an abuse of discretion.

2. Treatment of Home Located in McCook

The McCook house was purchased on March 14, 2002, and deeded to Golight by the seller. The evidence at trial was that the home continues to be owned by Golight. Joyce asserts that the trial court did not properly address the valuation issues surrounding the McCook house. The trial court's decree does not specifically mention the McCook house beyond the statement that Jerry shall pay "the McCook National Bank mortgage on the home located . . . in McCook," although the evidence shows that this property is owned by Golight and, based on the testimony of a tax accountant for Jerry and Joyce, that the purchase money was loaned to Golight. The parties' joint property statement contains

Jerry's valuation of this property at $120,197 and Joyce's valuation of $168,000. However, the joint property statement does not include the McCook house in the valuation of Golight, although it undisputedly is owned by Golight.

The above-mentioned tax accountant for Jerry and Joyce testified with respect to the McCook house. When asked how the purchase of the McCook house was handled, he responded:

> [Tax accountant:] . . . It would have been pretty difficult for a person in a divorce proceeding to acquire a home or acquire a loan. We were looking at it as a convenience deal. We advised [Jerry] that as soon as this thing [sic], it needs to be taken out of the [Golight] corporation. [Golight] shows it as a, does not show it as an asset, they show it as a loan from Jerry . . . .
>
> [Counsel for Joyce:] And [Golight] is funding the purchase of that house now?
>
> [Tax accountant:] No. It's on his, it's a payable from [Jerry] to [Golight].

On the joint property statement, Jerry claims the loan on the McCook house in the amount of $118,000 as a marital debt. As we understand Joyce's contention about the McCook house, it is that Jerry is "using" the McCook house twice—as a corporate asset which the court awarded to him via the award of the entirety of Golight, but also as a corporate debt reducing the overall value of Golight itself. Brief for appellee on cross-appeal at 29. The argument continues that because the trial court assigned this debt to Jerry, it should have increased Golight's valuation because the $118,000 debt was also used by McChesney as a corporate debt—however, we cannot be certain how McChesney treated the McCook house.

While the tax accountant for Jerry and Joyce states that the $118,000 debt is a "payable" from Jerry to Golight, two matters are noteworthy. First, McChesney's "Historical Balance Sheets" only go as far as the fiscal year ending May 31, 2001, whereas the purchase of the McCook house occurred long after that. Additionally, a $118,000 payable (the debt for the house purchase, payable by Jerry) owed to Golight would obviously be an asset of Golight, and there is no $118,000 payable from Jerry included in Golight's assets found on McChesney's historical

balance sheet (at page 9 of exhibit 26). Moreover, McChesney's testimony does not mention in any way the McCook house. By the same token, Joyce's valuation expert, Renter, does not specifically mention the McCook house in his testimony; nor does his written evaluation of Golight, exhibit 1, contain any specific reference to the McCook house as an asset, as a debt, or as an account payable from Jerry. Further, Renter does not mention any specific debt to McCook National Bank. However, the parties' property statement shows that such bank holds this mortgage on the home. The Renter report uses broad accounting terminology in its "Historical Balance Sheet Summary," but its valuations extend through the fiscal year ending May 2002. In summary, the evidentiary picture is less than clear about the McCook house, but at least on an inferential basis from the timing of the house purchase and the dates of the valuations in the two reports, the more solid inference is that Renter's valuation of Golight includes the McCook house as an asset and accounts for the debt associated with the house, and that McChesney's valuation does not—remembering that McChesney's valuation date fell before the McCook house was acquired and the associated debt was incurred. Because this cause will be remanded, we do not draw definite conclusions about the McCook house, except that McChesney's report's valuation date of necessity excludes from his calculations the house and the corresponding debt, the purchase and incurring of which were events that took place after the date of the valuation. This fact further reinforces our conclusion that the trial court's adoption of the McChesney report as the valuation of Golight was an abuse of discretion.

3. Waterfjord House—Johnson Lake

The Waterfjord House, owned entirely by Golight, is an asset to which, according to Joyce, the trial court failed to assign any value "above its stated fair market value." Brief for appellee on cross-appeal at 30. The property was acquired prior to the parties' separation, and Joyce values it at $450,000 and its furnishings and personal property at $150,000. In contrast, Jerry simply states on the joint property statement that all of the Waterfjord House is "[i]ncluded in [the] Golight valuation." Renter valued the Waterfjord House at what had been invested into its purchase

and renovation—$722,605. In McChesney's written valuation of Golight, no specific reference to the Waterfjord House can be found, and McChesney's "Summary Description of [Golight]" in that document makes no mention of the Waterfjord House. Nonetheless, in McChesney's testimony, he disagrees with Renter's valuation of the Waterfjord House and says there is nothing to indicate a value in the neighborhood of $700,000. He testified that the Waterfjord House's "book value" on Golight's corporate books was $240,000 and that its "tax assessed value" was $200,000. He offered no opinion as to the value of the personal property located at the Waterfjord House. McChesney did testify that the Waterfjord House was not showing any profit which would constitute a financial gain to Golight. The trial court addressed the Waterfjord House in its decree as follows:

> The Court has difficulty with . . . Renter's setting off the Waterfjord [House] as a separate entity. It is clear that Waterfjord House is part and parcel of Golight . . . . It is not the place of the Court to question the wisdom of such purchase nor the wisdom of the investment of the funds into Waterfjord House. It is simply part of the [Golight] corporation and its expense cannot be ignored. Due to those factors, and the determination by . . . McChesney that much of the overseas manufacturing equipment has little or no value, the Court finds that . . . McChesney's valuation of Golight is the correct one.

Close examination of Renter's report shows that he simply broke out the value of Golight into two natural components, namely its manufacturing business and its bed-and-breakfast operation at the Waterfjord House, assigned a value to each component, and added the values together to arrive at his total valuation for Golight. When the two components of Golight's operation are considered—a bed and breakfast and the manufacturing and retail sales of apparently useful tools—they could hardly be more different. Thus, assigning a separate value to each, and then combining the two for a total valuation, is not unreasonable and illogical. It should be helpful to a fact finder to understand that the Waterfjord House is a component of Golight's business which negatively impacts its future prospects and, quite likely, its valuation. To the extent that the fact that Renter broke Golight into its

two business components was used by the trial court as a basis to adopt the McChesney report, we disagree with that adoption. Renter's treatment of the two components of Golight is no reason to adopt a written valuation report which conspicuously lacks consideration of the fact that Golight owns a bed and breakfast in which it has admittedly invested over $700,000—and which is not profitable.

However, the evidence is clear that the manufacturing portion of Golight is profitable—after paying Jerry a salary of nearly $40,000 in 2001, providing benefits such as retirement and vehicles, and later providing the house for Jerry in McCook. The banker financing the Golight business, Hildebrandt, agreed with the statement that "Golight has excellent earning potential," but that the Waterfjord House has been a "financial drain." The Waterfjord House, an investment of over $700,000, is obviously a drag on Golight, as the evidence was that in the Waterfjord House's best year, it grossed a mere $16,000. However, McChesney also testified that the Waterfjord House was operating at a loss. While McChesney's oral testimony apparently suggests a book value of $240,000 for the Waterfjord House, his report contains no differentiation between the two components of Golight; nor does it value them separately. Thus, the reader of McChesney's report has little understanding of how McChesney actually treated the Waterfjord House, and again our overall confidence in the McChesney valuation is further reduced. In our view, the failure of the McChesney report to separately analyze the two components of Golight—one profitable and the other an apparent "money pit"—is a serious flaw in the McChesney valuation. The two components of Golight are distinct in many ways, including that the manufacturing portion of Golight has a proven record of earnings and, presumably at least, reasonable future prospects, whereas the Waterfjord House appears to be largely a voracious consumer of Golight's capital—for reasons which the record does not illuminate.

[6] The district court's declaration that it is not the "place of the Court to question the wisdom of [the] purchase [of the Waterfjord House] nor the wisdom of the investment of the funds into Waterfjord House" is inconsistent with the trial court's duty to fairly value and divide the marital estate. In our view, a fact

finder in the instant case must consider whether the expenditures in the Waterfjord House were merely a sham to obscure the true financial status of Golight by artificially and unreasonably inflating its debt load, and thereby obscuring its profitability and valuation. The trial court's declaration, essentially that it was "none of the court's business" what has been done with the Waterfjord House, is incorrect. If the court ignored how and why Jerry has spent hundreds of thousands of dollars on the Waterfjord House, and that expenditure's resulting impact on Golight, then the court has not fulfilled its duty to evaluate and divide the marital estate in a fair and reasonable manner—the ultimate test for determining the appropriateness of the division of property being reasonableness as determined by the facts of each case, *Meints v. Meints*, 258 Neb. 1017, 608 N.W.2d 564 (2000). Given that the Waterfjord House property was purchased prior to the divorce petition's filing, but a sum of approximately $500,000 more was spent in "improvements" to that property by Golight (an entity exclusively controlled by Jerry), the Waterfjord House is the "court's business" in keeping with its duty to arrive at a fair and reasonable property division.

VI. CONCLUSION

The trial judge's announcement of his impending departure at "12:10" before the owner of Golight had a chance to testify (and be cross-examined), plus the trial court's adoption of the flawed and stale McChesney valuation report, compels us to reverse the trial court's decree, except the dissolution of the marriage itself, and remand for a new trial. (Neither party challenges the finding that the marriage is irretrievably broken. See Neb. Rev. Stat. § 42-372 (Reissue 2004).)

[7] We find ourselves in the position of not having a sufficient record to decide the case on our own, although the law is clear that an appellate court has the power to enter the order which should have been made. See *Shockley v. Shockley*, 251 Neb. 896, 560 N.W.2d 777 (1997). Our review of the record reveals a hurried evidentiary presentation, apparently caused by the trial court's imposition of arbitrary time limitations. Thus, the record is incomplete and inadequate for us to decide the complex issues presented. We cannot finally decide the case after our de novo

review of this record—and feel confident that we have achieved a fair, reasonable, and just result. In this regard, we note that Renter's valuation date is May 31, 2002, over a year before trial.

[8] Counsel both agreed at oral argument to this court that they had been operating under severe time limits imposed by the district court. However, neither counsel has assigned the conduct of the trial as error; nor were protective steps taken, such as on-the-record requests for additional time or continuances. Nonetheless, we are dutybound to ensure a fair and reasonable property division, and we have no confidence after an exhaustive review of this record that such a division occurred in the trial court or that we could achieve such on this record. This is an equity case, and we must ensure that the parties have a fair hearing and a reasoned decision, which in our opinion did not occur. Arbitrary time limits can easily become the enemy of justice in our adversarial system. See *Robison v. Madsen*, 246 Neb. 22, 516 N.W.2d 594 (1994) (Supreme Court cautions trial courts against use of stopwatches or other similar limitations on time, saying that such methods of controlling course of trial might well overly restrict presentation of evidence and could prejudice party's right to fully present that party's case). Clearly, trial courts can impose reasonable time constraints on the conduct of trials. See *id.* The time limits apparently imposed here were not reasonable, which fact the record demonstrates. (However, we suggest, if limitations are imposed, that such be done on the record with the court stating the reasons therefor.)

We do not discuss the other matters raised in the appeal and cross-appeal, because our decision makes such unnecessary. See *Grahovac v. Grahovac*, 12 Neb. App. 585, 680 N.W.2d 616 (2004). We remand the matters of property division and alimony to the trial court for a new trial.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED FOR A NEW TRIAL.

RHONDA L. JAMESON, NOW KNOWN AS RHONDA L. FLECKY, APPELLEE, V. STEVEN J. JAMESON, APPELLANT.

700 N.W.2d 638

Filed July 5, 2005. No. A-04-019.

1. **Modification of Decree: Child Support: Appeal and Error.** Modification of child support payments is entrusted to the trial court's discretion, and although, on appeal, the issue is reviewed de novo on the record, the decision of the trial court will be affirmed absent an abuse of discretion.
2. **Judges: Words and Phrases.** A judicial abuse of discretion exists when a judge, within the effective limits of authorized judicial power, elects to act or refrain from action, but the selected option results in a decision which is untenable and unfairly deprives a litigant of a substantial right or a just result in matters submitted for disposition through a judicial system.
3. **Modification of Decree: Child Support: Proof.** A party seeking to modify a child support order must show a material change in circumstances which has occurred subsequent to the entry of the original decree or a previous modification and was not contemplated when the decree was entered.
4. **Rules of the Supreme Court: Child Support.** Under the Nebraska Child Support Guidelines, paragraph D, if applicable, earning capacity may be considered in lieu of a parent's actual, present income and may include factors such as work history, education, occupational skills, and job opportunities.
5. **Child Support.** Whether overpayments of child support should be credited retroactively against child support payments in arrears is a question of law.
6. **Appeal and Error.** To the extent issues of law are presented, an appellate court has an obligation to reach independent conclusions irrespective of the determinations made by the court below.
7. **Child Support.** The general rule for support overpayment claims is that no credit is given for voluntary overpayments of child support, even if they are made under a mistaken belief that they are legally required.
8. **Equity: Child Support.** Exceptions are made to the "no credit for voluntary overpayment of child support rule" when the equities of the circumstances demand it and when allowing a credit will not work a hardship on the minor children.

Appeal from the District Court for Douglas County: ROBERT V. BURKHARD, Judge. Affirmed.

Wesley S. Dodge for appellant.

David Riley for appellee.

IRWIN, CARLSON, and MOORE, Judges.

CARLSON, Judge.

INTRODUCTION

Steven J. Jameson appeals from an order of the district court for Douglas County adopting the referee's recommendation to dismiss the application to modify the decree of dissolution filed by Rhonda L. Jameson, now known as Rhonda L. Flecky. We affirm.

BACKGROUND

Steven and Rhonda were married on August 9, 1980, and their marriage was dissolved on October 28, 1991. The parties had four children during the course of their marriage: Jeremy Andrew, born February 26, 1981; Jonathan Patterson, born August 10, 1984; Jacob Daniel, born August 10, 1986; and Jordan Steven, born July 27, 1989. Rhonda was awarded custody of the minor children, and Steven was ordered to pay child support of $1,135 per month.

A modification order was entered on October 5, 1995, which changed custody of Jeremy from Rhonda to Steven and set Steven's child support obligation for the three remaining children in Rhonda's custody at $1,000 per month. The modification order provided that Steven's child support obligation would increase to $1,182 per month when Jeremy reached the age of majority. The modification order further provided that Steven's child support obligation would be $944 when there were two minor children remaining in Rhonda's custody and $608 when there was one minor child in Rhonda's custody.

Between October 1995 and May 2001, the parties entered into a series of informal agreements by which Steven's child support obligation was adjusted to account for increases in his income and for times when Jeremy resided with Rhonda and subsequently reached the age of majority. Each time the parties' adjusted the child support amount, Steven paid the agreed-upon amount to the clerk of the district court. The clerk's records of Steven's child support payments reflect that the amounts paid by Steven between 1995 and 2001 changed several times. The parties agree that each time Steven's obligation was changed, the new amount was based on the Nebraska Child Support Guidelines. However, the informal agreements were not presented to the court for modification of the decree.

Thus, the payment records of the clerk of the district court indicate that Steven had been overpaying his child support obligation and show that as of December 2001, Steven had a credit balance of $19,816.

Steven was terminated from his employment in January 2001, and he received a severance package that paid him his salary through May 2001. At the time Steven's employment was terminated and until his severance package ended in May, he was paying $1,530 per month in child support. In June 2001, Steven unilaterally began paying $500 per month in child support, without having any agreement with Rhonda. Steven continued to pay that amount up to the date of the hearing on Rhonda's application to modify.

On April 30, 2002, Rhonda filed in the district court an application to modify the decree alleging that Steven was delinquent in his child support payments and that Steven's unemployment constituted a substantial change of circumstances. Rhonda asked the district court to modify Steven's child support obligation and to calculate such obligation by "imputing to [Steven] an income commensurate with his level of education, skills, previous earnings, and experience." Rhonda further asked the court to order that the child support payment records be corrected to reflect both that Steven's child support obligation was paid current through June 2001 and that he was currently delinquent in the sum of $6,820.

Steven filed a response whereby he admitted that his unemployment constituted a material change in circumstances, such that his child support obligation should be reduced. A hearing was held before a district court referee on March 26, 2003.

Steven testified that he has a bachelor's degree in electronic engineering technology and a master's degree in electrical and computer engineering. He also testified that he was working toward a master's degree in business administration which he expected to complete in December 2003. Steven testified that at the time of the decree, his income was approximately $46,000, and that his income increased over the years such that he was earning approximately $105,000 when he was terminated in January 2001. Steven testified that he has had little income since his severance package ran out in May 2001 and that he was still

unemployed at the time of the hearing. Steven testified about the various efforts he was making to find a job in his field that would be comparable to his previous job. He testified that he thought $500 per month in child support would be a fair amount for him to pay, but he did not testify as to what amount of income or earning capacity this equates to or how he arrived at that amount of monthly support.

Rhonda testified that her annual income was approximately $6,000 at the time of the decree, that her annual income was $13,000 at the time of the hearing, and that she has never earned more than this amount. Rhonda testified that she did not know what Steven's earning capacity was but that she believed he could find a job, albeit at a lower salary than he was making when his employment was terminated. Rhonda apparently presented two child support worksheets using two different incomes for Steven, but the worksheets were received by the referee as only an aid, rather than as exhibits, and are not in the record before us.

The referee recommended that the district court enter an order dismissing Rhonda's application to modify, finding that there was no credible evidence presented of the parties' incomes that could be used to calculate child support in accordance with the Nebraska Child Support Guidelines. The referee further recommended that the district court find that the modification order of October 5, 1995, is the operative order regarding child support. The referee determined that between 1995 and 2001, Steven voluntarily elected to contribute child support beyond his legal obligation, and that he should not be given credit for such voluntary payments; nor should he be allowed to unilaterally modify the court-ordered obligation to offset such overpayments. Finally, the referee recommended that "all child support payments received by any payment center or office shall be credited only up to the extent of the ordered amount due at any applicable time" and that the district court should direct that all official payment records be adjusted accordingly.

Steven filed an exception to the recommendations of the referee. The district court overruled Steven's exception and adopted the referee's recommendations.

ASSIGNMENTS OF ERROR

Steven assigns that the district court erred in (1) dismissing Rhonda's application to modify and (2) adopting the referee's recommendation that Steven was not entitled to any credit for his overpayments of child support.

STANDARD OF REVIEW

[1,2] Modification of child support payments is entrusted to the trial court's discretion, and although, on appeal, the issue is reviewed de novo on the record, the decision of the trial court will be affirmed absent an abuse of discretion. *Gase v. Gase*, 266 Neb. 975, 671 N.W.2d 223 (2003); *Erica J. v. Dewitt*, 265 Neb. 728, 659 N.W.2d 315 (2003). A judicial abuse of discretion exists when a judge, within the effective limits of authorized judicial power, elects to act or refrain from action, but the selected option results in a decision which is untenable and unfairly deprives a litigant of a substantial right or a just result in matters submitted for disposition through a judicial system. *Gase v. Gase, supra*; *Noonan v. Noonan*, 261 Neb. 552, 624 N.W.2d 314 (2001).

ANALYSIS

[3] Steven first assigns that the district court erred in dismissing Rhonda's application to modify. He argues that his unemployment constitutes a material change in circumstances such that his child support obligation should be modified. A party seeking to modify a child support order must show a material change in circumstances which has occurred subsequent to the entry of the original decree or a previous modification and was not contemplated when the decree was entered. *Gase v. Gase, supra*; *Gammel v. Gammel*, 259 Neb. 738, 612 N.W.2d 207 (2000).

[4] Rhonda's application to modify asserted that Steven's unemployment constituted a material change in circumstances, and Steven agreed in his response. Rhonda's application asked the court to recalculate Steven's child support obligation, based on his earning capacity. Under the Nebraska Child Support Guidelines, paragraph D, if applicable, earning capacity may be considered in lieu of a parent's actual, present income and may

include factors such as work history, education, occupational skills, and job opportunities. *Claborn v. Claborn*, 267 Neb. 201, 673 N.W.2d 533 (2004); *Wagner v. Wagner*, 262 Neb. 924, 636 N.W.2d 879 (2001).

The referee found that there was no credible evidence of the parties' incomes to use in recalculating child support. We agree. The only evidence regarding the parties' incomes was based solely on the testimony of the parties. The testimony consisted only of each party's income at the time of the decree, Rhonda's income at the time of the hearing, and Steven's income at the time he became unemployed. Neither party presented any supporting documentation as to actual earnings in past years. Further, neither party offered competent evidence to establish what amount of income should be imputed to Steven in recalculating child support. The evidence showed that Steven has been unemployed since January 2001 and that he was making approximately $105,000 when his employment was terminated, but there was no evidence by either party regarding what his earning capacity was at the time of the hearing or whether Steven's earning capacity has changed since the 1995 modification order. Accordingly, the district court did not abuse its discretion in dismissing Rhonda's application to modify, given the lack of evidence to establish Steven's earning capacity. Steven's first assignment of error is without merit.

Steven next assigns that the district court erred in adopting the referee's recommendation that Steven is not entitled to any credit for his overpayments of child support. Steven does not suggest that he should be given credit for the full $19,816 in overpayments as of December 2001. Rather, he argues that equity dictates that he is entitled to a setoff or credit to the extent that he should not have any child support arrearages as of the date of the district court's order. Steven began paying $500 per month in child support in June 2001 and continued to do so up to the date of the hearing. Each $500 payment was less than the court-ordered amount, based on the October 5, 1995, modification order. Steven argues that equity requires that his overpayments be credited against his payments in arrears.

[5,6] Whether overpayments of child support should be credited retroactively against child support payments in arrears is a

question of law. *Palagi v. Palagi*, 10 Neb. App. 231, 627 N.W.2d 765 (2001). To the extent issues of law are presented, an appellate court has an obligation to reach independent conclusions irrespective of the determinations made by the court below. *Griess v. Griess*, 9 Neb. App. 105, 608 N.W.2d 217 (2000).

[7,8] In Nebraska, the general rule for support overpayment claims is that no credit is given for voluntary overpayments of child support, even if they are made under a mistaken belief that they are legally required. *Palagi v. Palagi, supra*; *Griess v. Griess, supra*. Our research reveals that the general rule in other jurisdictions also seems to be that no credit is given for voluntary overpayments of child support. See, *In re Marriage of Wassom*, 352 Ill. App. 3d 327, 815 N.E.2d 1251, 287 Ill. Dec. 448 (2004); *MacDonald v. Minton*, 142 S.W.3d 247 (Mo. App. 2004); *Pellar v Pellar*, 178 Mich. App. 29, 443 N.W.2d 427 (1989); *Haycraft v. Haycraft*, 176 Ind. App. 211, 375 N.E.2d 252 (1978). However, in *Griess v. Griess*, 9 Neb. App. at 115, 608 N.W.2d at 224, we recognized that "[e]xceptions are made to the 'no credit for voluntary overpayment rule' when the equities of the circumstances demand it and when allowing a credit will not work a hardship on the minor children."

In *Griess v. Griess, supra*, an obligor grossly and unwittingly overpaid child support by relying on inaccurate child support computations done by the obligee's lawyer and erroneously approved by the trial judge. In the instant case, based on informal agreements with Rhonda, Steven knowingly and voluntarily paid more than the court order obligated him to pay. The parties agree that the child support adjustments were based on the child support guidelines; thus, the agreed-upon amounts were not unreasonable. Further, in *Griess v. Griess, supra*, there was evidence that granting the obligor credit against his future child support payments would not work a hardship on the children. No such evidence exists in the present case. Equity does not require that Steven's payments above and beyond the amounts required by the October 5, 1995, modification order be credited against his child support arrears. Accordingly, Steven's second assignment of error is without merit.

Steven further contends that the referee's report and the district court's order are unclear as to where he stands in regard to his

child support payments. The district court's order states: "The Order of October 5, 1995, is controlling as to the parties and all child support payments received by any payment center or office shall be credited only up to the extent of the ordered amount due at any applicable time." Thus, the district court found that the October 5, 1995, modification order has been and continues to be the operative order in regard to child support. The court further ordered that the official child support payment records should credit Steven for the amount due at any applicable time pursuant to the October 5, 1995, modification order and should not reflect any amounts paid above and beyond the court-ordered amount at any applicable time. In addition, from June 2001 to the time of the hearing, Steven paid only $500 per month in child support, which was less than the court-ordered amount. Because Steven is not given any credit for his overpayment against his child support arrearages, Steven is in arrears beginning in June 2001 and for every month thereafter that he paid less than the court-ordered amount due at the applicable time. The child support payment records should reflect such monthly arrearages.

CONCLUSION

We conclude that Steven's assignments of error are without merit. Accordingly, the judgment of the district court overruling Steven's exception to the recommendations of the referee and adopting such recommendations is affirmed.

AFFIRMED.

KEENAN PACKAGING SUPPLY, INC., A SOUTH DAKOTA CORPORATION, APPELLANT AND CROSS-APPELLEE, V. ADA B. MCDERMOTT, TRUSTEE, APPELLEE AND CROSS-APPELLANT.

ADA B. MCDERMOTT, TRUSTEE, APPELLEE AND CROSS-APPELLANT, V. KATHY KEENAN, DOING BUSINESS AS KEENAN PACKAGING SUPPLY, APPELLANT AND CROSS-APPELLEE.

700 N.W.2d 645

Filed July 26, 2005. Nos. A-03-712, A-03-721.

1. **Breach of Contract: Damages.** A suit for damages arising from breach of a contract presents an action at law.

2. **Judgments: Appeal and Error.** In a bench trial of a law action, the trial court's factual findings have the effect of a jury verdict and will not be disturbed on appeal unless clearly wrong.
3. **Contracts: Appeal and Error.** The interpretation of a contract involves a question of law, for which an appellate court has an obligation to reach its conclusions independent of the determinations made by the court below.
4. **Leases: Contracts.** A lease agreement is to be construed as any other contract.
5. **Contracts: Words and Phrases.** A contract is ambiguous when a word, phrase, or provision in the contract has, or is susceptible of, at least two reasonable but conflicting interpretations or meanings.
6. **Contracts.** A determination as to whether ambiguity exists in a contract is to be made on an objective basis, not by the subjective contentions of the parties; thus, the fact that the parties have suggested opposing meanings of the disputed instrument does not necessarily compel the conclusion that the instrument is ambiguous.
7. ____. When the terms of a contract are clear, a court may not resort to rules of construction, and the terms are to be accorded their plain and ordinary meaning as the ordinary or reasonable person would understand them.
8. ____. A contract must be construed as a whole, and if possible, effect must be given to every part thereof.
9. ____. A party may not pick and choose among the clauses of a contract, accepting only those that advantage it.
10. ____. A written contract which is expressed in clear and unambiguous language is not subject to interpretation or construction.
11. **Public Policy: Damages: Negligence.** Public policy prevents a party from limiting its damages for gross negligence or willful and wanton misconduct.
12. **Pleadings.** A pleading has two purposes: (1) to eliminate from consideration contentions which have no legal significance and (2) to guide the parties and the court in the conduct of cases.
13. ____. Pleadings frame the issues upon which the cause is to be tried and advise the adversary as to what the adversary must meet.
14. ____. The issues in a given case will be limited to those which are pled.
15. **Negligence: Words and Phrases.** Gross negligence is great or excessive negligence, which indicates the absence of even slight care in the performance of a duty.
16. **Negligence: Intent: Words and Phrases.** In order for an action to be willful or wanton, the evidence must prove that a defendant had actual knowledge that a danger existed and that the defendant intentionally failed to act to prevent harm which was reasonably likely to result.
17. **Appeal and Error.** An appellate court is not obligated to engage in an analysis which is not needed to adjudicate the controversy before it.
18. **Landlord and Tenant.** To constitute a constructive eviction, it must be shown that the premises were rendered unfit for occupancy for the purposes for which they were leased or were rendered unfit so as to deprive lessee of the beneficial use of the premises.
19. ____. Any disturbance of the tenant's possession by the landlord or by someone under his authority, whereby the premises are rendered unfit for occupancy for the purposes for which they were demised or the tenant is deprived of the beneficial

enjoyment of the premises, amounts to a constructive eviction, if the tenant abandons the premises within a reasonable time.

20. **Landlord and Tenant: Leases.** In order for a lessee to rely upon constructive eviction as a ground for avoiding payment of the rent contracted for, the lessee must surrender or abandon the leased premises.

21. ____: ____. The constructive eviction of a lessee suspends the lessee's liability for rent accruing subsequent to the abandonment.

Appeal from the District Court for Douglas County: ROBERT V. BURKHARD, Judge. Affirmed in part, and in part reversed and remanded with directions.

James B. McVay, of Tiedeman, Lynch, Kampfe & McVay, for appellants.

Kirk E. Goettsch and Steven J. Riekes, of Marks, Clare & Richards, L.L.C., for appellee.

IRWIN, CARLSON, and MOORE, Judges.

MOORE, Judge.

INTRODUCTION

Ada B. McDermott, Trustee, as lessor, and Kathy Keenan, doing business as Keenan Packaging Supply, as lessee, entered into a lease for certain commercial property in Omaha, Nebraska. At the time the parties signed the lease, Keenan operated her business as a sole proprietorship. Keenan subsequently incorporated her business as Keenan Packaging Supply, Inc., and assigned to the corporation all causes of action arising in favor of Keenan in connection with the lease. For the sake of simplicity, we shall refer herein to both incarnations of Keenan's business as "Keenan Packaging." Ada, as trustee, filed a petition in the district court for Douglas County alleging that Keenan Packaging was liable for unpaid rent owed pursuant to the lease. Keenan Packaging filed a petition in the district court against Ada, as trustee. Keenan Packaging alleged, in part, that Ada breached the lease by failing to maintain the roof of the leased property, which failure resulted in the loss or destruction of considerable personal property of Keenan Packaging from water damage. The district court consolidated the two cases for trial, and after the trial, the court entered an order dismissing both petitions. Both parties appealed from the decision of the district court. The appeals were

consolidated, and Keenan Packaging was designated as the appellant and cross-appellee and Ada was designated as the appellee and cross-appellant for purposes of briefing and argument. For the reasons set forth herein, we affirm in part, and in part reverse and remand with directions.

BACKGROUND

In approximately 1977, Ada and her husband, Joe McDermott, acquired certain commercial property in Omaha. Ada and Joe subsequently conveyed this property to the Ada McDermott Revocable Trust (the trust). Ada is trustee of the trust, and she performs bookkeeping and tax-related work for the trust's commercial rental properties. Joe, as the manager of the commercial buildings owned by the trust, performs maintenance, interacts with tenants, and supervises employees working at the property. The building at issue here (the McDermott property) consists of 80,000 square feet and is divided into sections or bays and leased to different parties. The McDermott property has one continuous roof over the entire 80,000 square feet.

Keenan Packaging is in the business of distributing packaging, janitorial, and laminating equipment and supplies. In May 1998, Keenan began looking for a new space to lease for her business. At that time, Keenan and a representative of a commercial management company inspected the McDermott property. The particular area available for lease was 12,500 square feet located in the far west end of the building. An office area comprising about 10 to 15 percent of the total rental space was located at the front of the bay, while warehouse facilities were located to the back of the bay. Upon first inspecting the McDermott property, Keenan observed that the carpeting was wet, that the offices had waterstains, and that the warehouse had pools of water on the floor. Keenan discussed those problems with Joe and the commercial management company representative, who both assured Keenan that the McDermotts would take care of the problem with the roof.

Ada, as trustee, and Keenan Packaging subsequently entered into a lease agreement for the rental space, such lease commencing June 15, 1998, and ending June 30, 2001, with a monthly rental amount of $3,490. Keenan Packaging paid a security

deposit equal to 1 month's rent and paid half a month's rent for June 1998. The relevant lease provisions are as follows:

> 6. REPAIR AND MAINTENANCE: The Lessee shall, at his sole expense, keep the interior of the premises, including all windows, doors and glass, in good order and repair, reasonable wear and tear and damage by fire excepted. The Lessor shall keep the structural supports, exterior walls and roof of the building in good order and repair and shall be responsible for the operation and maintenance of all common areas and facilities as hereinafter provided. . . .
>
> . . . .
>
> 10. CONDITION OF PREMISES: The Lessee has examined the premises and is satisfied with the physical condition thereof, including all equipment and appurtenances, and his taking possession thereof shall be conclusive evidence of his receipt thereof in good and satisfactory order and repair, unless otherwise specified herein. . . .
>
> . . . .
>
> 14. PERSONAL PROPERTY AT RISK OF LESSEE: All personal property in the premises shall be at the risk of the Lessee only. The Lessor shall not be or become liable for any damage to such personal property, to the premises or to Lessee or any other persons or property as a result of water leakage, sewerage, electric failure, gas or odors or for any damage whatsoever done or occasioned by or from any plumbing, gas, water or other pipes or any fixtures, equipment, wiring or appurtenances whatsoever, or for any damage caused by water, snow or ice being or coming upon the premises, or for any damage arising from any act or neglect of other tenants, occupants or employees of the building in which the premises are situated or arising by reason of the use of, or any defect in, said building or any of the fixtures, equipment, wiring or appurtenances therein, or by the act or neglect of any other person or caused in any other manner whatsoever.
>
> . . . .
>
> 30. NO OTHER AGREEMENTS: This lease contains the entire understanding and agreement of the parties,

> supersedes all prior understandings and agreements and cannot be changed orally.

"Addendum A," attached to the lease and signed by the parties, provided in part that the lessor, at the lessor's expense, would "[r]epair ceiling in hall area and repair roof where needed."

Shortly after moving into the premises, Keenan Packaging experienced water problems that continued throughout its tenancy. Keenan Packaging paid rent pursuant to the lease through February 1999. In March, Keenan informed the McDermotts that Keenan Packaging could sustain no more damages and would pay no more rent until the McDermotts had the roof repaired. On or about July 7, the McDermotts caused a notice to quit to be served on Keenan Packaging. The parties subsequently entered into an agreement whereby Ada would not hold Keenan Packaging responsible for the remaining term of the lease if Keenan Packaging vacated the premises, which Keenan Packaging did on August 21.

Ada, as trustee, filed suit against Keenan Packaging on November 3, 1999. Ada alleged that Keenan Packaging failed and refused to abide by the terms of the lease before it vacated the premises on August 21, in particular by failing to pay rent to Ada as it came due. Ada alleged that based on the lease agreement, Keenan Packaging was indebted to Ada for $3,490 per month for the months of March through July 1999 and for a prorated amount of $2,364.19 for August 1 through 21, 1999, for a total amount due of $19,814.19.

Keenan Packaging filed an answer on November 19, 1999. Keenan Packaging denied Ada's allegations that it had failed and refused to abide by the terms of the lease and to pay rent when it came due. Keenan Packaging alleged that the leased premises were untenantable due to the failure of the roof to such an extent that every time it rained, the roof would leak, damaging or destroying furniture, equipment, and product. Keenan Packaging further alleged that such untenantability excused it from its obligation to pay rent. Keenan Packaging denied that it was indebted to Ada for $19,814.19 and sought dismissal of Ada's petition.

Keenan Packaging filed suit against Ada, as trustee, on May 11, 2000. Keenan Packaging alleged that Ada had materially

breached the terms of the lease by failing to keep the structural supports, exterior walls, and roof of the building in good order and repair and in failing to repair as needed the roof at the McDermott property. Keenan Packaging alleged that it vacated the McDermott property on or about August 21, 1999, due to Ada's material breaches of the lease. Keenan Packaging alleged that it incurred damages as follows: (1) $17,671.36 in damage to inventory, (2) $7,973 in damage to equipment, (3) $14,216.42 in additional rental expenses and other expenses incurred to obtain substitute space, (4) $2,113.98 in moving expenses, (5) $8,304.58 in additional wages paid by Keenan Packaging, (6) $2,979.58 in other miscellaneous expenses, and (7) $3,490 in the loss of the security deposit paid to Ada. Keenan Packaging alleged that the costs and expenses set forth were the kind that would ordinarily follow from Ada's failure to perform as required under the lease and that Ada knew or should have known that the costs and expenses incurred by Keenan Packaging were the likely result from Ada's breach of the lease. On this first cause of action, Keenan Packaging sought judgment against Ada in the amount of $56,748.92. Keenan Packaging also set forth causes of action for fraudulent misrepresentation and fraudulent concealment.

On July 11, 2000, Ada, as trustee, filed an answer to Keenan Packaging's petition. Ada admitted that Keenan Packaging vacated the McDermott property on or about August 21, 1999, but generally denied the remaining allegations of Keenan Packaging's petition.

On August 31, 2000, the district court entered an order granting Keenan Packaging's motion to consolidate the two cases for trial, which trial was held before the court on January 15 and 16, 2003. Keenan testified that when Keenan Packaging moved into the McDermott property, most of the items listed in the addendum to the lease had been completed, but that she did not know if any repair had been made to the roof as required by the addendum. The record at trial shows generally that Keenan Packaging experienced water problems within 2 or 3 days after moving into the premises. These water problems continued throughout the 14 months that Keenan Packaging occupied space in the McDermott property, despite various attempts by the McDermotts' employees to repair the roof. Throughout Keenan Packaging's tenancy,

Keenan or her employees consistently contacted the McDermotts whenever there was a water problem. In order to avoid or limit damage to product, Keenan and her employees would place trash cans throughout the leased area, move product from wet areas, and place tarps over product. The McDermotts provided Keenan Packaging with burlap sacks to help mop up the water, built a trough over the office area to catch water and direct it into trash cans, and provided trash cans and barrels in other portions of the premises to catch water.

In March 1999, there was a meeting attended by Keenan, the McDermotts, two of Keenan Packaging's employees, and a representative of the real estate management company for the McDermott property. At this meeting, Keenan told Joe that Keenan Packaging could not sustain further damages and that it would not pay rent until the McDermotts repaired the roof. Keenan testified that Joe promised during the meeting to replace the roof on the McDermott property. Keenan testified further that based on Joe's representation during the March meeting, Keenan Packaging elected to remain in the McDermott property. Subsequent to the March meeting, Keenan Packaging sent several letters to Ada outlining Keenan's understanding of Joe's representations during the meeting. Keenan Packaging never received a response to any of these letters and vacated the McDermott property in mid-August. Ada testified that under the lease, Keenan Packaging still owed $19,814.19—a rental amount of $3,490 per month for March through July 1999, plus a prorated rental amount of $2,364.19 for 21 days in August. Ada further testified that after Keenan Packaging vacated the McDermott property, the trust retained the security deposit paid by Keenan Packaging, and that when the security deposit was applied against the rent due, the balance owed by Keenan Packaging was $16,324.19. At trial, Keenan Packaging offered evidence concerning the damages allegedly sustained by it due to the leaky roof. We do not set forth the details of that evidence herein because the issue of Keenan Packaging's damages is not dispositive of our resolution of the parties' appeals.

On May 27, 2003, the district court entered an order ruling on the parties' claims. In its order, the court set forth certain factual findings and relevant portions of the lease agreement. The

court noted a serious question on proof of damages to the personal property of Keenan Packaging and observed that damages could not be based on speculation and conjecture. The court found there was no question that Keenan Packaging suffered some water damage to its personal property but found that paragraph 14 of the lease was very clear as to responsibility for personal property loss. The court found that the addendum clause, whereby Ada agreed to "repair roof where needed," did not supersede, modify, or eliminate the clear language of paragraph 14 of the lease. The court found that Ada was not guilty of gross negligence or willful and wanton misconduct with regard to roof repairs and that the McDermotts in fact attempted several times to repair the roof problems. The court concluded that Keenan Packaging must bear the loss of its personal property and any resulting damages and that Ada had no liability for Keenan Packaging's claims.

As to Ada's claim for rent from March 1 through August 21, 1999, the district court found that Keenan Packaging had a legitimate reason "for withholding rent and vacating the premises because of water damage to [its] products and equipment." The court further observed that just because Ada was not liable for the water damage, that did not mean Keenan Packaging had to stay in the McDermott property until the end of the lease term at the risk of sustaining further damage to its personal property. The court concluded that Keenan Packaging was not liable for the alleged unpaid rent.

The district court dismissed both parties' petitions and found that any request by any party for relief not specifically granted by the order of May 27, 2003, was denied. The parties subsequently perfected their respective appeals to this court.

ASSIGNMENTS OF ERROR

Keenan Packaging asserts that the district court erred in (1) finding that the language of the lease and the addendum was not ambiguous and in failing to consider the parties' intent in determining whether Ada was liable for damages sustained by Keenan Packaging; (2) finding that the language of paragraph 14 of the lease was not superseded, modified, or eliminated by the provisions of the lease that required Ada to keep the roof of the

building in good order and repair and those provisions of the addendum that required Ada to repair the roof where needed; (3) finding that Ada was not guilty of gross negligence and wanton misconduct in her failure to keep the roof of the building in good order and repair and to repair the roof where needed; and (4) failing to award Keenan Packaging damages sustained because of the leaky roof on the McDermott property.

Ada, as trustee, asserts on cross-appeal that the district court erred in finding that Keenan Packaging had a legitimate reason for withholding rent.

STANDARD OF REVIEW

[1-3] A suit for damages arising from breach of a contract presents an action at law. *Par 3, Inc. v. Livingston*, 268 Neb. 636, 686 N.W.2d 369 (2004). In a bench trial of a law action, the trial court's factual findings have the effect of a jury verdict and will not be disturbed on appeal unless clearly wrong. *Id.* The interpretation of a contract involves a question of law, for which an appellate court has an obligation to reach its conclusions independent of the determinations made by the court below. *Midwest Neurosurgery v. State Farm Ins. Cos.*, 268 Neb. 642, 686 N.W.2d 572 (2004).

ANALYSIS

Interpretation of Lease.

Keenan Packaging asserts that certain provisions in the lease and the addendum thereto are in conflict, are therefore ambiguous, and should be read to modify or eliminate paragraph 14 of the lease. Paragraph 14 contains the exculpatory clause relieving Ada of liability for damage to the personal property of Keenan Packaging caused by, inter alia, water leakage. Keenan Packaging relies on paragraph 6 of the lease, requiring Ada to keep the roof of the building in good order and repair, and on the addendum provision, requiring Ada to repair the ceiling in the hall area and to repair the roof where needed. Keenan Packaging argues that these provisions in the lease and the addendum are conflicting and are subject to different interpretations. Keenan Packaging essentially argues that the application of the exculpatory clause in paragraph 14 negates any remedy for a breach by Ada of paragraph 6 or the addendum. We disagree.

[4-9] A lease agreement is to be construed as any other contract. *Johnson Lakes Dev. v. Central Neb. Pub. Power*, 254 Neb. 418, 576 N.W.2d 806 (1998). A contract is ambiguous when a word, phrase, or provision in the contract has, or is susceptible of, at least two reasonable but conflicting interpretations or meanings. *Jensen v. Board of Regents*, 268 Neb. 512, 684 N.W.2d 537 (2004). A determination as to whether ambiguity exists in a contract is to be made on an objective basis, not by the subjective contentions of the parties; thus, the fact that the parties have suggested opposing meanings of the disputed instrument does not necessarily compel the conclusion that the instrument is ambiguous. *Fraternal Order of Police v. County of Douglas*, 259 Neb. 822, 612 N.W.2d 483 (2000). When the terms of a contract are clear, a court may not resort to rules of construction, and the terms are to be accorded their plain and ordinary meaning as the ordinary or reasonable person would understand them. *Midwest Neurosurgery v. State Farm Ins. Cos., supra.* A contract must be construed as a whole, and if possible, effect must be given to every part thereof. *Big River Constr. Co. v. L & H Properties*, 268 Neb. 207, 681 N.W.2d 751 (2004). A party may not pick and choose among the clauses of a contract, accepting only those that advantage it. *Poulton v. State Farm Fire & Cas. Cos.*, 267 Neb. 569, 675 N.W.2d 665 (2004).

The Nebraska Supreme Court in *Bedrosky v. Hiner*, 230 Neb. 200, 430 N.W.2d 535 (1988), considered an exculpatory provision similar to that found in the lease in the present case. In *Bedrosky*, the plaintiffs suffered personal property losses from a fire which damaged the commercial structure they had leased. The plaintiffs claimed that the defendant landlord had failed to comply with certain regulations of the State Fire Marshal's office, failed to take other preventive measures, and, contrary to the defendant's representation, failed to keep the sprinkler system in proper working order. The plaintiffs asserted that the defendant should be responsible for the plaintiffs' losses, despite the exculpatory provisions in the parties' lease.

[10] The Nebraska Supreme Court in *Bedrosky* found that when read in its "plainest, clearest sense," the lease placed no liability on the defendant for the damage to the plaintiffs' property. 230 Neb. at 206, 430 N.W.2d at 540. The court observed

that a written contract which is expressed in clear and unambiguous language is not subject to interpretation or construction. *Id.* The plaintiffs did not specifically argue that the lease was ambiguous; rather, they urged a nonliteral interpretation, based on public policy. More specifically, the plaintiffs argued that to construe the lease according to its plain language—in other words, to exempt the defendant from liability—would create an unconscionable result. The court reviewed the varying responses of other state courts considering the issue of exculpatory clauses in commercial leases. The court then found no indication in the evidence that the plaintiff who originally leased the property was a victim of disparity in bargaining power. The plaintiff voluntarily entered the lease and agreed to its terms. The language of the lease plainly exculpated the defendant from liability for damage to the plaintiffs' property. The Nebraska Supreme Court found that the plain language of the exculpatory clause did not permit the court to read into its meaning a limiting provision as urged by the plaintiffs. The court further found that the language of the exculpatory clause was not in contravention of public policy.

In the present case, as noted by the district court, paragraph 14 of the lease is very clear as to responsibility for personal property loss. The record shows that Keenan had leased commercial property prior to entering the lease at issue here. We see nothing in the record to suggest a disparity in the bargaining power between the parties. Keenan, as a representative of Keenan Packaging, signed a lease containing the exculpatory clause found in paragraph 14, the requirement in paragraph 6 that Ada keep the roof of the building in good order and repair, and the addendum provision that required Ada to repair the roof as a condition of Keenan Packaging's occupying the McDermott property. We also observe that Keenan Packaging was required by paragraph 15 of the lease to provide insurance, which insurance would cover, among other things, "property damage." Further, the lease included paragraph 10 stating that Keenan Packaging had examined and was satisfied with the physical condition of the premises, except as otherwise specified. Clearly, Keenan Packaging is not free to pick and choose among the clauses of the lease, accepting only those that are advantageous to it. See *Poulton v. State Farm Fire & Cas. Cos.*, 267 Neb. 569, 675 N.W.2d 665 (2004). The lease, read as a

whole and in its plainest and clearest sense, provides that Ada is not responsible for damages to Keenan Packaging's personal property due to, among other things, water leakage. The district court did not err in failing to conclude that the lease was ambiguous and in failing to conclude that paragraph 14 was superseded, modified, or eliminated by other provisions of the lease. Keenan Packaging's assertions to the contrary are without merit.

Gross Negligence and Wanton Misconduct.

Keenan Packaging asserts that the district court erred in finding that Ada was not guilty of gross negligence and wanton misconduct in her failure to keep the roof of the building in good order and repair and to repair the roof where needed. Keenan Packaging argues that even if paragraph 14 of the lease is valid and enforceable, Ada's acts in failing to repair the roof constituted gross negligence.

[11] The Nebraska Supreme Court has held that public policy prevents a party from limiting its damages for gross negligence or willful and wanton misconduct. *New Light Co. v. Wells Fargo Alarm Servs.*, 247 Neb. 57, 525 N.W.2d 25 (1994). In *New Light Co.*, the plaintiff's petition alleged that the defendant was grossly negligent in various regards with respect to its installation of a fire alarm system. The defendant generally denied the allegations of the petition and claimed that a clause of the parties' contract exculpated it from liability for the plaintiff's damages sustained in a fire. The Nebraska Supreme Court held that whether a particular exculpatory clause in a contractual agreement violates public policy depends upon the facts and circumstances of the agreement and the parties involved. *Id.* In *New Light Co.*, the court concluded that the parties had not contemplated gross negligence and willful and wanton misconduct because the exculpatory clause made no mention of such activities. The court held that even if the exculpatory clause could be construed to include gross negligence and wanton and willful misconduct, such exclusion was prohibited by public policy. Because the court found no language in the agreement clearly expressing an intent to limit the defendant's liability for acts of gross negligence or willful and wanton misconduct, the court

concluded that the exculpatory clause did not affect the plaintiff's right to assert a cause of action based on such activity.

[12-14] Unlike the plaintiff in *New Light Co.*, Keenan Packaging in the instant case did not plead gross negligence and wanton misconduct in its petition. The Nebraska Supreme Court has previously held, in the context of a contract dispute, that a pleading has two purposes: (1) to eliminate from consideration contentions which have no legal significance and (2) to guide the parties and the court in the conduct of cases. *Spanish Oaks v. Hy-Vee*, 265 Neb. 133, 655 N.W.2d 390 (2003). Pleadings frame the issues upon which the cause is to be tried and advise the adversary as to what the adversary must meet. *Id.* The issues in a given case will be limited to those which are pled. *Id.* We observe that the present consolidated cases were filed under Nebraska's old code pleading system and before the implementation of Nebraska's new civil pleading rules. See Neb. Ct. R. of Pldg. in Civ. Actions 1 (rev. 2004) (new rules of pleading apply to civil actions filed on or after January 1, 2003). The court in *Spanish Oaks* noted that "[w]hile . . . judicial efficiency might be promoted if courts were to, sua sponte, determine questions raised by the facts but not presented in the pleadings, that efficiency would come at the expense of due process." 265 Neb. at 149, 655 N.W.2d at 404. Compare, *Blinn v. Beatrice Community Hosp. & Health Ctr.*, 13 Neb. App. 459, 696 N.W.2d 149 (2005) (case filed under new rules of pleading holding that when issues not raised by pleadings are tried by express or implied consent of parties, issues shall be treated in all respects as if they had been raised in pleadings); *Schnell v. Schnell*, 12 Neb. App. 321, 673 N.W.2d 578 (2003) (issues not raised in pleadings may be reached when record shows both parties were on notice of issue and both parties fully litigated issue).

[15,16] Even assuming in the present case that both parties were on notice and fully litigated the issue of gross negligence and wanton misconduct, and despite Keenan Packaging's failure to plead the issue, we see nothing in the record to suggest that the district court's factual finding on this issue was clearly wrong. The district court in the present case held that this "is not a case where [Ada] was guilty of gross negligence or willful and

wanton misconduct as regards roof repairs." The court observed that the McDermotts attempted to repair the roof problem several times during Keenan Packaging's tenancy. Gross negligence is great or excessive negligence, which indicates the absence of even slight care in the performance of a duty. *Bennett v. Labenz*, 265 Neb. 750, 659 N.W.2d 339 (2003). In order for an action to be willful or wanton, the evidence must prove that a defendant had actual knowledge that a danger existed and that the defendant intentionally failed to act to prevent harm which was reasonably likely to result. *Drake v. Drake*, 260 Neb. 530, 618 N.W.2d 650 (2000). The district court was not clearly wrong in finding that the McDermotts' actions with regard to the roof repair did not rise to the level of gross negligence or willful or wanton misconduct. Keenan Packaging's assignment of error is without merit.

Keenan Packaging's Damages.

[17] Finally, Keenan Packaging asserts that the district court erred in failing to award Keenan Packaging damages sustained because of the leaky roof on the McDermott property. Given our resolution of Keenan Packaging's other assignments of error, we need not address this error. An appellate court is not obligated to engage in an analysis which is not needed to adjudicate the controversy before it. *Burke v. McKay*, 268 Neb. 14, 679 N.W.2d 418 (2004).

Constructive Eviction.

Ada, as trustee, asserts on cross-appeal that the district court erred in finding that Keenan Packaging had a legitimate reason for withholding rent. Keenan Packaging alleged in its answer to Ada's petition that the leased premises were untenantable due to the failure of the roof and that such untenantability excused it from its obligation to pay rent. Ada argues that Keenan Packaging's claim of untenantability constitutes a defense to Ada's claim for rent only if there was a constructive eviction.

[18,19] To constitute a constructive eviction, it must be shown that the premises were rendered unfit for occupancy for the purposes for which they were leased or were rendered unfit so as to deprive lessee of the beneficial use of the premises. *Middagh v. Stanal Sound Ltd.*, 222 Neb. 54, 382 N.W.2d 303 (1986). See,

also, *May v. Marijo Corp.*, 207 Neb. 422, 299 N.W.2d 433 (1980); *Kimball v. Lincoln Theatre Corporation*, 129 Neb. 446, 261 N.W. 842 (1935) (*Kimball II*); *Kimball v. Lincoln Theatre Corporation*, 125 Neb. 677, 251 N.W. 290 (1933) (*Kimball I*). The Nebraska Supreme Court has held that any disturbance of the tenant's possession by the landlord or by someone under his authority, whereby the premises are rendered unfit for occupancy for the purposes for which they were demised or the tenant is deprived of the beneficial enjoyment of the premises, amounts to a constructive eviction, if the tenant abandons the premises within a reasonable time. *Kimball I*.

Ada argues that Keenan Packaging did not abandon the premises as required, in that it only vacated the premises after being compelled to do so by a notice to quit for nonpayment of rent. Keenan Packaging acknowledges the requirement that it abandon the premises in order to successfully claim constructive eviction, but it argues that it abandoned the premises in a reasonable time because it was induced to remain on the premises by the McDermotts' assurances that the roof would be repaired. The parties both rely on the following:

> Under the covenant to repair or to improve the premises during the term, ordinarily used in leases of real estate, the tenant may not retain possession and assert a breach of the covenant as a complete defense to an action for rent. Whatever right a tenant may have to terminate his or her liability for *future rent* by abandoning the premises on the ground that they are uninhabitable as a result of the breach of the landlord's covenant to repair is waived by remaining in possession after the breach, unless the tenant was induced to remain by the representations of the landlord that the defects would be repaired.
>
> A mere declaration that the lessee does not intend to continue to occupy the premises, or even a formal tender of possession to the landlord, does not constitute an abandonment within the meaning of any principle of law that will permit a tenant to avoid liability for rent through abandoning the premises upon the breach by the landlord of his or her covenant to repair or to improve the premises. In order for the tenant to avoid liability for rent by asserting a claim

> of abandonment of the premises resulting from the breach of the landlord's covenant to repair, the tenant must actually surrender the premises.

(Emphasis supplied.) 49 Am. Jur. 2d *Landlord and Tenant* § 777 at 638-39 (1995). Ada also notes the following:

> An act of a landlord which deprives the tenant of that beneficial enjoyment of the premises to the tenant is entitled under the lease, causing the tenant to abandon the premises, amounts to a constructive eviction and *suspends liability for rent accruing subsequent to the abandonment.* So, where a landlord, without being guilty of an actual physical disturbance of the tenant's possession, is guilty of such acts as will justify or warrant the tenant in leaving the premises, and the tenant abandons them, then the circumstances which justify such abandonment, taken in connection with the act of abandonment itself, will support a plea of eviction as against an action for rent.
>
> The rule that in order for the tenant to be entitled to assert a constructive eviction, the tenant must abandon the premises applies where the tenant seeks to assert a constructive eviction as a defense to an action for rent. The view generally taken by the authorities is that in order for the lessee to rely upon constructive eviction as a ground for avoiding payment of the rent contracted for, the lessee must surrender or abandon the leased premises. If the tenant makes no surrender of the possession, but continues to occupy after the commission of the acts which would justify leaving, the tenant will be deemed to have waived the right to abandon. It would be unjust to permit the tenant to remain in possession and then escape the payment of rent by pleading a state of facts which, although conferring a right to abandon, had been unaccompanied by the exercise of that right. The rules stated elsewhere as to the time within which a tenant must abandon possession in order to be entitled to assert a constructive eviction apply in determining the right to assert a constructive eviction as a defense to an action for rent.

(Emphasis supplied.) *Id.*, § 734 at 602-03.

While the district court did not make a specific finding that the McDermotts' failure to repair the roof amounted to a

constructive eviction of Keenan Packaging, the court stated, in support of its finding that Keenan Packaging is not liable for the unpaid rent from March to August 1999, that "Keenan [Packaging] had a legitimate reason for withholding rent and vacating the premises because of water damage to [its] products and equipment." We interpret this finding to mean that Keenan Packaging was constructively evicted from the premises by virtue of the McDermotts' failure to repair the roof. Further, implicit in the district court's ruling is a finding that Keenan Packaging abandoned the premises within a reasonable time. The record supports such a finding as well, in that Keenan was induced to remain on the premises for some time after Ada's breach of the lease by the McDermotts' representations that the roof would be repaired. The district court was not clearly wrong in finding that the McDermotts' failure to repair the roof amounted to a constructive eviction of Keenan Packaging and that Keenan Packaging abandoned the premises within a reasonable time of Ada's breach.

[20,21] The district court determined that Keenan Packaging was not liable for rent that accrued prior to the abandonment of the premises. We can find no support for such a position in Nebraska law. In our research, we have found Nebraska cases wherein the lessee of certain real property claimed it was constructively evicted from the leased property and that such constructive eviction absolved it from paying rent after the date of its abandonment of the property. See, *Gehrke v. General Theatre Corp.*, 207 Neb. 301, 298 N.W.2d 773 (1980) (lessee responsible for balance of rent due under lease after lessee vacated premises, because court found no constructive eviction); *Kimball I* (liability for rent subsequent to abandonment not actually discussed because court found lessee was not constructively evicted). See, also, *May v. Marijo Corp.*, 207 Neb. 422, 299 N.W.2d 433 (1980) (affirming jury award of rent due until expiration of lease in constructive eviction case, but not specifying point from which award of rent began). We have found no Nebraska cases which discuss the liability for rent prior to the abandonment of the premises occasioned by constructive eviction. We believe the authority contained in 49 Am. Jur. 2d, *supra*, is a correct analysis of the law in the area of constructive

eviction. We therefore hold that in order for a lessee to rely upon constructive eviction as a ground for avoiding payment of the rent contracted for, the lessee must surrender or abandon the leased premises. We further hold that the constructive eviction of a lessee suspends the lessee's liability for rent accruing subsequent to the abandonment.

We find that the district court erred in excusing Keenan Packaging from the payment of $19,814.19 for rent which accrued prior to Keenan Packaging's abandonment of the premises, i.e., rent for March through August 21, 1999. Accordingly, we reverse that portion of the district court's judgment which dismissed Ada's petition and remand the cause to the district court with instructions to enter judgment in favor of Ada and against Keenan Packaging in the sum of $16,324.19—an amount equal to the unpaid rent which accrued prior to Keenan Packaging's abandonment of the premises less Keenan Packaging's security deposit of $3,490.

CONCLUSION

The district court incorrectly concluded that Ada's breach absolved Keenan Packaging from its obligation to pay rent while it continued to occupy the premises. Accordingly, we reverse that portion of the district court's judgment which dismissed Ada's petition and remand the cause to the district court with directions to enter judgment in favor of Ada and against Keenan Packaging in the sum of $16,324.19—an amount equal to the unpaid rent which accrued prior to Keenan Packaging's abandonment of the premises less Keenan Packaging's security deposit. We affirm the district court's order in all other respects.

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

DIANNE M. McCOMBS, FORMERLY KNOWN AS DIANNE M. LEVELL, APPELLEE, V. DALE RAY HALEY, APPELLEE, AND JOHN C. McCOMBS, APPELLANT.

700 N.W.2d 659

Filed July 26, 2005. No. A-03-1361.

1. **Declaratory Judgments: Courts: Jurisdiction: Parties: Waiver.** The presence of necessary parties in declaratory judgment actions is jurisdictional and cannot be waived, and if such persons are not made parties, then the district court has no jurisdiction to determine the controversy.
2. **Standing: Jurisdiction: Parties.** Standing is a jurisdictional component of a party's case because only a party who has standing may invoke the jurisdiction of a court.
3. **Judgments: Jurisdiction: Appeal and Error.** When a jurisdictional question does not involve a factual dispute, its determination is a matter of law, which requires an appellate court to reach a conclusion independent of the decisions made by the lower courts.
4. **Declaratory Judgments: Parties.** A declaratory judgment action is to declare the rights, status, or other legal relations between the parties.
5. **Declaratory Judgments.** The decision whether to entertain an action for declaratory judgment is within the discretion of the trial court.
6. ____. An action for declaratory judgment does not lie where another equally serviceable remedy is available.
7. **Marriage.** An annulment action can be granted only when one or more of the grounds enumerated in Neb. Rev. Stat. § 42-374 (Reissue 2004) exist.
8. **Declaratory Judgments: Parties.** The statute authorizing declaratory judgments is applicable only where all interested and necessary persons are made parties to the proceeding.
9. **Parties: Words and Phrases.** A necessary or indispensable party has been defined as one who has an interest in the controversy to an extent that such party's absence from the proceedings prevents the court from making a final determination concerning the controversy without affecting such party's interest.
10. ____: ____. A necessary party has been defined as one who may be compelled to respond to the prayer of the plaintiff's petition, and where there is nothing such a one is called upon to do, or can be compelled to do as a duty, one is not a necessary party.
11. **Standing: Jurisdiction: Justiciable Issues.** As an aspect of jurisdiction and justiciability, standing requires that a litigant have such a personal stake in the outcome of a controversy as to warrant invocation of a court's jurisdiction and justify the exercise of the court's remedial powers on the litigant's behalf.
12. **Standing.** In order to have standing to invoke a tribunal's jurisdiction, one must have some legal or equitable right, title, or interest in the subject of the controversy.
13. **Actions: Parties: Standing.** The purpose of a standing inquiry is to determine whether one has a legally protectable interest or right in the controversy that would benefit by the relief to be granted.

Appeal from the District Court for Douglas County: J. MICHAEL COFFEY, Judge. Affirmed.

David J. Lanphier, of Broom, Johnson, Clarkson & Lanphier, for appellant.

James B. McVay, of Tiedeman, Lynch, Kampfe & McVay, for appellee Dianne M. McCombs.

IRWIN, CARLSON, and MOORE, Judges.

CARLSON, Judge.

INTRODUCTION

Pursuant to a declaratory judgment action brought by Dianne M. McCombs, formerly known as Dianne M. Levell, the district court for Douglas County, Nebraska, declared that a purported marriage between Dianne and Dale Ray Haley is null and void. John C. McCombs filed a motion asking the trial court to grant a new trial or to set aside said judgment, alleging that the court did not have jurisdiction over Dianne's declaratory judgment action. The trial court overruled John's motion, finding that John was not a necessary party to the declaratory judgment action and that he did not have standing to make such a motion. We affirm.

BACKGROUND

Dianne filed a declaratory judgment action on February 26, 2003, asking the court to declare the purported marriage between her and Dale to be null and void. Trial was held on the declaratory judgment action on April 24. Dianne testified that she met Dale in 1969 while she was living in Nebraska. In September 1975, Dale was serving time in prison in Leavenworth, Kansas. At that time, Dianne and Dale entered into an arrangement in which Dianne agreed to be Dale's wife "on paper" so that the parole board would believe he had a wife and son to come home to when he was released. Dianne and an individual named David Harpster obtained a marriage license in Dianne's and Dale's names from the "Clerk's office" in Lancaster County, Nebraska. In obtaining the license, Harpster represented to the clerk's office that he was Dale. Dale never appeared before the clerk to obtain

the license; nor had he authorized Harpster to act on his behalf. On September 29, 1975, Dianne and Harpster, again representing himself as Dale, participated in a marriage ceremony in Lancaster County. At the time the ceremony took place, Dale was still in prison in Leavenworth, Kansas.

Dianne testified that when she and Harpster obtained the marriage license and went through the marriage ceremony, she did not intend to actually be Dale's wife. Dianne testified that she never expected she and Dale would live together as husband and wife and that they never did. She further testified that she and Dale never consummated the purported marriage and that she saw Dale only one time between 1977, when Dale was released from prison, and 1978, when she moved out of Nebraska. She had no contact with him after moving out of Nebraska until she contacted him about the declaratory judgment action.

Dale entered a voluntary appearance and did not appear at the trial. Dale's testimony was presented in the form of an affidavit and was consistent with Dianne's testimony. It further stated that he did not give Harpster any authority to obtain a marriage license on his behalf or to participate in a marriage ceremony on his behalf and that it was not his intention to enter into a marital relationship with Dianne. A stipulation signed by both parties was also entered as evidence which set forth facts consistent with Dianne's testimony and Dale's affidavit.

At the conclusion of the trial, the trial court found that Dianne's petition should be granted because Dianne and Dale never actually entered into their purported marriage. The court declared that the purported marriage was "null and void ab initio, from the beginning." The trial court entered an order to this effect on April 28, 2003.

On April 30, 2003, John filed a motion for new trial or to set aside the judgment, alleging that he had standing to bring such motion as a real party in interest because an action was pending in a Florida court concerning the validity of a marriage between him and Dianne. The motion stated that the validity of the purported marriage between Dianne and Dale is material and relevant to the marriage at issue in the Florida action. The motion further alleged that neither Dianne nor Dale is a Nebraska resident as required by Nebraska law for the court to have jurisdiction in

an annulment action. John did not file a motion to intervene in the original action.

A hearing on John's motion was held on May 30, 2003. John offered certain exhibits in support of his position. The trial court reserved ruling on the admission of John's exhibits at the time they were offered. There is no indication in the record that the court ever ruled on their admission, and thus, there is no indication that the exhibits were ever received into evidence. The trial court overruled John's motion, finding that it had jurisdiction to declare Dianne and Dale's purported marriage null and void and that John was not a necessary party to the action and did not have standing to move for a new trial.

ASSIGNMENTS OF ERROR

John assigns that the trial court erred in (1) decreeing an annulment in the absence of subject matter jurisdiction, (2) determining that granting an annulment under the Uniform Declaratory Judgments Act waives the statutory requirements for subject matter jurisdiction for an annulment, (3) excluding the exhibits he offered, (4) determining that he lacked standing to contest the annulment, and (5) refusing to vacate the annulment.

STANDARD OF REVIEW

[1] The presence of necessary parties in declaratory judgment actions is jurisdictional and cannot be waived, and if such persons are not made parties, then the district court has no jurisdiction to determine the controversy. See, *Dunn v. Daub*, 259 Neb. 559, 611 N.W.2d 97 (2000); *Taylor Oil Co. v. Retikis*, 254 Neb. 275, 575 N.W.2d 870 (1998).

[2] Standing is a jurisdictional component of a party's case because only a party who has standing may invoke the jurisdiction of a court. See, *Mutual Group U.S. v. Higgins*, 259 Neb. 616, 611 N.W.2d 404 (2000); *Rozmus v. Rozmus*, 257 Neb. 142, 595 N.W.2d 893 (1999).

[3] When a jurisdictional question does not involve a factual dispute, its determination is a matter of law, which requires an appellate court to reach a conclusion independent of the decisions made by the lower courts. *Ruzicka v. Ruzicka*, 262 Neb. 824, 635 N.W.2d 528 (2001); *Nebraska Nutrients v. Shepherd*, 261 Neb. 723, 626 N.W.2d 472 (2001).

ANALYSIS

[4,5] We first address whether the trial court properly exercised its jurisdiction over Dianne's declaratory judgment action to clarify her marital status relative to Dale. A declaratory judgment action is to declare the rights, status, or other legal relations between the parties. Neb. Rev. Stat. § 25-21,149 (Reissue 1995); *Bentley v. School Dist. No. 025*, 255 Neb. 404, 586 N.W.2d 306 (1998). As the trial court found, § 25-21,149 does not set forth the subject matters which are appropriate for such actions. Thus, the decision whether to entertain an action for declaratory judgment is within the discretion of the trial court. *State Farm Mut. Auto. Ins. Co. v. Allstate Ins. Co.*, 268 Neb. 439, 684 N.W.2d 14 (2004); *Continental Western Ins. Co. v. Farm Bureau Ins. Co.*, 2 Neb. App. 527, 511 N.W.2d 559 (1994).

There is authority which holds that the marital status of parties is a proper subject for declaratory relief. 26 C.J.S. *Declaratory Judgments* § 38(a) (1956). "Under statutes providing for declaratory judgments, a declaration as to the marital status of the parties is contemplated, where an actual, justiciable controversy exists." *Id.* at 116. Further, 22A Am. Jur. 2d *Declaratory Judgments* § 173 at 740 (2003) states in part:

> Declaratory judgments may be used to determine marital status and rights incident thereto; however an action for declaratory judgment cannot be used by a party to obtain a divorce or annulment, or to entertain actions for declaratory relief where the state has no interest or concern with the marital status questioned.

It is clear that the State of Nebraska has sufficient interest and concern in the status of the purported marriage between Dianne and Dale to allow the trial court to entertain the declaratory judgment action. The purported marriage between Dianne and Dale occurred in Nebraska, and Dianne was a resident of Nebraska at the time.

[6,7] We further recognize that Dianne did not have a remedy, other than a declaratory judgment action, available to her. An action for declaratory judgment does not lie where another equally serviceable remedy is available. *Northwall v. State*, 263 Neb. 1, 637 N.W.2d 890 (2002); *Galyen v. Balka*, 253 Neb. 270, 570 N.W.2d 519 (1997). Dianne did not have an equally

serviceable remedy available to her, as she could not file an action for an annulment. Dianne could not satisfy the residency requirement for an annulment, which requires that the plaintiff be a resident of the county in which the complaint is filed. See Neb. Rev. Stat. § 42-373 (Reissue 2004). Dianne was not a resident of Nebraska when she filed her declaratory judgment action. Further, none of the grounds for an annulment listed in Neb. Rev. Stat. § 42-374 (Reissue 2004) apply to Dianne's purported marriage to Dale. The grounds under that statute include the following: (1) The marriage between the parties is prohibited by law, (2) either party is impotent at the time of the marriage, (3) either party had a spouse living at the time of the marriage, (4) either party was mentally ill or a person with mental retardation at the time of marriage, or (5) force or fraud. An annulment action can be granted only when one or more of the grounds enumerated in § 42-374 exist. See *Guggenmos v. Guggenmos*, 218 Neb. 746, 359 N.W.2d 87 (1984). Therefore, based on the above analysis and the circumstances in the present case, we determine that the trial court did not abuse its discretion in entertaining jurisdiction over Dianne's declaratory judgment action.

We next consider whether John was a necessary party to the declaratory judgment action between Dianne and Dale. The trial court concluded that John was not a necessary party to the declaratory judgment action and that he did not have standing to move for a new trial. The presence of necessary parties in declaratory judgment actions is jurisdictional and cannot be waived, and if such persons are not made parties, then the district court has no jurisdiction to determine the controversy. See, *Dunn v. Daub*, 259 Neb. 559, 611 N.W.2d 97 (2000); *Taylor Oil Co. v. Retikis*, 254 Neb. 275, 575 N.W.2d 870 (1998). If John was a necessary party, the trial court did not have jurisdiction to declare the purported marriage between Dianne and Dale null and void.

[8] Neb. Rev. Stat. § 25-21,159 (Cum. Supp. 2004) provides in part: "When declaratory relief is sought, all persons shall be made parties who have or claim any interest which would be affected by the declaration, and no declaration shall prejudice the rights of persons not parties to the proceeding." The Nebraska

Supreme Court has held on numerous occasions that the statute authorizing declaratory judgments is applicable only where all interested and necessary persons are made parties to the proceeding. *Dunn v. Daub, supra*; *Taylor Oil Co. v. Retikis, supra.*

[9,10] A necessary or indispensable party has been defined as one who has an interest in the controversy to an extent that such party's absence from the proceedings prevents the court from making a final determination concerning the controversy without affecting such party's interest. *Id.* A necessary party has also been defined as one who may be compelled to respond to the prayer of the plaintiff's petition, and where there is nothing such a one is called upon to do, or can be compelled to do as a duty, one is not a necessary party. See, *Calabro v. City of Omaha*, 247 Neb. 955, 531 N.W.2d 541 (1995); *State ex rel. Stenberg v. Murphy*, 247 Neb. 358, 527 N.W.2d 185 (1995).

John's counsel argued to the trial court that John was a necessary party because the order declaring the purported marriage between Dianne and Dale null and void could adversely affect his interest in the pending Florida action between him and Dianne. At the hearing on John's motion, John offered certain exhibits to support his position that he was a necessary party. The exhibits were marked for identification, but the trial court reserved ruling on the exhibits at the time they were offered. The record does not show that the trial court ever ruled on the admissibility of John's exhibits or that an offer of proof was ever made. Therefore, based on the record before us, the exhibits were not received into evidence and were not considered by the trial court. Thus, we do not consider any of the exhibits on appeal. See *Morrison Enters. v. Aetna Cas. & Surety Co.*, 260 Neb. 634, 619 N.W.2d 432 (2000). Further, John did not testify at the hearing on his motion. As such, there was no evidence before the trial court to support John's position that he was a necessary party.

John failed to show that his absence from the declaratory judgment action prevented the court from making a final determination of the status of Dianne and Dale's purported marriage without affecting John's interest. Further, there is nothing John can be "called upon to do, or can be compelled to do as a duty" as a result of the court's order declaring the purported marriage

null and void. See *Calabro v. City of Omaha*, 247 Neb. at 974, 531 N.W.2d at 554. We conclude on this record that John was not a necessary party to the declaratory judgment action pursuant to § 25-21,159. The trial court made a complete determination of the status of the purported marriage between Dianne and Dale without John's being included as a party to the action.

The trial court also found that John did not have standing to move for a new trial or for the judgment to be set aside in the declaratory judgment action. Having determined that John was not a necessary party to the declaratory judgment action, we conclude that it logically follows that he did not have standing to challenge the court's order declaring Dianne and Dale's purported marriage null and void.

Standing is a jurisdictional component of a party's case because only a party who has standing may invoke the jurisdiction of a court. *Governor's Policy Research Office v. KN Energy*, 264 Neb. 924, 652 N.W.2d 865 (2002); *Miller v. City of Omaha*, 260 Neb. 507, 618 N.W.2d 628 (2000).

[11,12] As an aspect of jurisdiction and justiciability, standing requires that a litigant have such a personal stake in the outcome of a controversy as to warrant invocation of a court's jurisdiction and justify the exercise of the court's remedial powers on the litigant's behalf. *Chambers v. Lautenbaugh*, 263 Neb. 920, 644 N.W.2d 540 (2002); *State ex rel. Steinke v. Lautenbaugh*, 263 Neb. 652, 642 N.W.2d 132 (2002). In order to have standing to invoke a tribunal's jurisdiction, one must have some legal or equitable right, title, or interest in the subject of the controversy. *Id.*

[13] The purpose of a standing inquiry is to determine whether one has a legally protectable interest or right in the controversy that would benefit by the relief to be granted. *Mutual Group U.S. v. Higgins*, 259 Neb. 616, 611 N.W.2d 404 (2000); *Hawkes v. Lewis*, 255 Neb. 447, 586 N.W.2d 430 (1998).

Based on the requirements for standing and given our conclusion that John was not a necessary party, John did not have standing to bring a motion for new trial or for the judgment to be set aside, challenging the court's order declaring the purported marriage between Dianne and Dale null and void. The sole issue presented to the trial court was the validity of the purported marriage between Dianne and Dale. As to this single

issue, the only persons who had a legally protectable interest or right in the controversy were Dianne and Dale. The trial court's ruling regarding Dianne and Dale's purported marriage may affect the outcome of the pending litigation between Dianne and John in Florida. However, such a possibility does not equate to John's having a legally protectable interest or right in the controversy between Dianne and Dale.

Having concluded that John was not a necessary party and that he did not have standing to bring a motion challenging the court's order in the declaratory judgment action, we need not address his remaining assignments of error. See *Rush v. Wilder*, 263 Neb. 910, 644 N.W.2d 151 (2002) (appellate court is not obligated to engage in analysis which is not needed to adjudicate case and controversy before it).

Finally, Dianne has requested an award of attorney fees in this appeal. Neb. Ct. R. of Prac. 9F (rev. 2001) requires that

> [a]ny person who claims the right . . . to an attorney fee in a civil case appealed to the Supreme Court or the Court of Appeals must file a motion for the allowance of such a fee supported by an affidavit which justifies the amount of the fee sought for services in the appellate court.

Upon Dianne's compliance with rule 9F, we will render a decision on Dianne's request for attorney fees for this appeal.

CONCLUSION

We conclude that the trial court did not abuse its discretion in entertaining jurisdiction over Dianne's declaratory judgment action. We further conclude that John was not a necessary party to the declaratory judgment action and that John did not have standing to bring a motion for new trial or to set aside the judgment, challenging the trial court's order declaring the purported marriage between Dianne and Dale null and void. Accordingly, the trial court's order overruling John's motion for new trial or to set aside the judgment is affirmed.

AFFIRMED.

STEVE NIELSEN ET AL., APPELLANTS, V. DONALD E. NIELSEN AND CLARENCE MOCK, APPELLEES.

700 N.W.2d 675

Filed July 26, 2005. No. A-04-615.

1. **Standing: Jurisdiction.** Because the requirement of standing is fundamental to a court's exercising jurisdiction, a litigant or court before which a case is pending can raise the question of standing at any time during the proceeding.
2. **Standing: Words and Phrases.** Standing is the legal or equitable right, title, or interest in the subject matter of the controversy which entitles a party to invoke the jurisdiction of the court.
3. **Standing: Jurisdiction.** Standing relates to a court's power, that is, jurisdiction, to address the issues presented and serves to identify those disputes which are appropriately resolved through the judicial process.
4. **Standing: Jurisdiction: Parties.** Standing is a jurisdictional component of a party's case because only a party who has standing may invoke the jurisdiction of a court.
5. **Standing.** The purpose of an inquiry as to standing is to determine whether one has a legally protectable interest or right in the controversy that would benefit by the relief to be granted.
6. **Standing: Claims: Parties.** In order to have standing, a litigant must assert the litigant's own legal rights and interests and cannot rest his or her claim on the legal rights or interests of third parties.
7. **Standing: Jurisdiction: Justiciable Issues.** As an aspect of jurisdiction and justiciability, standing requires that a litigant have such a personal stake in the outcome of a controversy as to warrant invocation of a court's jurisdiction and justify the exercise of the court's remedial powers on the litigant's behalf.
8. **Standing: Divorce: Property Settlement Agreements.** Generally, adult children do not have a legally protectable interest or a personal stake in the outcome of their parents' divorce and/or property settlement agreement so as to give them standing to challenge a parent's divorce decree.
9. **Decedents' Estates: Standing: Jurisdiction.** Except as to proceedings which do not survive the death of the decedent, a personal representative of a decedent domiciled in this state at his or her death has the same standing to sue and be sued in the courts of this state and the courts of any other jurisdiction as his or her decedent had immediately prior to death.
10. **Decedents' Estates: Executors and Administrators: Actions.** Where an executor or administrator has been guilty of fraud or collusion with the party to be sued, or, more generally, where the interests of the personal representative are antagonistic to those of the heirs or distributees, the heirs or distributees may maintain actions relating to the personalty of the estate in their own names. Similarly, when the legal representative has failed or refused to act, the heir may maintain an action to recover assets for the benefit of the estate.
11. **Judicial Notice: Records: Appeal and Error.** An appellate court may take judicial notice of its records, proceedings, and judgments in a prior related case when the issues are interwoven and interdependent and the controversy has been considered and determined in the prior action.

Appeal from the District Court for Cuming County: ROBERT B. ENSZ, Judge. Reversed and remanded with directions to dismiss.

Richard J. Thramer for appellants.

Mark D. Fitzgerald, of Fitzgerald, Vetter & Temple, for appellee Donald E. Nielsen.

Clarence E. Mock and Matthew M. Munderloh, of Johnson & Mock, for appellee Clarence Mock.

INBODY, Chief Judge, and SIEVERS and CASSEL, Judges.

SIEVERS, Judge.

Steve Nielsen, Michael Nielsen, Don Duane Nielsen, and the Estate of Barbara Jean Nielsen appeal from the decision of the district court for Cuming County granting summary judgment in favor of Donald E. Nielsen and Clarence Mock. We do not reach the merits of the summary judgment, because we find that the plaintiffs-appellants lack standing.

FACTUAL AND PROCEDURAL BACKGROUND

Donald E. Nielsen (Donald) and Barbara Jean Nielsen (Barbara) were married on June 29, 1951, in Blair, Nebraska. During the marriage, three children were born: Don Duane, Steve, and Michael. On September 6, 1989, Barbara filed a petition for dissolution of marriage, and her amended petition was filed on October 16. On November 20, 1989, the divorce decree was entered, in which the court approved the property settlement agreement entered into by Donald and Barbara. Also on November 20, and pursuant to the property settlement, Barbara received a lump-sum payment of $625,000 from Donald. During the divorce, Donald was represented by his longtime attorney, Mock, and Barbara was represented by William Line. At the time of the decree, Barbara had terminal cancer, and she died of complications related to such cancer on July 24, 1990.

On November 13, 2003, Steve, Michael, Don Duane, and the Estate of Barbara Jean Nielsen (hereinafter collectively referred to as "Plaintiffs") filed a petition against Donald and Mock. Plaintiffs alleged that Steve, Michael, and Don Duane are the

only heirs pursuant to the will of Barbara and that each was to receive an equal share of her estate, which the record shows was executed on November 20, 1989—the same day as the divorce. In count I of the petition, Plaintiffs alleged that during the course of her marriage to Donald, Barbara was never fully informed as to the value and type of investments composing the marital estate. Plaintiffs also alleged that after filing the petition for dissolution of marriage, Donald conspired with others (including Mock and Line) to conceal from Barbara and the court the actual value and extent of the entire marital estate in an effort to procure Barbara's acquiescence to a proposed distribution of the marital estate. Plaintiffs alleged that at all relevant times, Barbara was suffering from terminal cancer, and that she relied solely upon the fraudulent representation of the value of the marital estate and upon the advice of her counsel, Line, with regard to the truth of Donald's representations. Plaintiffs alleged that unbeknownst to Barbara, said representations as to the value of the marital estate were false, and known to be false by Donald, Mock, and Line, who had agreed to and entered into a plan to defraud Barbara as to the value of the marital estate. Plaintiffs alleged that Donald and Mock obtained an agreement of compliance with Barbara's attorney, Line, in furtherance of their scheme to defraud Barbara, through the payment of $25,000, of which $10,000 was paid to Line in cash at the direction of Donald and the remaining $15,000 was paid to Line through the award of attorney fees. Plaintiffs alleged that such amount bore no justification to the billable hours expended by Line.

Plaintiffs also alleged that Rod Zwygart, a certified public accountant and the personal accountant of Donald and Barbara, periodically, at Donald's request, prepared statements of assets and liabilities of Donald, which statements reflected only the cost of said assets and reflected only the assets which were disclosed to Zwygart by Donald or directed to be included by Donald, but that the actual assets of Donald greatly exceeded those of which were disclosed to Zwygart. Plaintiffs alleged that the financial statement presented to Barbara, and relied upon by her in the formulation of her decision to accept the proposed stipulation and property settlement agreement, was based largely upon a cost accounting method of the disclosed assets and was

not reflective of their true fair market value and that the financial statement did not contain an accurate statement of the entire marital estate. The pleading further alleged that such false and misleading financial information was presented to Barbara as fair and accurate valuations of the entire marital estate and that Barbara accepted Donald's settlement proposal based upon such false and misleading information and without the independent advice of counsel because Line had accepted $10,000 in cash from Donald and was to be paid $15,000 in attorney fees. It is alleged that the first time Plaintiffs became aware of the conspiracy to defraud Barbara was after a meeting in December 2001, requested by Zwygart, in which Zwygart revealed such to Don Duane.

Plaintiffs alleged that Barbara's divorce from Donald was procured by fraud and that Donald concealed from Barbara and the court the true value and extent of the marital estate in order to effectuate a decree incorporating Donald and Barbara's property settlement agreement, which was procured through the use of bribery, deceit, misrepresentation, concealment of assets, and fraud.

In count II of the petition, Plaintiffs alleged that Steve, Michael, and Don Duane are the only heirs to the estate of Barbara and that prior to her filing the petition for dissolution of marriage, Barbara executed a last will and testament specifically disinheriting Donald and leaving her entire estate to Donald and Barbara's three sons. As said, the record shows the date of her will to be November 20, 1989. Plaintiffs alleged that the intent of Donald in perpetrating the fraud upon Barbara was to prevent the effective distribution of her interest in the marital estate to their three sons, as set forth in her last will and testament. Plaintiffs alleged that the intent of Donald, Mock, and Line was not only to deny Barbara her rightful share of the marital estate, but also to deny Steve, Michael, and Don Duane the benefits as set forth in Barbara's last will and testament. Plaintiffs alleged that by virtue of the conspiracy, Steve, Michael, and Don Duane were deprived of their rightful shares of Barbara's estate, resulting in damages, including loss of enjoyment of life, loss of educational opportunities, loss of the use and economic benefits derived from their rightful inheritance, and prejudgment interest.

Plaintiffs requested judgment against Donald and Mock "on Count I for determination by the Court of a fair and equitable distribution of the marital estate, said sum to be in excess of $20,000,000.00, and on Count II, a sum determined by the Court to fairly and adequately compensate Plaintiff[s] in an amount to be determined."

On February 23, 2004, Mock filed a motion for summary judgment, alleging that "there is no genuine issue as to any material fact and [he] is entitled to judgment as a matter of law." On February 26, Donald filed his motion for summary judgment, also alleging that "there is no genuine issue or conflict as to any material fact and [he] is entitled to judgment as a matter of law." On March 3, Plaintiffs filed separate resistances to the motions for summary judgment, the details of which are not germane to our resolution of this appeal. A hearing on the motions for summary judgment was held on March 4 and continued on April 1. Both motions were heard together because the evidence was the same in both. Subsequent to the April 1 hearing, Donald and Mock submitted written objections to the exhibits.

The district court's order was filed on May 6, 2004. The district court granted both Mock's and Donald's motions for summary judgment, finding that there was no genuine issue shown by the evidence as to reliance by Barbara upon any statement made by Mock, that the undisputed evidence contravened any claim of fraudulent misrepresentation by Donald, and that the evidence disclosed no underlying tort as would be required by a theory of civil conspiracy between Donald and Mock. Plaintiffs now appeal.

ASSIGNMENTS OF ERROR

Plaintiffs' assignments of error generally contend that the trial court wrongfully entered summary judgment, but because we find a lack of standing, we do not detail such assignments.

ANALYSIS

[1-7] Before we can reach the merits of this case, we must determine whether Plaintiffs have standing to invoke the court's jurisdiction. Standing was raised for the first time on appeal; however, "[b]ecause the requirement of standing is fundamental to a court's exercising jurisdiction, a litigant or court before

which a case is pending can raise the question of standing at any time during the proceeding." *Mutual Group U.S. v. Higgins*, 259 Neb. 616, 619, 611 N.W.2d 404, 408 (2000).

> Standing is the legal or equitable right, title, or interest in the subject matter of the controversy which entitles a party to invoke the jurisdiction of the court. *Crosby v. Luehrs, supra*; *Hradecky v. State*, 264 Neb. 771, 652 N.W.2d 277 (2002). Standing relates to a court's power, that is, jurisdiction, to address the issues presented and serves to identify those disputes which are appropriately resolved through the judicial process. *Governor's Policy Research Office v. KN Energy*, 264 Neb. 924, 652 N.W.2d 865 (2002); *Mutual Group U.S. v. Higgins*, 259 Neb. 616, 611 N.W.2d 404 (2000). Standing is a jurisdictional component of a party's case because only a party who has standing may invoke the jurisdiction of a court. *Governor's Policy Research Office v. KN Energy, supra*; *Miller v. City of Omaha*, 260 Neb. 507, 618 N.W.2d 628 (2000).
>
> The purpose of an inquiry as to standing is to determine whether one has a legally protectable interest or right in the controversy that would benefit by the relief to be granted. *Crosby v. Luehrs, supra*; *Hradecky v. State, supra*. In order to have standing, a litigant must assert the litigant's own legal rights and interests and cannot rest his or her claim on the legal rights or interests of third parties. *Id.* The litigant must have some legal or equitable right, title, or interest in the subject of the controversy. See, *Crosby v. Luehrs, supra*; *Chambers v. Lautenbaugh*, 263 Neb. 920, 644 N.W.2d 540 (2002).

Adam v. City of Hastings, 267 Neb. 641, 646, 676 N.W.2d 710, 714 (2004). "As an aspect of jurisdiction and justiciability, standing requires that a litigant have such a personal stake in the outcome of a controversy as to warrant invocation of a court's jurisdiction and justify the exercise of the court's remedial powers on the litigant's behalf." *Mutual Group U.S. v. Higgins*, 259 Neb. at 619, 611 N.W.2d at 408.

The essence of the claim presented here is that the sons of Donald and Barbara challenge, and seek to overturn, the judgment which dissolved their parents' marriage and approved the

property settlement agreement entered into by Donald and Barbara. The claim, to some extent, seeks to masquerade as a claim for fraudulent deprivation of the sons' "rightful inheritance," predicated upon the allegation that the property settlement approved by the trial court was obtained by fraud. See *Colson v. Colson*, 215 Neb. 452, 339 N.W.2d 280 (1983). See, also, *Klabunde v. Klabunde*, 194 Neb. 681, 234 N.W.2d 837 (1975) (when party to divorce action, represented by counsel, voluntarily executes property settlement agreement which is approved by court and incorporated into divorce decree from which no appeal is taken, ordinarily decree will not thereafter be vacated or modified as to such property provisions, in absence of fraud or gross inequity).

Barbara's will gave each of the three sons an equal share of whatever she owned at her death. What she owned at the time of her death included whatever was left of her share of the marital estate received in the district court's judgment of November 20, 1989. Thus, if the sons' inheritance is to change, it follows that the divorce decree must be found to have been procured by fraud, or grossly inequitable. Therefore, the crucial question is whether a child of a marriage, individually as opposed to acting in a representative capacity, can collaterally attack his or her parents' divorce decree because the child's inheritance was reduced because of alleged fraud in the procurement of the settlement and decree. We suggest that the answer becomes rather self-evident if one asks who would have standing to attack the decree for fraud in the procurement thereof, if Barbara were alive? Clearly, in such circumstances, only Barbara would have standing, and it follows that in the present fact situation, only Barbara's estate, acting through the personal representative, has standing.

[8,9] We hold that generally, adult children do not have a "legally protectable interest" or a "personal stake in the outcome" of their parents' divorce and/or property settlement agreement so as to give them standing to challenge a parent's divorce decree. The claim is that Barbara was "shortchanged" by fraud in the divorce, resulting in her estate's being less than it should have been upon her death. Neb. Rev. Stat. § 30-2464 (Cum. Supp. 2002) provides that except as to proceedings which do not survive the death of the decedent, a personal representative of a

decedent domiciled in this state at his or her death has the same standing to sue and be sued in the courts of this state and the courts of any other jurisdiction as his or her decedent had immediately prior to death. Thus, the claim of fraud in the procurement of the settlement and decree was Barbara's until her death, and then it became a cause of action to be brought by her personal representative. See *Tecumseh Nat. Bank v. McGee*, 61 Neb. 709, 85 N.W. 949 (1901) (claim for payment of deposit of decedent is normally to be brought by representative, but in limited circumstances, claim may be pursued by heir).

The exceptions outlined in *Tecumseh Nat. Bank v. McGee* arose in a suit by George Harmon for return of a $5,000 bank deposit. A decision adverse to Harmon was reversed by the Nebraska Supreme Court, but before the action could be tried again, Harmon died. The action was revived and pursued by the administrator of Harmon's estate, who ultimately settled it for $800—$200 apiece for each of four heirs. But, one heir did not agree to the settlement, refused the money, and sued in her individual capacity.

[10] The Nebraska Supreme Court in *McGee* delineated limited circumstances under which an action to collect a debt due the estate could be brought directly by an heir as an exception to the general rule that such claim must be brought by the administrator. The *McGee* court defined those circumstances as those where there are no demands from creditors, there has been no administration, or the administration has closed. However, the *McGee* rule was modified in *Mead Co. v. Doerfler*, 146 Neb. 21, 27, 18 N.W.2d 524, 527 (1945), where the court discussed the exception, and a number of other cases, and concluded as follows:

> We think the reasoning supporting the exception already recognized inevitably points to a pronouncement that this court will recognize an exception where the representative of the deceased has failed, neglected and refused to prosecute action on behalf of the estate for the benefit of interested parties provided that the administrator is made a party to the action.

In *Beachy v. Becerra*, 259 Neb. 299, 304, 609 N.W.2d 648, 652 (2000), the Supreme Court quoted with approval from 31 Am. Jur. 2d *Executors and Administrators* § 1285 (1989):

> "[W]here the executor or administrator has been guilty of fraud o[r] collusion with the party to be sued, or, more generally, where the interests of the personal representative are antagonistic to those of the heirs or distributees, the heirs or distributees may maintain actions relating to the personalty of the estate in their own names. Similarly, when the legal representative has failed or refused to act, the heir may maintain an action to recover assets for the benefit of the estate."

In *Beachy v. Becerra, supra*, the decedent's niece brought an action against the decedent's personal representative, Mary Becerra, and Becerra's husband to recover property wrongfully transferred by the decedent during her lifetime. While the trial court sustained Becerra's demurrer, the Nebraska Supreme Court found that the issue of whether the niece had standing to bring an action on behalf of the estate was rendered moot by the initiation of the same action against Becerra by the successor personal representative. Therefore, the appeal was dismissed. See, also, *Hampshire v. Powell*, 10 Neb. App. 148, 626 N.W.2d 620 (2001) (as general rule, personal representative is proper person to proceed for recovery of assets of estate).

[11] An appellate court may take judicial notice of its records, proceedings, and judgments in a prior related case when the issues are "interwoven and interdependent" and the controversy has been considered and determined in the prior action. See *Baltensperger v. United States Dept. of Ag.*, 250 Neb. 216, 220, 548 N.W.2d 733, 736 (1996). We have released our opinion this same day in *Nielsen v. Nielsen*, No. A-04-894, 2005 WL 1719731 (Neb. App. July 26, 2005) (not designated for permanent publication), a lawsuit brought by Barbara's personal representative claiming that Donald defrauded Barbara in the procurement of the property settlement agreement by hiding and failing to disclose the extent of the marital estate—which in turn resulted in Steve, Michael, and Don Duane's not receiving the inheritance from Barbara that they should have absent such fraud. Not only are the cases interrelated, they are the same, because *Nielsen v. Nielsen, supra*, is brought by Barbara's personal representative for the benefit of Barbara's heirs—who the record shows were limited to Steve, Michael, and Don Duane.

For the sake of completeness, we note that Neb. Rev. Stat. § 30-2401 (Reissue 1995) states, in pertinent part, "Upon the death of a person, his [or her] real and personal property devolves to the persons to whom it is devised by his [or her] last will . . . subject to . . . administration." As we have judicially noticed, Barbara's personal representative is pursuing the lawsuit in *Nielsen v. Nielsen, supra*, thereby subjecting it to administration. Therefore, § 30-2401 provides no standing in the instant case to Steve and Michael, or to Don Duane in his capacity as a devisee of Barbara's will.

Accordingly, it is abundantly clear that Donald and Barbara's three sons lack standing to bring this action, because it has also been brought by Don Duane in his capacity as personal representative. The fact that Donald's attorney, Mock, was sued here but not in the lawsuit brought by the personal representative is of no consequence, because the issue which is dispositive is whether these plaintiffs have standing to sue to recover on behalf of Barbara's estate, not who they sued. And, the sons and heirs do not have standing, as detailed above.

We note that the "Estate of Barbara Jean Nielsen" is also named as a plaintiff-appellant. However, the "Estate" can only act in Barbara's stead in bringing claims she had at the time of her death by and through the estate's personal representative—and in this case, Don Duane is not proceeding as the representative, but individually. Thus, while the "Estate" is a named party, it is not the proper party—the personal representative is, and he is bringing this claim in *Nielsen v. Nielsen, supra.*

The second count of Plaintiffs' petition in this case is that Steve, Michael, and Don Duane were deprived of their "rightful shares" of Barbara's estate; however, such claim is necessarily predicated on success in changing the decree in *Nielsen v. Nielsen, supra*. In other words, if the estate does not succeed in enlarging Barbara's estate in *Nielsen v. Nielsen, supra*, count II of this lawsuit is meaningless, and because Steve, Michael, and Don Duane, individually, do not have the requisite standing to contest Barbara's divorce from Donald, or whether her estate should have been larger, they lack standing to assert count II, assuming without deciding that it is really any different from count I.

CONCLUSION

For the reasons stated above, we reverse, and remand the cause to the trial court with directions to vacate its findings and summary judgment in favor of Donald and Mock and to dismiss the action, because Plaintiffs lack standing to bring this suit.

REVERSED AND REMANDED WITH DIRECTIONS TO DISMISS.

IN RE INTEREST OF CHRISTOPHER R., A CHILD UNDER 18 YEARS OF AGE. STATE OF NEBRASKA, APPELLEE, V. CHRISTOPHER R., APPELLEE, AND NEBRASKA DEPARTMENT OF HEALTH AND HUMAN SERVICES, OFFICE OF JUVENILE SERVICES, APPELLANT.

700 N.W.2d 668

Filed July 26, 2005. No. A-04-1065.

1. **Juvenile Courts: Evidence: Appeal and Error.** Juvenile cases are reviewed de novo on the record, and an appellate court is required to reach a conclusion independent of the juvenile court's findings. When the evidence is in conflict, however, an appellate court may give weight to the fact that the lower court observed the witnesses and accepted one version of the facts over the other.
2. **Evidence: Appeal and Error.** When the evidence is in conflict, an appellate court may give weight to the fact that the lower court observed the witnesses and accepted one version of the facts over the other.
3. **Juvenile Courts: Appeal and Error.** Juvenile cases are reviewed de novo on the record, and an appellate court is required to reach a conclusion independent of the juvenile court's findings.

Appeal from the County Court for Scotts Bluff County: G. GLENN CAMERER, Judge. Reversed and remanded with directions.

Robert E. Wheeler, Special Assistant Attorney General, for appellant.

Brian J. Lockwood, Deputy Scotts Bluff County Public Defender, for appellee Christopher R.

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

CARLSON, Judge.

INTRODUCTION

The Nebraska Department of Health and Human Services, Office of Juvenile Services (OJS), appeals from an order of the county court for Scotts Bluff County, sitting as a juvenile court. In that order, the juvenile court denied OJS' request for a higher level of treatment for Christopher R., who had previously been adjudicated for the sexual abuse of minors and had been receiving treatment at the Lincoln Regional Center (LRC). The court ordered that Christopher be returned to his parents' care and overruled OJS' motion to discharge Christopher from OJS' custody. For the reasons set forth below, we reverse, and remand with directions.

BACKGROUND

On May 3, 2002, the deputy county attorney for Scotts Bluff County filed a petition alleging that in 1999 or 2000, Christopher, born October 7, 1988, attempted to subject M.A., a minor, to sexual penetration without M.A.'s consent. The petition also stated that in September 2001, Christopher subjected D.K., also a minor, to sexual penetration without D.K.'s consent.

An affidavit of probable cause filed by the Gering Police Department stated that both M.A. and D.K. indicated to officers that Christopher had inserted his finger into their rectums. One of the minors also stated that Christopher had held him down by force on a bed and forced his penis into the minor's rectum, ejaculating onto his buttocks. The affidavit further stated that there was a potential third victim, who had not yet been interviewed at the time the affidavit was made.

Also on May 3, 2002, the juvenile court adjudicated Christopher as a minor within the meaning of Neb. Rev. Stat. § 43-247(2) and (3)(b) (Cum. Supp. 2002) upon Christopher's admission of the allegations against him.

On August 28, 2002, a dispositional hearing was held and the court placed Christopher in the care, custody, and control of OJS for direct supervision and further placement. Christopher was then placed at LRC for sexual offender treatment. In November 2003, Christopher moved to a treatment group home called the Whitehall Sex Offender Program (Whitehall) at LRC.

On April 29, 2004, a psychiatrist and a licensed mental health provider with Whitehall jointly wrote a letter to the juvenile court on behalf of the treatment team at Whitehall. In that letter, they stated that Christopher had moved to Whitehall in November 2003 and had sexually assaulted two same-age male peers and one 10-year-old female. The letter also stated that while in treatment, Christopher disclosed that he had assaulted two male cousins, ages 2 and 6, and a female cousin, age 12. The letter indicated that Christopher's sexual contact had included forced sexual touching, forced masturbation, and forced vaginal and anal penetration.

The letter also stated that Christopher was currently attending school at LRC given that after beginning public school on August 23, 2003, he was expelled in January 2004 at the public school's request due to alleged gang activity and the fact that Christopher had sexually touched or harassed a female student. As to current progress, the letter stated that Christopher had displayed deviant and manipulative behaviors in the last few weeks before the letter was written, having brought his girl friend onto campus, trying to pass her off as a relative, and having made plans with two other juveniles to run away from school.

The letter stated that Christopher's primary problem was adjustment disorder with mixed disturbance of emotions and conduct, which placed Christopher at high risk for future law violations. The letter noted that Christopher's sexual offending behaviors appeared to be secondary at that time. The treatment team recommended the following for Christopher: a 24-hour supervised residential facility to provide safety and security for Christopher, continued social or coping skills programming and cognitive restructuring, continued psychiatric care, and continued court supervision.

On June 2, 2004, the juvenile court held a hearing on Christopher's continued placement at Whitehall. Bridget Trebilcock, an integrated care coordination service worker with the Nebraska Department of Health and Human Services (DHHS), testified that she had been Christopher's caseworker for the preceding year. Trebilcock testified that she had recently learned that LRC was concerned about Christopher's growing conduct disorder behaviors. Trebilcock stated that Christopher

had yet to successfully complete the sexual offender program at LRC and that LRC was asking that Christopher be discharged from Whitehall and placed in an enhanced treatment group home, one step above Whitehall in the restrictiveness of its environment. Trebilcock stated that there were several such homes in Nebraska, including one in Lincoln. Trebilcock stated that Christopher wished to stay in Lincoln to be near his girl friend and had threatened to cause as much trouble as he could, including breaking the law, in order to remain in Lincoln.

Trebilcock stated that she had prepared a case plan and court report dated May 26, 2004, and that document was entered into evidence. In the report, Trebilcock stated that since moving to Whitehall, Christopher had made little progress, struggling with the accountability that comes with fewer restrictions at the group-home level of care. Trebilcock stated that while at Whitehall, Christopher "struggled with appropriate boundaries, feeding into negative behaviors of others, staying on task, and manipulating [Whitehall] staff."

Trebilcock stated that recently, Christopher had become even more noncompliant with the rules and restrictions at Whitehall and had threatened to kill, stab, or choke other juveniles at the group home. Trebilcock stated that in Whitehall's opinion, Christopher was not ready to be back in the community and needed further treatment at another facility to ensure his own safety, as well as that of the community.

Christopher's mother testified at the June 2, 2004, hearing and stated that she wanted Christopher to come home. She testified that she had arranged for Christopher to see two mental health providers for his conduct disorder, his attention deficit disorder, and his sexual offenses. Regarding supervision, she testified that both she and her husband, Christopher's father, worked outside of the home and that she hoped that Christopher could get a job for the summer wherein he would be supervised by people having knowledge of his past offenses. She testified that she and Christopher's father had two other children—a son who was 11 at the time of the hearing and a daughter who was 6. Christopher's mother stated that some of Christopher's sexual assault victims were his cousins who still lived in the area.

At the end of the hearing, the juvenile court stated that it was agreeable to the idea of Christopher's coming home, because his treatment at LRC had been unsuccessful so far and because, in the court's view, Christopher may not do any better at an enhanced treatment group home. The court noted, though, that it would not agree to Christopher's going home on a trial basis unless Christopher had full-time adult supervision. The court asked Christopher's parents to look into supervision options. The court stated that if full-time supervision could not be found for Christopher, Christopher would be placed in an enhanced treatment group home. The court set out its findings in an order filed August 19, 2004, in which the court stated that Christopher was to be placed back with his parents, the placement being effective as of July 30, 2004.

On July 23, 2004, another hearing was held. At that hearing, Trebilcock testified that DHHS searched the state for an enhanced treatment group home for Christopher, but that all such placements were denied because Christopher had not successfully completed Whitehall's sexual offender program. Trebilcock stated that DHHS had found a residential treatment center to treat Christopher in South Sioux City, Nebraska. Trebilcock stated that Christopher would be able to enter the treatment center in 30 to 60 days and would be treated for both his conduct disorder and his sexual offending behaviors. Until that time, she testified, LRC would maintain Christopher's placement at LRC in order to keep Christopher and the community safe. Trebilcock testified that it was not safe to return Christopher to his home at that time because although Christopher had been educated regarding his sexual offenses, Christopher was unable to apply this education because of his conduct disorder.

Trebilcock testified that Christopher's tendency to minimize his behaviors had contributed to his inability to complete the program at Whitehall and that Christopher's family had not supported Christopher in helping him control his behaviors. Specifically, Trebilcock stated that over the last several months before the July 23, 2004, hearing, Christopher's family had stopped contact with DHHS on occasion. Trebilcock also stated that Christopher's father had remarked that Christopher should come home and that Christopher relied on his father's statement,

asserting that he did not have to participate in the Whitehall program any more because his father wanted him to come home.

Trebilcock also testified that Christopher continued to sexually violate others while placed at Whitehall. In addition to touching the inner thigh of a girl at public school, which in part led to Christopher's expulsion, Christopher had recently groped another male during a basketball game at LRC. Trebilcock also noted that Christopher had sexually assaulted both boys and girls and that these children varied widely in terms of their age.

After hearing all of the evidence, the juvenile court stated that even though Christopher was at high risk to reoffend, it would not be fair to Christopher to keep him in an out-of-home placement or in an institutional setting. The court stated that he would allow Christopher to go home, but that Christopher's parents had to come up with a plan providing an adequate amount of adult supervision for Christopher. The court ordered that Christopher be placed in detention and that within a week, OJS was to prepare and file a safety plan outlining conditions under which Christopher and the community would be reasonably safe while Christopher lived at home. The court memorialized its findings in a journal entry filed August 23, 2004, stating that allowing Christopher to come home "is not an unacceptable risk provided proper parental supervision."

Within the required time period, OJS filed its safety plan, stating that OJS was not waiving its objection to Christopher's returning home. The safety plan laid out by OJS recommended the following in the event that Christopher did return home: that Christopher's victims and their families be notified of Christopher's return, given that two of Christopher's victims live near his family home and that other victims were family members; that Christopher and his family participate in intense individual and family therapy; that Christopher follow all conditions of liberty for his "parole"; and that Christopher be supervised and follow the safety plan.

In late July 2004, after the July 23 hearing, OJS had stated in a brief to the juvenile court that it objected to any ruling by the court allowing Christopher to return home because Christopher presented an unreasonable risk of harm to others, both in his parents' home and in the community at large. OJS stated that

although it had set out a safety plan as ordered by the court, in its opinion, the risk of harm could not be alleviated by a safety plan that did not require therapeutic success prior to Christopher's placement with his parents. For these reasons, OJS requested the court to enter an order discharging Christopher from OJS' custody.

Also in late July 2004, after the July 23 hearing, the trial judge had called Whitehall officials and told them that Christopher was to be released to his parents' care, and Christopher was then placed with his parents. On August 19, the court conducted a further hearing on the court-ordered safety plan, OJS' objections, and OJS' request to discharge Christopher. At the hearing, Trebilcock testified that Christopher's aunt was supervising Christopher when Christopher's parents could not do so. Trebilcock stated that Christopher had started football practice the preceding week and that Christopher's parents had arranged for a family friend to watch Christopher at practice.

Trebilcock stated that Christopher would drive back and forth from school on his own and that the school needed to be notified of Christopher's past problems so that he could be adequately supervised there. Trebilcock stated that Christopher was receiving outpatient sexual offender treatment and was also seeing a professional for attention deficit hyperactivity disorder and conduct disorder. Trebilcock stated that Christopher's placement with his parents was contrary to OJS' recommendations and that OJS could not adequately provide services to Christopher and his parents under the circumstances.

Christopher's father also testified. He stated that he and Christopher's mother had yet to tell Christopher's school about Christopher's sexual offender issues and that the family friend who was responsible for watching Christopher during football practice was also unaware of Christopher's background. Christopher's father stated that he was unsure that the family friend should be made aware of Christopher's past.

In a journal entry filed September 3, 2004, the court overruled OJS' objections and ordered that Christopher be placed in his parents' home under OJS' supervision. The court ordered that OJS' safety plan be implemented and ordered Christopher's parents to comply with the safety plan. The court also denied OJS'

request to discharge Christopher and asked OJS to provide transitional services. OJS appeals.

ASSIGNMENTS OF ERROR

On appeal, OJS contends that the court erred in (1) denying OJS' request for a higher level of treatment for Christopher, (2) ordering OJS to develop a safety plan and submit it to the court for approval, (3) ordering that Christopher be released from detention to his parents while yet in the custody of OJS and without prior notice and opportunity for OJS to be heard, (4) ordering that Christopher be placed in his parents' home during his continued custody in OJS and over OJS' objection, (5) ordering OJS to implement the safety plan and to supervise Christopher in the parental home, and (6) denying OJS' request that the court discharge Christopher from OJS' custody if Christopher were ordered returned to his parents' home.

STANDARD OF REVIEW

[1] Juvenile cases are reviewed de novo on the record, and an appellate court is required to reach a conclusion independent of the juvenile court's findings. When the evidence is in conflict, however, an appellate court may give weight to the fact that the lower court observed the witnesses and accepted one version of the facts over the other. *In re Interest of Heather R. et al.*, 269 Neb. 653, 694 N.W.2d 659 (2005).

ANALYSIS

On appeal, OJS contends that the court erred in denying its request for a higher level of treatment for Christopher.

Neb. Rev. Stat. § 43-408(4) (Reissue 2004) involves requests by OJS to transfer a juvenile to a higher level of care and states in part:

> For transfer hearings, the burden of proof to justify the transfer is on [OJS], the standard of proof is clear and convincing evidence, and the strict rules of evidence do not apply. Transfers of juveniles from one place of treatment to another are subject to section 43-251.01 and to the following:
>
> (a) Except as provided in subdivision (b) of this subsection, if [OJS] proposes to transfer the juvenile from a

> less restrictive to a more restrictive place of treatment, a plan outlining the proposed change and the reasons for the proposed change shall be presented to the court which committed the juvenile. Such change shall occur only after a hearing and a finding by the committing court that the change is in the best interests of the juvenile, with due consideration being given by the court to public safety. At the hearing, the juvenile has the right to be represented by counsel.

In the instant case, OJS filed a request to transfer Christopher to a more restrictive setting. At subsequent hearings, OJS presented evidence to show that Christopher's transfer to a more restrictive facility was in Christopher's best interests and that returning Christopher home without successful completion of a treatment program was a threat to the public's safety.

[2] Initially, we note that Christopher disagrees that OJS was requesting a transfer to a more restrictive setting for him, citing some testimony by Trebilcock suggesting that the transfer would be to a treatment setting with similar restrictions. Our review of the record shows that there was conflicting evidence on this issue and that the juvenile court determined that OJS was seeking to transfer Christopher to a more restrictive facility. We will not overturn the juvenile court's finding in that regard. When the evidence is in conflict, an appellate court may give weight to the fact that the lower court observed the witnesses and accepted one version of the facts over the other. *In re Interest of Heather R. et al., supra.*

The record shows that in November 2003, Christopher moved to Whitehall, and that he had sexually assaulted two same-age male peers and one 10-year-old female. While in treatment, Christopher disclosed that he had assaulted two male cousins, ages 2 and 6, and a female cousin, age 12. Christopher's sexual contact had included forced sexual touching, forced masturbation, and forced vaginal and anal penetration.

Although Christopher began attending public school on August 23, 2003, he was expelled in January 2004 at the school's request due to his alleged gang activity and sexually touching or harassing a female student. The record also shows that LRC intended to discharge Christopher from the Whitehall

program given Christopher's increasing display of deviant and manipulative behaviors including threats to kill, stab, or choke other juveniles at the group home. Trebilcock stated that in Whitehall's opinion, Christopher was not ready to be back in the community and needed further treatment at another facility to ensure his own safety, as well as that of the community.

The record shows that the treatment team originally diagnosed Christopher with an adjustment disorder with mixed disturbance of emotions and conduct, in addition to his sexual offending and attention deficit disorder. Subsequently, Christopher was diagnosed with adolescent-onset conduct disorder, which placed Christopher at high risk for future law violations. The treatment team recommended the following for Christopher: a 24-hour supervised residential facility to provide safety and security for Christopher, continued social or coping skills programming and cognitive restructuring, continued psychiatric care, and continued court supervision.

Trebilcock testified that it was not safe to return Christopher to his parents' home because although Christopher had been educated regarding his sexual behaviors, Christopher was unable to apply this education because of his conduct disorder. Trebilcock also testified that Christopher's tendency to minimize his behaviors had contributed to his inability to complete the program at Whitehall and that Christopher's family had not supported Christopher in helping him control his behaviors.

Additionally, Trebilcock stated that Christopher asserted that he did not wish to go back and live with his parents and that he wanted to stay in Lincoln to be near his girl friend, even if that meant going into foster care. Trebilcock also stated that Christopher had threatened to cause as much trouble as he could, including breaking the law, in order to be able to remain in Lincoln.

Trebilcock testified that Christopher continued to sexually violate others while placed at Whitehall. In addition to touching the inner thigh of a girl at public school, which in part led to Christopher's expulsion, Christopher had recently groped another male during a basketball game at LRC. Trebilcock also noted that Christopher had sexually assaulted both boys and girls and that these children varied widely in terms of their age. Most

important, Trebilcock stated that Christopher had never successfully completed treatment for his sexual offenses at Whitehall.

[3] Juvenile cases are reviewed de novo on the record, and an appellate court is required to reach a conclusion independent of the juvenile court's findings. *In re Interest of Heather R. et al.*, 269 Neb. 653, 694 N.W.2d 659 (2005). After reviewing the record de novo, we conclude that the juvenile court erred in denying OJS' request to transfer Christopher to a facility with increased restrictions. The evidence on this record illustrates that OJS met its burden to show, by clear and convincing evidence, that such a move was in Christopher's best interests and that the public would remain safe if Christopher were transferred.

Although the juvenile court acknowledged that Christopher was at high risk to reoffend, the court stated that it was not fair to Christopher to send him to another treatment facility rather than send him home. We note, though, that § 43-408 speaks not of fairness but of whether such a change "is in the best interests of the juvenile, with due consideration being given by the court to public safety."

The record shows that despite 2 years of treatment at Whitehall, Christopher failed to successfully complete his treatment, continued to engage in sexually violative behavior, and remained a threat to other people's safety. The record clearly shows that Christopher is in need of further treatment and that sending Christopher home to live with his parents is not in Christopher's best interests; additionally, placement with his parents does not take into consideration the public's safety.

CONCLUSION

After reviewing the record de novo, we conclude that the juvenile court erred in releasing Christopher to live with his parents. Therefore, the juvenile court's order is reversed, and we remand the cause to the court with directions to adopt OJS' case plan and court report recommending Christopher's transfer to a more restrictive facility. Because of this resolution, we do not address OJS' other assignments of error. See *Kelly v. Kelly*, 246 Neb. 55, 516 N.W.2d 612 (1994) (appellate court is not obligated to engage in analysis which is not needed to adjudicate case and controversy before it).

REVERSED AND REMANDED WITH DIRECTIONS.

STATE OF NEBRASKA, APPELLEE, V. MARK E. WAYT, APPELLANT.

701 N.W.2d 841

Filed August 2, 2005. No. A-04-1352.

1. **Sentences: Appeal and Error.** Sentences within statutory limits will be disturbed by an appellate court only if the sentences complained of were an abuse of judicial discretion.
2. **Sentences.** In determining a sentence, the trial judge should consider factors such as the defendant's age, mentality, education, experience, social and cultural background, past criminal record, and motivation for the offense and the nature of the offense.
3. **Probation and Parole: Sentences.** Under Neb. Rev. Stat. § 29-2268 (Reissue 1995), when a probationer violates the terms of his or her probation, the court may revoke the probation and impose a new sentence as might have been imposed originally for the crime of which he or she was convicted.
4. **Statutes.** It is not within the province of a court to read a meaning into a statute that is not warranted by the language; neither is it within the province of a court to read anything plain, direct, or unambiguous out of a statute.
5. **Judgments.** A nunc pro tunc order operates to correct a clerical error or a scrivener's error, not to change or revise a judgment or order, or to set aside a judgment actually rendered, or to render an order different from the one actually rendered, even if such order was not the order intended.
6. **Sentences: Time.** A sentence validly imposed takes effect from the time it is pronounced.
7. **Sentences.** When a valid sentence has been put into execution, the trial court cannot modify, amend, or revise it in any way, either during or after the term or session of court at which the sentence was imposed. Any attempt to do so is of no effect, and the original sentence remains in force.
8. **Criminal Law: Courts: Sentences.** Where a portion of a sentence is valid and a portion is invalid or erroneous, the court has authority to modify or revise the sentence by removing the invalid or erroneous portion of the sentence if the remaining portion of the sentence constitutes a complete valid sentence.
9. **Trial: Appeal and Error.** A party cannot complain of error which he or she invited the trial court to commit.
10. **Sentences.** Pursuant to Neb. Rev. Stat. § 83-1,106(1) (Reissue 1999), a court must give credit for time served on a charge when a prison sentence is imposed for that charge.

Appeal from the District Court for Cheyenne County: KRISTINE R. CECAVA, Judge. Affirmed.

Donald J.B. Miller, of Matzke, Mattoon & Miller, for appellant.

Jon Bruning, Attorney General, Susan J. Gustafson, and Matt Herstein, Senior Certified Law Student, for appellee.

INBODY, Chief Judge, and SIEVERS and CASSEL, Judges.

CASSEL, Judge.

INTRODUCTION

The district court for Cheyenne County sentenced Mark E. Wayt to prison after he violated probation. We reject Wayt's claims that the sentence is excessive and fails to grant sufficient credit for time served. We also address the district court's power to correct a partially invalid sentence, where the parties recognized the invalid portion and requested the court to modify its sentence because the minimum term of the indeterminate sentence was greater than that allowed by law. Pursuant to Neb. Ct. R. of Prac. 11E(5)b (rev. 2000), this case was submitted without oral argument. We affirm.

BACKGROUND

Pursuant to a plea agreement, Wayt was convicted of driving under the influence of alcoholic liquor, fourth offense, a Class IV felony in violation of Neb. Rev. Stat. § 60-6,196 (Cum. Supp. 2002). On May 7, 2004, the trial court pronounced a sentence of 10 days in jail and 3 years' probation. One of the conditions of Wayt's probation required him to report on May 11 to inpatient substance abuse treatment. On May 17, the State filed documents charging that Wayt had violated his probation. On June 23, Wayt filed a request for extradition from Wyoming, where he was in custody, to Nebraska, for disposition of the charges against him. On September 29, Wayt was present at a hearing in Nebraska on the violation of probation. Wayt admitted that he had failed to report to inpatient treatment on May 11, 12, and 13 and that he had thereby violated the terms of his probation. On October 26, the trial court rendered an order revoking Wayt's probation and resentencing him "to incarceration in the Department of Correctional Services, Lincoln, Nebraska for a term of not less than two (2) years nor more than four (4) years, with credit for time previously served, to wit: twenty-nine (29) days." The trial court further ordered Wayt to pay a fine and ordered his driver's license to be revoked for 15 years. In response to a "Stipulation and Consent" filed by the parties, the trial court on November 19 entered a "Nunc Pro Tunc Journal," which was identical to the previous sentencing

order in every respect except that it purported to change Wayt's prison sentence to "not less than . . . **fifteen (15) months** nor more than four (4) years."

ASSIGNMENTS OF ERROR

Wayt assigns that the trial court erred in (1) failing to give him proper credit for jail time previously served, (2) imposing an excessively harsh sentence, and (3) imposing a sentence more severe than the original sentence.

STANDARD OF REVIEW

[1] Sentences within statutory limits will be disturbed by an appellate court only if the sentences complained of were an abuse of judicial discretion. *State v. Thomas*, 268 Neb. 570, 685 N.W.2d 69 (2004).

ANALYSIS

Excessive Sentence.

Wayt alleges that the sentence imposed by the trial court is excessive and that he should have received probation rather than time in prison. Wayt was initially convicted of a Class IV felony, which carries a penalty of 0 to 5 years' imprisonment, a $10,000 fine, or both. See Neb. Rev. Stat. § 28-105 (Cum. Supp. 2004). The trial court sentenced Wayt to 15 months to 4 years in prison, a term within statutory limits.

[2] In determining a sentence, the trial judge should consider factors such as the defendant's age, mentality, education, experience, social and cultural background, past criminal record, and motivation for the offense and the nature of the offense. *State v. True*, 236 Neb. 274, 460 N.W.2d 668 (1990). The presentence investigation in this case reveals that Wayt has a lengthy history of abusing alcohol and driving under the influence of alcohol, with 15 convictions for the offense since 1985. Despite serving previous sentences of probation and incarceration, Wayt has continued to reoffend. Wayt's criminal record also contains drug-related charges, as well as convictions for burglary, fraud, and obstructing a peace officer. Wayt has received little or no substance abuse treatment, and when given the opportunity to attend inpatient treatment as a condition of his probation, Wayt failed to report to the treatment facility, apparently because he feared

being arrested on an outstanding warrant. Wayt reported that he earned approximately $600 per month and that he spent approximately half of that amount on alcohol. Evidently, Wayt's abuse of alcohol has been a disruptive force in his life, and his repeated convictions for driving under the influence demonstrate that he poses a danger to himself and to others. We conclude that the trial court did not abuse its discretion in sentencing Wayt to 15 months to 4 years in prison.

[3,4] Wayt argues that this court should limit his sentence to no more than 3 years in prison, and he requests that this court adopt the following rule: "in the event a person is re-sentenced for a probation violation, a trial court may not impose a sentence of incarceration longer, in terms of time, than the length of the original probation." Brief for appellant at 8. Under Neb. Rev. Stat. § 29-2268 (Reissue 1995), when a probationer violates the terms of his or her probation, the court may revoke the probation and impose a new sentence "as might have been imposed originally for the crime of which he [or she] was convicted." It is not within the province of a court to read a meaning into a statute that is not warranted by the language; neither is it within the province of a court to read anything plain, direct, or unambiguous out of a statute. *State v. Warriner*, 267 Neb. 424, 675 N.W.2d 112 (2004). Because the trial court, at the time it granted a probationary sentence, had the power to impose the sentence to the term of imprisonment that it ultimately imposed, § 29-2268 clearly conflicts with Wayt's proposed rule. This court lacks the power to adopt the rule proposed by Wayt.

Initial Erroneous Sentence.

[5] The State requests that this court either enter a new sentencing order or remand for a new order, because the trial court's "Nunc Pro Tunc Journal" was not the proper means of correcting Wayt's sentence. A nunc pro tunc order operates to correct a clerical error or a scrivener's error, not to change or revise a judgment or order, or to set aside a judgment actually rendered, or to render an order different from the one actually rendered, even if such order was not the order intended. See *Walsh v. City of Omaha*, 11 Neb. App. 747, 660 N.W.2d 187 (2003). Regardless of the second order's title, it did not operate as a nunc

pro tunc order. The first order on resentencing "spoke the truth," i.e., it accurately recorded the sentence pronounced by the district court. However, as we discuss below, that first order was partially invalid. The content of the inaccurately titled second order imposed a valid sentence.

In attacking the validity of the corrected sentence of 15 months' to 4 years' imprisonment, the State requests that we modify "the district court's original sentence of two to four years, to not less than twenty months nor more than four years." Brief for appellee at 10.

[6,7] Of course, we recognize that a sentence validly imposed takes effect from the time it is pronounced. *State v. Gass*, 269 Neb. 834, 697 N.W.2d 245 (2005). When a valid sentence has been put into execution, the trial court cannot modify, amend, or revise it in any way, either during or after the term or session of court at which the sentence was imposed. *Id.* Any attempt to do so is of no effect, and the original sentence remains in force. *Id.* This rule does not apply in the case before us because the district court's first order on resentencing did not impose a totally valid sentence.

The minimum term of a Class IV felony indeterminate sentence cannot exceed one-third of the maximum term allowed by law; that is, the minimum term for a Class IV felony cannot exceed 20 months' imprisonment. See, Neb. Rev. Stat. § 29-2204(1)(a)(ii)(A) (Cum. Supp. 2004); *State v. White*, 256 Neb. 536, 590 N.W.2d 863 (1999). In the case before us, the initial minimum prison sentence of 2 years exceeded the minimum term allowed by law.

In *McElhaney v. Fenton*, 115 Neb. 299, 212 N.W. 612 (1927), the defendant was sentenced to a term of 3 to 20 years' imprisonment, but the statute provided for a term of 1 to 10 years' imprisonment. The Nebraska Supreme Court held that fixing the maximum sentence at not more than 20 years' imprisonment was erroneous, but the court did not render the judgment void. Instead, the court stated that the sentence "stands as valid and enforceable for the term that the statute authorized the court to impose sentence, to wit, for not more than ten years." *Id.* at 301, 212 N.W. at 612. The court concluded that habeas corpus would not lie where the sentence was merely erroneous and not void.

[8] Like the sentence in *McElhaney*, the 2-year minimum sentence in this case was erroneous but not void. Where a portion of a sentence is valid and a portion is invalid or erroneous, the court has authority to modify or revise the sentence by removing the invalid or erroneous portion of the sentence if the remaining portion of the sentence constitutes a complete valid sentence. *State v. McDermott*, 200 Neb. 337, 263 N.W.2d 482 (1978). In *McDermott*, the Nebraska Supreme Court held that the district court was correct in determining that the county court should have modified or revised its original sentence by removing the erroneous portion. We conclude that under the circumstances in the present case, the trial court was empowered to correct its judgment to enter a valid sentence.

[9] We also note that the State joined in the stipulation that gave rise to the trial court's correction of the erroneous portion of the initial sentence, which stipulation specifically requested a sentence of 15 months' to 4 years' imprisonment. Even if the trial court had erred in altering the initial sentence, it is well established that a party cannot complain of error which he or she invited the trial court to commit. See *State v. Zima*, 237 Neb. 952, 468 N.W.2d 377 (1991).

We have concluded that the trial court did not abuse its discretion in sentencing Wayt to 15 months to 4 years in prison, and we decline to disturb that judgment.

Credit for Time Served.

[10] The trial court gave Wayt credit for 29 days served, presumably between the date of Wayt's extradition from Wyoming and October 26, 2004, the date the trial court rendered its initial order purporting to sentence Wayt to 2 to 4 years' imprisonment. Wayt asserts that the trial court erred in failing to give him additional credit for 103 days served in Wyoming, from June 23 to September 29, 2004. Pursuant to Neb. Rev. Stat. § 83-1,106(1) (Reissue 1999), a court must give credit for time served on a charge when a prison sentence is imposed for that charge. *State v. Banes*, 268 Neb. 805, 688 N.W.2d 594 (2004). When Wayt requested extradition to Nebraska, he alleged that he was "in custody" in Wyoming. However, there is no evidence on the record that Wayt was serving time in Wyoming for the

present charge. In the absence of evidence that the present charge precipitated Wayt's incarceration in Wyoming, we conclude that the trial court did not abuse its discretion in assessing Wayt's time served.

CONCLUSION

For the foregoing reasons, we affirm the trial court's judgment sentencing Wayt to 15 months' to 4 years' imprisonment, with credit for 29 days served.

AFFIRMED.

MARVIN MEREDITH, APPELLEE AND CROSS-APPELLANT, V. SCHWARCK QUARRIES, INC., APPELLANT AND CROSS-APPELLEE.

701 N.W.2d 387

Filed August 9, 2005. No. A-03-1136.

1. **Workers' Compensation: Appeal and Error.** An appellate court may modify, reverse, or set aside a Workers' Compensation Court decision only when (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 findings of the single judge who conducted the original hearing.
3. ____: ____. Upon appellate review, the findings of fact made by the trial judge of the compensation court have the effect of a jury verdict and will not be disturbed unless clearly wrong.
4. ____: ____. An appellate court is obligated in workers' compensation cases to make its own determinations as to questions of law.
5. **Workers' Compensation: Words and Phrases.** Temporary disability contemplates the period the employee is submitting to treatment, is convalescing, is suffering from the injury, and is unable to work because of the accident.
6. ____: ____. Total disability in the context of the workers' compensation law does not mean a state of absolute helplessness, but means disablement of an employee to earn wages in the same kind of work, or work of a similar nature, that he or she was trained for or accustomed to perform, or any other kind of work which a person of his or her mentality and attainments could do.
7. **Workers' Compensation.** When a worker has reached maximum recovery, the remaining disability is permanent and such worker is no longer entitled to compensation for temporary disability.

8. ____. Whether an employee has reached maximum medical improvement or recovery is a question of fact to be determined by the compensation court.
9. **Workers' Compensation: Evidence: Appeal and Error.** If the record contains evidence to substantiate the factual conclusions reached by the Workers' Compensation Court, an appellate court is precluded from substituting its view of the facts for that of the Workers' Compensation Court.
10. **Evidence: Appeal and Error.** In testing the sufficiency of the evidence to support the findings of fact, the evidence must be considered in the light most favorable to the successful party, every controverted fact must be resolved in favor of the successful party, and the successful party will have the benefit of every inference that is reasonably deducible from the evidence.
11. **Workers' Compensation.** As the trier of fact, the Workers' Compensation Court is the sole judge of the credibility of witnesses and the weight to be given their testimony.
12. **Workers' Compensation: Expert Witnesses.** While expert witness testimony may be necessary to establish the cause of a claimed injury, the Workers' Compensation Court does not need to depend on expert testimony to determine the degree of disability but instead may rely on the testimony of the claimant.
13. **Courts: Appeal and Error.** When a cause is remanded with specific directions, the court to which the mandate is directed has no power to do anything but to obey the mandate. The order of the appellate court is conclusive on the parties, and no judgment or order different from, or in addition to, that directed by the appellate court can be entered by the trial court.
14. **Workers' Compensation: Judgments: Appeal and Error.** Where a workers' compensation award is reversed on the basis that the award fails to comply with Workers' Comp. Ct. R. of Proc. 11 (2002), the order is effectively rendered a nullity. On a subsequent appeal, the issue is not whether the order on remand is inconsistent with the original award, but, rather, whether it is supported by the evidence under the applicable standard of review.
15. **Workers' Compensation.** Total disability exists when an injured employee is unable to earn wages in either the same or a similar kind of work he or she was trained or accustomed to perform or in any other kind of work which a person of the employee's mentality and attainments could perform.
16. ____. Whether a claimant has sustained disability which is total or partial and which is temporary or permanent is a question of fact.

Appeal from the Nebraska Workers' Compensation Court. Affirmed in part, and in part reversed.

Jeffry D. Patterson, of Bartle & Geier Law Firm, for appellant.

Rolf Edward Shasteen, of Shasteen, Brock & Scholz, P.C., for appellee.

IRWIN, SIEVERS, and CASSEL, Judges.

IRWIN, Judge.

I. INTRODUCTION

Schwarck Quarries, Inc. (Schwarck), appeals an order of a three-judge review panel for the Nebraska Workers' Compensation Court. Schwarck argues that the review panel erred in affirming the trial court's award of temporary total disability benefits and vocational rehabilitation services to Marvin Meredith, but correctly reversed the trial court's modified award of permanent total disability benefits. On cross-appeal, Meredith argues that the review panel erred in reversing the trial court's award of permanent total disability benefits.

We find that the review panel did not err in affirming the trial court's award of temporary total disability benefits and vocational rehabilitation services. We further find that the review panel did err in finding that the trial court exceeded its authority on remand by modifying the award of permanent total disability benefits.

II. BACKGROUND

This case comes before us for the second time. The first time, it was disposed of in an unpublished opinion, *Meredith v. Schwarck Quarries, Inc.*, No. A-01-1318, 2002 WL 1315376 (Neb. App. June 18, 2002) (not designated for permanent publication). A detailed description of the facts is contained therein. We will discuss only the facts necessary to dispose of the case now before us.

On September 1, 1999, Meredith was injured in a work-related accident while working for Schwarck. Meredith testified that he had initially experienced some pain, that he had continued working, but that the pain increasingly worsened as time passed. In November, Meredith sought treatment from Saint Elizabeth Company Care, was given work restrictions, was prescribed medication, and was recommended for physical therapy. Meredith was later evaluated by Dr. D.M. Gammel, who diagnosed Meredith with "1. Chronic myofascitis of the cervical spine due to work related injury of 1 September 1999 [and] 2. Status postoperative spinal fusion L5-S1, with aggravation resulting in chronic myofascitis of the lumbar spine due to work related injury of 1 September 1999." Gammel opined that Meredith's "injury of 1 September 1999 has resulted in an

aggravation of [a] previous lumbar injury however there is no additional impairment." Gammel further opined that due to the September 1999 accident, Meredith incurred a 5-percent whole person impairment rating to his cervical spine.

On November 29, 1999, Meredith filed a petition in the Nebraska Workers' Compensation Court seeking compensation for the injury he suffered in September 1999. Specifically, Meredith sought medical costs, temporary total disability benefits, permanent partial disability benefits, vocational rehabilitation services, attorney fees, and penalties.

A trial was held on November 1, 2000. On April 2, 2001, the trial court entered an order determining that Meredith did suffer an injury in September 1999. The court determined that as a result of the injury, Meredith incurred medical and hospital expenses, was temporarily totally disabled from November 9, 1999, through May 12, 2000, and thereafter sustained a 44-percent loss of earning capacity. The court also specifically determined that the accident caused Meredith's injuries. The court awarded Meredith benefits for both his temporary total disability and his permanent partial disability and stated that he was entitled to vocational rehabilitation services.

Schwarck appealed the order of the trial court to a three-judge review panel. On appeal, the review panel affirmed the ruling of the trial court, stating that the findings of fact were not clearly wrong and that no error of law appeared. The review panel noted Schwarck's objections to Gammel's medical opinion on which the trial court had relied, but the review panel determined that "Gammel possessed sufficient facts to enable him to express reasonably accurate conclusions and opinions regarding his evaluation of [Meredith]."

Schwarck then appealed to this court. We determined that there was sufficient competent evidence to support the trial court's finding that the September 1999 accident was the cause of Meredith's cervical spine injury, and we affirmed the trial court's decision with regard to causation. See *Meredith v. Schwarck Quarries, Inc.*, No. A-01-1318, 2002 WL 1315376 (Neb. App. June 18, 2002) (not designated for permanent publication). However, with regard to the trial court's award of disability benefits, we reversed, and remanded the matter to the trial

court, stating that the court failed to comply with Workers' Comp. Ct. R. of Proc. 11 (2002), which requires compensation courts to provide "reasoned decisions which contain findings of facts and conclusions of law based upon the whole record which clearly and concisely state and explain the rationale for the decision so that all interested parties can determine why and how a particular result was reached."

On remand, the trial court entered a modified order dated February 7, 2003. The trial court iterated its ruling with regard to Meredith's temporary total disability benefits, expressly basing its determination both on the restrictions placed on Meredith by Saint Elizabeth Company Care and on Meredith's testimony regarding his injury and the consequences of it. The trial court also determined that Meredith reached maximum medical improvement on May 12, 2000, thus terminating Meredith's temporary total disability benefits, such determination expressly based on Gammel's medical report, Meredith's testimony, and "a complete review of all the medical records offered in [the] case."

The trial court then determined that Meredith had suffered a permanent total disability, as opposed to the 44-percent loss of earning capacity as previously determined. The court based this determination primarily on Gammel's medical report and Meredith's testimony. The court also based its determination on its findings that Meredith was not able to "perform suitable work for which he has previous training or experience."

With regard to vocational rehabilitation services, the trial court stated that this court had affirmed the trial court's prior ruling that Meredith was entitled to vocational rehabilitation services. However, the trial court then stated, "[G]iven the circumstances with respect to this case being appealed and the questionable status of certain findings related to [Meredith's] disability status, [the trial court] once again orders that [Meredith] remains entitled to vocational rehabilitation services." The court based this determination on its previous findings that Meredith had prior work experience as "a self employed mechanic, rock quarry worker, farmer, woodcutter, and landscaper's helper" and that because of Meredith's restrictions, he would "not [be] able to perform suitable work for which he has previous training or experience."

Schwarck again appealed the order of the trial court to a three-judge review panel, and Meredith cross-appealed. The review panel noted that this court had already affirmed the trial court's findings of causation and that thus, only the trial court's findings regarding temporary total disability benefits and maximum medical improvement were at issue. The review panel held that the trial court's findings were not clearly wrong, recognizing that the trial court "weighed the divergent medical evidence," considered all of the testimony, and made its determinations based thereon. The review panel therefore affirmed the trial court's findings with regard to Meredith's total temporary disability benefits and date of maximum medical improvement.

However, the review panel reversed the portion of the trial court's modified order which found Meredith to be permanently totally disabled. The review panel stated that the trial court exceeded its authority on remand when it "redetermined Meredith to be permanently totally disabled." The review panel then directed the trial court, on remand, to "indicate the evidence relied upon in its original finding regarding loss of earning power."

Finally, with regard to vocational rehabilitation services, the review panel stated that it understood this court's remand to "be limited to the degree of disability and requiring a reasoned decision in conformity with Rule 11." As such, the review panel concluded that the trial court's remaining findings of fact and conclusions of law regarding vocational rehabilitation services were affirmed.

This appeal now follows.

III. ASSIGNMENTS OF ERROR

Schwarck argues on appeal that (1) the review panel erred in assuming that this court affirmed the trial court's finding that Meredith suffered a disability in the September 1999 accident, (2) the trial court erred in failing to specify evidence sufficient to find that Meredith was temporarily totally disabled through May 12, 2000, (3) the trial court erred in failing to specify evidence sufficient to find that Meredith suffered any loss of earning capacity as a result of the September 1999 accident, and (4) the trial court erred in stating that this court affirmed the trial

court's conclusion that Meredith is entitled to vocational rehabilitation services.

On cross-appeal, Meredith argues that the review panel erred in (1) finding that the trial court exceeded its authority on remand by modifying Meredith's award of benefits and (2) reversing the trial court's finding that Meredith was permanently totally disabled.

IV. ANALYSIS

1. Standard of Review

[1] An appellate court may modify, reverse, or set aside a Workers' Compensation Court decision only when (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. *Morris v. Nebraska Health System*, 266 Neb. 285, 664 N.W.2d 436 (2003); *Zavala v. ConAgra Beef Co.*, 265 Neb. 188, 655 N.W.2d 692 (2003); *Vega v. Iowa Beef Processors*, 264 Neb. 282, 646 N.W.2d 643 (2002).

[2,3] 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 findings of the single judge who conducted the original hearing. *Morris, supra*; *Frauendorfer v. Lindsay Mfg. Co.*, 263 Neb. 237, 639 N.W.2d 125 (2002); *Vonderschmidt v. Sur-Gro*, 262 Neb. 551, 635 N.W.2d 405 (2001). Upon appellate review, the findings of fact made by the trial judge of the compensation court have the effect of a jury verdict and will not be disturbed unless clearly wrong. *Morris, supra*; *Frauendorfer, supra.*

[4] An appellate court is obligated in workers' compensation cases to make its own determinations as to questions of law. *Morris, supra*; *Larsen v. D B Feedyards*, 264 Neb. 483, 648 N.W.2d 306 (2002); *Vega, supra.*

2. Causation

Schwarck first argues that the review panel erred in "assuming that [this court] affirmed the trial court's finding in its initial

award that [Meredith] suffered disability in an accident occurring September 1, 1999." As acknowledged by Schwarck, the review panel stated that this court "specifically affirmed the trial judge's findings and conclusions regarding medical causation. We therefore address only the period of temporary indemnity and maximum medical improvement." The review panel was correct in its statement.

In our prior review of this case, we affirmed the trial court's findings on causation—that Meredith's work-related accident on September 1, 1999, caused his cervical spine injury. See *Meredith v. Schwarck Quarries, Inc.*, No. A-01-1318, 2002 WL 1315376 (Neb. App. June 18, 2002) (not designated for permanent publication). We then remanded the case because we were unable to review the trial court's award of disability benefits, because the trial court did not provide a reasoned decision from which we could review the evidence on which the court relied. See *id.* The review panel was correct in concluding that the only issue on remand was the trial court's award of disability benefits.

In arguing that Meredith failed to prove that the September 1999 accident caused his disability, Schwarck seems to impose a second burden of proving causation for a claimant in a workers' compensation injury case. Schwarck asserts that while Meredith proved that his accident caused his injury, he must also now prove that his accident caused his disability. We find this to be an argument of semantics. If Meredith has proven that his accident has caused his injury, which we concluded that he had, and then now proves that he suffered disability from his injury, then we find that Meredith has necessarily proven that the accident caused the disability. We do not think Meredith must again prove causation if he does in fact prove that he suffered a disability.

3. Temporary Total Disability and Maximum Medical Improvement

Schwarck next argues that the trial court specified insufficient evidence to support an award of temporary total disability benefits through May 12, 2000. The trial court found that Meredith was temporarily totally disabled from and including November

9, 1999, through May 12, 2000. Schwarck concedes that Meredith is entitled to receive temporary total disability benefits for November 9 to 23, 1999, which are the dates of the restrictions imposed by Saint Elizabeth Company Care. Schwarck states, "There is no question that the evidence specified by the trial court is sufficient to suggest that Meredith suffered a period of temporary total disability beginning on November 9, 1999." Brief for appellant at 16. Schwarck then emphasizes that "the restrictions were only temporary, lasting from November 9 to November 23." Brief for appellant at 17. Therefore, the only question before this court is whether there is sufficient evidence on the record to support the trial court's finding that Meredith continued to suffer temporary total disability from November 24, 1999, through May 12, 2000.

[5-7] Temporary disability contemplates the period the employee is submitting to treatment, is convalescing, is suffering from the injury, and is unable to work because of the accident. *Green v. Drivers Mgmt., Inc.*, 10 Neb. App. 299, 634 N.W.2d 22 (2001), *reversed in part on other grounds* 263 Neb. 197, 639 N.W.2d 94 (2002). See *Uzendoski v. City of Fullerton*, 177 Neb. 779, 131 N.W.2d 193 (1964). Total disability in the context of the workers' compensation law does not mean a state of absolute helplessness, but means disablement of an employee to earn wages in the same kind of work, or work of a similar nature, that he or she was trained for or accustomed to perform, or any other kind of work which a person of his or her mentality and attainments could do. *Mata v. Western Valley Packing*, 236 Neb. 584, 462 N.W.2d 869 (1990). See *Green, supra*. When a worker has reached maximum recovery, the remaining disability is permanent and such worker is no longer entitled to compensation for temporary disability. *Weichel v. Store Kraft Mfg. Co.*, 10 Neb. App. 276, 634 N.W.2d 276 (2001); *Gardner v. Beatrice Foods Co.*, 231 Neb. 464, 436 N.W.2d 542 (1989); *Kleiva v. Paradise Landscapes*, 227 Neb. 80, 416 N.W.2d 21 (1987).

The trial court stated in its order that it based its findings of temporary total disability on Gammel's opinion that Meredith was at maximum medical improvement on May 12, 2000. The court found that Meredith's temporary total disability ceased on May 12, 2000, when Gammel reported that Meredith suffered

from a permanent impairment rating to his cervical spine of 5 percent. The court stated that Gammel, in his report, defined a permanent impairment rating as " 'an impairment that has become static or well stabilized with or without medical treatment and is not likely to remit despite medical treatment,' " which definition complied with that of maximum medical improvement as it exists in Nebraska case law.

[8,9] Whether an employee has reached maximum medical improvement or recovery is a question of fact to be determined by the compensation court. *Weichel, supra.* See *Heiliger v. Walters & Heiliger Electric, Inc.*, 236 Neb. 459, 461 N.W.2d 565 (1990). Upon appellate review, the findings of fact made by the trial judge of the compensation court have the effect of a jury verdict and will not be disturbed unless clearly wrong. *Weichel, supra*; *Frank v. A & L Insulation*, 256 Neb. 898, 594 N.W.2d 586 (1999). If the record contains evidence to substantiate the factual conclusions reached by the Workers' Compensation Court, an appellate court is precluded from substituting its view of the facts for that of the Workers' Compensation Court. *Id.*

Schwarck argues at great length that Gammel's opinion is not credible and that Gammel did not have all of the necessary information to form his opinion because Meredith did not provide an accurate medical history to Gammel. However, as we stated in our prior opinion for this case, "Gammel was specifically informed of the inconsistencies during his deposition and was then asked if the revised information would cause him to change his report or findings in any way. Gammel testified that his opinions would remain unchanged." *Meredith v. Schwarck Quarries, Inc.*, No. A-01-1318, 2002 WL 1315376 at *4 (Neb. App. June 18, 2002) (not designated for permanent publication).

[10,11] In testing the sufficiency of the evidence to support the findings of fact, the evidence must be considered in the light most favorable to the successful party, every controverted fact must be resolved in favor of the successful party, and the successful party will have the benefit of every inference that is reasonably deducible from the evidence. *Frauendorfer v. Lindsay Mfg. Co.*, 263 Neb. 237, 639 N.W.2d 125 (2002). See *Hagelstein v. Swift-Eckrich*, 261 Neb. 305, 622 N.W.2d 663 (2001). Moreover, as the trier of fact, the Workers' Compensation Court

is the sole judge of the credibility of witnesses and the weight to be given their testimony. *Frauendorfer, supra*; *Wilson v. Larkins & Sons*, 249 Neb. 396, 543 N.W.2d 735 (1996). In the case at bar, we will not question the trial court's determination that Gammel was a credible witness.

The trial court also based its findings regarding Meredith's temporary total disability on the work restrictions placed on Meredith by Saint Elizabeth Company Care, as well as on Meredith's testimony regarding his injuries. Schwarck argues that the work restrictions placed on Meredith were only for November 9 through 23, 1999, and that thus, the court was clearly wrong in finding that Meredith was temporarily totally disabled through May 12, 2000. Schwarck's argument is incorrect.

The work restrictions placed on Meredith by Saint Elizabeth Company Care are specifically delineated as "11/9/99-11/23/99." However, these dates are not necessarily dispositive as to the duration of Meredith's temporary total disability. Meredith testified that he did not return to Saint Elizabeth Company Care for further treatment because he had "too many medical bills" and because Schwarck had informed him that "[Schwarck] did not have [workers' compensation insurance]." Because Meredith did not return to Saint Elizabeth Company Care for further treatment, its initial dates of restrictions are not conclusive as to the dates of Meredith's temporary total disability.

In addition, Meredith testified that he had not been employed or worked since November 1999 and that the pain in his back and neck from his injury was worse than the last time he worked. Meredith testified that he experienced the pain resulting from his injury up until the date of trial, that his pain was "constant," and that it worsened with "bending, sitting, standing, lifting, some walking and climbing stairs."

Meredith admitted to having had a prior back injury in 1990, for which he had back surgery. Meredith testified that he had received a lump-sum settlement in a workers' compensation case for that injury and that after the settlement, he returned to work with some restrictions. Meredith also admitted that he had been in a traffic accident in 1995 that caused injury to his back. However, Meredith testified that any problems he had experienced from his prior injuries did not significantly affect his work

at Schwarck and had worsened after his accident in 1999 at Schwarck. Meredith also testified that he could not drive the trucks at work because of his injury and that Schwarck told him that he was not needed at work if he could not drive a truck.

[12] Schwarck argues:

> It was necessary for Meredith to adduce competent expert testimony regarding the cause of his claimed disability, and that required Meredith to adduce competent expert medical testimony demonstrating that any disability resulting from the September 1, 1999, accident was different from, or a material increase of[,] his preexisting disability caused by a prior work-related accident and a prior motor vehicle accident.

Brief for appellant at 13. While expert witness testimony may be necessary to establish the cause of a claimed injury, the Workers' Compensation Court does not need to depend on expert testimony to determine the degree of disability but instead may rely on the testimony of the claimant. *Cords v. City of Lincoln*, 249 Neb. 748, 545 N.W.2d 112 (1996). See *Luehring v. Tibbs Constr. Co.*, 235 Neb. 883, 457 N.W.2d 815 (1990). We find that Gammel's report supports the trial court's conclusions regarding Meredith's temporary total disability. Furthermore, Meredith's testimony was sufficient for the trial court to conclude that Meredith was temporarily totally disabled.

Schwarck also argues at great length that, as with Gammel's testimony, Meredith's testimony is not credible. As we stated above, in testing the sufficiency of the evidence to support the findings of fact, the evidence must be considered in the light most favorable to the successful party, every controverted fact must be resolved in favor of the successful party, and the successful party will have the benefit of every inference that is reasonably deducible from the evidence. *Frauendorfer v. Lindsay Mfg. Co.*, 263 Neb. 237, 639 N.W.2d 125 (2002). See *Hagelstein v. Swift-Eckrich*, 261 Neb. 305, 622 N.W.2d 663 (2001). Viewing Meredith's testimony in the light most favorable to the successful party, Meredith, we cannot find that the trial court was clearly wrong in determining that Meredith was a credible witness and that he was temporarily totally disabled through May 12, 2000.

4. Permanent Disability

(a) Trial Court's Authority on Remand

In the original award of the trial court, Meredith was determined to have suffered a 44-percent loss of earning capacity. We remanded the issue of disability benefits, based on a finding that the court's order failed to comply with rule 11. On remand, the trial court determined that Meredith was permanently totally disabled. The review panel reversed this finding, stating that the trial court exceeded its authority on remand by modifying its previous order. Schwarck argues that the review panel was correct in reversing the modified order of the trial court and that the trial court failed to specify sufficient evidence to find that Meredith suffered *any* loss of earning capacity as a result of the September 1999 accident.

Meredith argues on cross-appeal that the review panel erred in finding that the trial court exceeded its authority on remand. Meredith further argues that the review panel erred in reversing the trial court's modification on remand of its original order, because its modified order was well within the trial court's authority.

The review panel cited to *K N Energy, Inc. v. Cities of Broken Bow et al.*, 248 Neb. 112, 532 N.W.2d 32 (1995), in determining that the trial court in the case at bar exceeded the remand of this court by modifying its previous finding regarding Meredith's loss of earning power. However, *K N Energy, Inc.*, is not controlling in the case at bar. In *K N Energy, Inc.*, the Nebraska Supreme Court had previously reinstated an order of a district court that this court had reversed. After that Supreme Court order, additional motions were made to the district court which the district court refused to address, stating it did not have jurisdiction. On appeal of that district court judgment, the Nebraska Supreme Court agreed that the district court did not have jurisdiction to grant motions made after the Supreme Court's order, because such order reinstating the district court's order was a final judgment.

Other cases in which a trial court was held to exceed its authority on remand hold similarly to *K N Energy, Inc.* See, *State v. Williams*, 253 Neb. 111, 568 N.W.2d 246 (1997) (holding that when Nebraska Supreme Court remanded case for determination

of whether alleged juror misconduct occurred and, if so, whether conduct was prejudicial, district court was without power to determine that claim of juror misconduct was procedurally barred); *Gates v. Howell*, 211 Neb. 85, 90, 317 N.W.2d 772, 775 (1982) (holding that "a case, once litigated and directed back to the trial court only for the purpose of entering a judgment on the mandate in accordance with the opinion of the court, is not open to further litigation"). See, also, *Xerox Corp. v. Karnes*, 221 Neb. 691, 380 N.W.2d 277 (1986); *Jurgensen v. Ainscow*, 160 Neb. 208, 69 N.W.2d 856 (1955).

In the case at bar, our remand to the trial court was not an instruction to enter a final judgment. Rather, our remand included instructions for the trial court to "enter an order which complies with the requirements of rule 11, based on the whole record available to the court when the first award was entered." *Meredith v. Schwarck Quarries, Inc.*, No. A-01-1318, 2002 WL 1315376 at *5 (Neb. App. June 18, 2002) (not designated for permanent publication).

[13] We recognize that when a cause is remanded with specific directions, the court to which the mandate is directed has no power to do anything but to obey the mandate. The order of the appellate court is conclusive on the parties, and no judgment or order different from, or in addition to, that directed by the appellate court can be entered by the trial court. *Williams, supra*; *Xerox Corp., supra*. See *Gates, supra*.

However, in the case at bar, the trial court did not disobey the mandate of this court. The trial court entered an order which, if the evidence supports the findings in that order and the order sets forth a reasoned decision, complies with rule 11. Our order did not prevent the trial court from modifying its prior order if the court determined that the evidence as it already existed on the record supported a different determination of disability.

Furthermore, this court did not make a finding as to whether Meredith suffered permanent disability as a result of his work-related injury and, if so, whether the trial court's determination of the extent of disability was correct. Rather, we could not determine whether the trial court's finding regarding permanent disability was correct because we did not know on what evidence such finding was based. If the trial court discovered on remand

that its reasoning supported a different determination of disability, the court should be able to enter an order in compliance with rule 11 that has the proper extent of disability and specifies the evidence relied upon in making such a determination.

[14] This finding is similar to that of the Nebraska Supreme Court in *Owen v. American Hydraulics*, 258 Neb. 881, 606 N.W.2d 470 (2000). In *Owen v. American Hydraulics*, 254 Neb. 685, 578 N.W.2d 57 (1998), the Supreme Court affirmed the review panel's reversal of a workers' compensation award by the trial judge, on the basis that the award failed to comply with rule 11. The Supreme Court "remand[ed] the cause to the trial judge with directions to enter an order based upon the evidence adduced at trial which complies with the requirements of rule 11." 254 Neb. at 696, 578 N.W.2d at 64. On a subsequent appeal, the Supreme Court stated that its determination that the original award was ambiguous, contradictory, and not in compliance with rule 11 effectively rendered the order a nullity. *Owen, supra*. The Supreme Court further stated that in the subsequent appeal, the issue was not whether the order on remand was inconsistent with the original award, but, rather, whether it was supported by the evidence under the applicable standard of review.

As such, we find that in the case at bar, the review panel erred in reversing the order of the trial court on the basis that the trial court exceeded its authority in modifying its original order. Our prior reversal of the trial court's original award of benefits effectively rendered the original award a nullity, and the trial court, on remand, was not prohibited from modifying its original order.

(b) Permanent Disability Determination

Because we find that the trial court did not exceed its authority in modifying its order of February 7, 2003, we now address whether the trial court's determination of permanent total disability was in error. We find that the record does support a finding of permanent total disability and, as such, supports the trial court's original award of permanent partial disability benefits. Accordingly, Meredith is entitled to the trial court's most recent award of permanent partial disability benefits.

[15,16] Total disability exists when an injured employee is unable to earn wages in either the same or a similar kind of work he or she was trained or accustomed to perform or in any other kind of work which a person of the employee's mentality and attainments could perform. *Harmon v. Irby Constr. Co.*, 258 Neb. 420, 604 N.W.2d 813 (1999); *Yarns v. Leon Plastics, Inc.*, 237 Neb. 132, 464 N.W.2d 801 (1991). Total disability in the context of the workers' compensation law does not mean a state of absolute helplessness, but means disablement of an employee to earn wages in the same kind of work, or work of a similar nature, that he or she was trained for or accustomed to perform, or any other kind of work which a person of his or her mentality and attainments could do. *Willuhn v. Omaha Box Co.*, 240 Neb. 571, 483 N.W.2d 130 (1992). Whether a claimant has sustained disability which is total or partial and which is temporary or permanent is a question of fact. *Harmon, supra*; *Sherard v. Bethphage Mission, Inc.*, 236 Neb. 900, 464 N.W.2d 343 (1991).

Upon appellate review, the findings of fact made by the trial judge of the compensation court have the effect of a jury verdict and will not be disturbed unless clearly wrong. *Starks v. Cornhusker Packing Co.*, 254 Neb. 30, 573 N.W.2d 757 (1998). See *Harmon, supra*.

In the case at bar, the trial court determined on remand that Meredith was permanently totally disabled as of May 13, 2000. The court stated that it based its determination on Meredith's testimony and on Gammel's restrictions as it quoted in its original order. The court found that Meredith is "not . . . able to perform suitable work for which he has previous training or experience." We find that this determination of the trial court is not clearly wrong.

The trial court's original order, referenced in its modified order, noted that Gammel opined:

> [Meredith] suffered chronic myofascitis of the cervical spine and an aggravation injury resulting in chronic myofascitis of the lumbar spine due to a work related injury of September 1, 1999, . . . suffered no additional permanent disability because of the aggravation to his lumbar spine, and suffered a 5 percent impairment to the cervical spine as a result of the accident of September 1, 1999.

The trial court also noted in its original order that "[Meredith] testified that he had had some problems with his neck before the injury in this case, but not like that which existed after the accident at [Schwarck's]." The court then specifically found "[Meredith's] testimony to be believable and . . . that the 5 percent impairment represents an impairment to the body as a whole, attributable solely to the accident and injury to [Meredith's] cervical spine on September 1, 1999." While expert witness testimony may be necessary to establish the cause of a claimed injury, the Workers' Compensation Court does not need to depend on expert testimony to determine the degree of disability but instead may rely on the testimony of the claimant. *Cords v. City of Lincoln*, 249 Neb. 748, 545 N.W.2d 112 (1996). See *Luehring v. Tibbs Constr. Co.*, 235 Neb. 883, 457 N.W.2d 815 (1990).

The trial court stated in its original order that "[Meredith] has prior work experience as a self employed mechanic, rock quarry worker, farmer, woodcutter, and landscaper's helper." The court stated that Gammel had "established restrictions for [Meredith's] neck injury to be no repetitive arm motions, no reaching forward, and no job requiring static or frequent flexing or frequent bending of the neck." The court then found that Meredith would "have significant problems in the future with his cervical spine/neck and related headaches" and that "[w]ith these restrictions, [Meredith] is not able to perform suitable work for which he has previous training or experience." We find that the record supports the court's findings and that these findings are sufficient to establish that Meredith was permanently totally disabled. Accordingly, we find that a determination that Meredith was permanently totally disabled is not clearly wrong.

5. Vocational Rehabilitation Services

Finally, Schwarck argues that the trial court was "clearly wrong to state that [this court] affirmed [the trial court's] conclusion that [Meredith] was entitled to vocational rehabilitation benefits." We find that Schwarck is correct that we did not affirm the trial court's original award of vocational rehabilitation services. However, we find that such error is harmless.

The trial court's original order awarded vocational rehabilitation services to Meredith on the basis of a finding that

Meredith was permanently partially disabled. On appeal, we could not conduct a meaningful appellate review without an order from the trial court that complied with rule 11. See *Meredith v. Schwarck Quarries, Inc.*, No. A-01-1318, 2002 WL 1315376 (Neb. App. June 18, 2002) (not designated for permanent publication). We did not address whether the trial court erred in awarding vocational rehabilitation services, because we could not determine whether the court erred in awarding permanent partial disability benefits, a prerequisite for awarding vocational rehabilitation services.

However, on remand, the trial court determined that Meredith was permanently totally disabled and again awarded vocational rehabilitation services. Neb. Rev. Stat. § 48-162.01(3) (Supp. 1999) provides in part:

> When as a result of the injury an employee is unable to perform suitable work for which he or she has previous training or experience, he or she is entitled to such vocational rehabilitation services, including job placement and retraining, as may be reasonably necessary to restore him or her to suitable employment.

Based on the trial court's determination that Meredith is permanently totally disabled, an award of vocational rehabilitation services is not in error.

V. CONCLUSION

We find that the trial court was not clearly wrong in determining that Meredith was temporarily totally disabled through May 12, 2000. We further find that the review panel did not err in affirming the trial court's award of temporary total disability benefits. We also find, contrary to the review panel's holding, that the trial court, on remand, was not prohibited from modifying its original award of permanent partial disability benefits and awarding permanent total disability benefits. Finally, because Meredith is entitled to permanent total disability benefits, the trial court's award of vocational rehabilitation services is not in error. The matter is remanded to the review panel with directions to enter an order consistent with this opinion.

AFFIRMED IN PART, AND IN PART REVERSED.

STATE OF NEBRASKA, APPELLEE, V. JOHN K. NGUTH, APPELLANT.

701 N.W.2d 852

Filed August 16, 2005. No. A-04-1037.

1. **Jury Instructions.** Whether jury instructions given by a trial court are correct is a question of law.
2. **Jury Instructions: Proof: Appeal and Error.** In an appeal based on a claim of erroneous jury instructions, the appellant has the burden to show that the questioned instructions were prejudicial or otherwise adversely affected a substantial right of the appellant.
3. **Convictions: Evidence: Appeal and Error.** In reviewing a criminal conviction, an appellate court does not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence. Such matters are for the finder of fact, and a conviction will be affirmed, in the absence of prejudicial error, if the properly admitted evidence, viewed and construed most favorably to the State, is sufficient to support the conviction.
4. **Parental Rights: Minors.** The use of force upon or toward the person of another is justifiable if the actor is the parent or guardian or other person similarly responsible for the general care and supervision of a minor or a person acting at the request of such parent, guardian, or other responsible person and (1) such force is used for the purpose of safeguarding or promoting the welfare of the minor, including the prevention or punishment of his or her misconduct, and (2) such force used is not designed to cause or known to create a substantial risk of causing death, serious bodily harm, disfigurement, extreme pain or mental distress, or gross degradation.
5. **Jury Instructions: Evidence.** If there is any evidence to support the giving of a jury instruction, it must be given.
6. **Criminal Law: Minors.** Neb. Rev. Stat. § 28-1413 (Reissue 1995) does not create or confer an affirmative right to use physical or corporal punishment, but, rather, the statute only provides a defense against criminal liability.
7. **Jury Instructions: Proof: Appeal and Error.** To establish reversible error from a court's refusal to give a requested instruction, an appellant has the burden to show that (1) the tendered instruction is a correct statement of the law, (2) the tendered instruction is warranted by the evidence, and (3) the appellant was prejudiced by the court's refusal to give the tendered instruction.
8. **Intent: Circumstantial Evidence: Proof.** Whether a defendant possesses the requisite state of mind is a question of fact and may be proved by circumstantial evidence.
9. **Lesser-Included Offenses: Jury Instructions: Evidence.** A court must instruct on a lesser-included offense if (1) the elements of the lesser offense for which an instruction is requested are such that one cannot commit the greater offense without simultaneously committing the lesser offense and (2) the evidence produces a rational basis for acquitting the defendant of the greater offense and convicting the defendant of the lesser offense.
10. **Lesser-Included Offenses: Jury Instructions.** If the first prong of the elements test for determining when a court must instruct the jury on a lesser-included offense is not satisfied, it is unnecessary to analyze the second prong.

11. **Lesser-Included Offenses: Courts.** To determine whether one crime is a lesser-included offense of another, a court is to look initially not to the evidence, but to the statutory elements of the crimes at issue; the process is a comparison of criminal statutes to determine if it is impossible to commit the greater offense without at the same time committing the lesser offense.
12. **Criminal Law: Minors: Intent.** Misdemeanor child abuse is a lesser-included offense of felony child abuse under Neb. Rev. Stat. § 28-707 (Cum. Supp. 2004). It is the defendant's state of mind which differentiates the offenses—if the abuse is committed knowingly and intentionally, it is a felony; if committed negligently, it is a misdemeanor.
13. **Criminal Law: Intent.** The intent with which an act is committed may be inferred from the words and acts of the defendant and from the circumstances surrounding the incident.
14. **Double Jeopardy: Evidence: New Trial: Appeal and Error.** If a defendant appeals a conviction and obtains a reversal based on a trial error, the Double Jeopardy Clause does not forbid a retrial so long as the sum of the evidence offered by the State and admitted by the trial court, whether erroneously or not, would have been sufficient to sustain a guilty verdict.

Appeal from the District Court for Hall County: JAMES LIVINGSTON, Judge. Reversed and remanded for a new trial.

Jerry J. Fogarty, Deputy Hall County Public Defender, for appellant.

Jon Bruning, Attorney General, and Kevin J. Slimp for appellee.

IRWIN, SIEVERS, and CASSEL, Judges.

SIEVERS, Judge.

John K. Nguth appeals the decision of the district court for Hall County convicting him of child abuse, a Class IIIA felony, and sentencing him to 9 months in the Hall County jail.

FACTUAL AND PROCEDURAL BACKGROUND

The Hall County Attorney filed an information against Nguth on March 12, 2004, charging him with Class IIIA felony child abuse in violation of Neb. Rev. Stat. § 28-707(1)(b) (Cum. Supp. 2004). The information alleged that on or about February 2, Nguth "knowingly and intentionally caused or permitted a minor child to be cruelly confined or cruelly punished; to-wit: G.K.K., DOB: 11-19-1992." An amended information alleging the same was filed on May 27, 2004. Jury selection was held on July 1, and the jury trial began on July 6.

At the outset of the trial, G.K.K. was qualified as a witness by the trial court through its questioning of G.K.K. about the importance of truth telling. G.K.K. testified that in February 2004, he lived with Nguth, Nguth's wife, and their four sons. G.K.K. testified that Nguth and his wife are not G.K.K.'s parents but that they told people they were his parents. G.K.K. testified that he participated in a basketball program at the elementary school he attended, although he did not tell Nguth or his wife about G.K.K.'s participation in the program. G.K.K. testified that the program's final basketball game was at the senior high school and that G.K.K.'s physical education teacher picked him up at 5 p.m. to take him to the game.

G.K.K. testified that when the physical education teacher took G.K.K. home at 9:40 p.m., Nguth was upset but did not say anything. G.K.K. testified that he changed his clothes and then went to the living room, where Nguth was, and that Nguth started asking G.K.K. questions about whether it was G.K.K.'s choice to go to the senior high school without telling Nguth. G.K.K. testified that he told Nguth he was sorry and that when G.K.K. would not say anything, Nguth

> would start to get angrier, then he got up and took out the cord and then I got a little scared and I sat on the couch and then — then he told me to keep talking and I keep [sic] talking, talking and then — then I was keep [sic] telling him that I was sorry, and then he just started hitting me.

G.K.K. described the cord as a white electrical cord with the plug missing. G.K.K. said that the cord was attached to what looked like a candle with a bulb on top and that the candle would light up when the cord was plugged in. G.K.K. testified that Nguth got the cord off the top of the television and hit G.K.K. 15 to 20 times with the cord, hitting him on his face, hands, back, and legs. G.K.K. testified that the cord Nguth used to hit G.K.K. was not found.

G.K.K. testified that he lied to the school nurse about how he got his injuries because he was scared but that the truth is Nguth hit him. G.K.K. testified that his friend told him that " 'we have to tell the teacher because that happened to me once and my dad almost killed me but he doesn't do that anymore.' " G.K.K. testified that his classroom teacher saw his face and sent him to the

principal's office, where G.K.K. talked to the principal and the police. G.K.K. testified that after talking to the police, he had to go to the hospital, and that Nguth's wife went with him. G.K.K. testified that by the way she looked, he could tell she was upset, and that she was upset because Nguth had been arrested.

G.K.K.'s physical education teacher testified that he picked G.K.K. up from his home at 6 p.m. and took him to the final basketball game. The teacher said that he returned G.K.K. to his home at 9 p.m. and that the teacher could tell Nguth was upset by his facial expressions and his tone of voice. The teacher testified that he saw G.K.K. at school the next day and that G.K.K. had a swollen eye, a line down his face, and puffy lips. The teacher also testified that G.K.K. was sad, upset, and afraid.

The elementary school staff nurse testified that early on the morning of February 3, 2004, G.K.K.'s teacher sent him to the nurse's office because G.K.K. was not feeling well. The school nurse testified that she observed G.K.K. at that time and that he had injuries which required first aid treatment. She described those injuries as follows:

> [G.K.K.] had a vertical one-half inch scabbed laceration between his left eyebrow and his upper left eyelid; he had two vertical lacerations side-by-side, one was half inch and the other was an inch laceration just below the left eye; his left eye was swollen; there was a two-inch vertical scabbed laceration just below the left eye extending along his left nose down to the upper lip; his upper lip was swollen; he had dark drainage, moist drainage in the outer canal of his left ear, and his left eye pupil was slow to respond to light.

The school nurse testified that she estimated the injuries were incurred within the previous 12 to 24 hours. She testified that G.K.K. told her he ran into a door, but that upon further questioning, G.K.K. said he had been struck by Nguth with a type of belt. The school nurse testified that the police and the "EMS team" arrived and took G.K.K. to the hospital.

An emergency room doctor at the hospital testified that he treated G.K.K. on February 3, 2004. The doctor testified that G.K.K. had a linear abrasion on his face which would be consistent with the report that he had been struck by a rope or cord. The doctor also testified that it is possible G.K.K. could have

been struck more than once, although a hospital nurse's notes say that G.K.K. was struck one time. When pressed on cross-examination, the doctor testified that G.K.K. could "possibly" have received his injuries by falling off a bed. However, the doctor testified generally that falling leaves bruising and being struck leaves marks and abrasions like G.K.K. had.

A Grand Island police officer testified that on February 3, 2004, she went to the elementary school in response to a possible child abuse case. The officer testified that she spoke to G.K.K. and observed "two marks on the left side of his face, swollen eye and a swollen upper lip and it looked like there was some dried blood in his left ear." The officer testified that she was present when the pictures of G.K.K.'s injuries were taken—such pictures were admitted into evidence at trial. The officer testified that she went to G.K.K.'s house and spoke with Nguth. The officer testified that Nguth admitted to being upset with G.K.K. because of the basketball incident and that Nguth asked her, " 'Why can't you just take the kid?' " The officer testified that at that time, she looked for the weapon described by G.K.K. and found on top of an entertainment center a "triangle electrical item, silver and gold and it had a white extension cord." However, the officer testified that she later showed the item to G.K.K. and that he indicated it was not the item Nguth used to hit him.

Three witnesses testified for the defense: Nguth's son B.K., Nguth, and the police officer. After being qualified by the court, B.K., who was 12 years old, testified that on the night of February 2, 2004, he saw a bump on G.K.K.'s head, and that G.K.K. told B.K. that G.K.K. had fallen off the bunk bed. (The police officer testified that B.K. had also told her that G.K.K. fell off the bed.) B.K. testified that on February 2, G.K.K. never told him to tell Nguth that G.K.K. went to play basketball. B.K. also testified that he never told G.K.K. to lie or to tell people that G.K.K. fell out of the bed.

Nguth testified, through an interpreter, that G.K.K. had lived with him since Nguth came to the United States from Africa. Nguth testified that on February 2, 2004, he was worried because he did not know where G.K.K. was—he was worried because children can get "lost" in this country. He testified that G.K.K. came home around 10 p.m., after being missing for 4 to 5 hours.

Nguth testified, "I was not in position to punish [G.K.K.] but I was in position to tell him what he did is wrong." Nguth testified that he told G.K.K. to go to his room and do his assignment, that G.K.K. slipped as he was climbing into bed, and that Nguth saw a bruise on G.K.K.'s eye but did not think it was a "big" injury. Nguth testified that he took G.K.K. to school the next day and that after a while, the police came to Nguth's house. Nguth testified that he told the police that G.K.K. had slipped while climbing into bed. (The record indicates that in Nguth's conversation with the police, a neighbor may have translated for Nguth.)

The jury found Nguth guilty of child abuse as charged. A sentencing hearing was held on August 24, 2004, and the court's journal entry was filed on the same day. The district court found that Nguth was not a fit and proper candidate for probation and sentenced him to 9 months in the Hall County jail, with a credit of 8 days for time served. Nguth now appeals.

ASSIGNMENTS OF ERROR

Nguth alleges that the district court erred in (1) overruling his request for a jury instruction on justification of parental discipline and his request that negligent child abuse be instructed as a lesser-included offense, (2) finding the evidence sufficient to convict him of felony child abuse, and (3) imposing an excessive sentence.

STANDARD OF REVIEW

[1,2] Whether jury instructions given by a trial court are correct is a question of law. *State v. Wright*, 261 Neb. 277, 622 N.W.2d 676 (2001). In an appeal based on a claim of erroneous jury instructions, the appellant has the burden to show that the questioned instructions were prejudicial or otherwise adversely affected a substantial right of the appellant. *Id.*

[3] In reviewing a criminal conviction, an appellate court does not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence. Such matters are for the finder of fact, and a conviction will be affirmed, in the absence of prejudicial error, if the properly admitted evidence, viewed and construed most favorably to the State, is sufficient to support the conviction. *State v. McPherson*, 266 Neb. 734, 668 N.W.2d 504 (2003).

ANALYSIS

Jury Instructions.

At common law, a parent, or one standing in the relation of parent, was not liable either civilly or criminally for moderately and reasonably correcting a child, but it was otherwise if the correction was immoderate and unreasonable. *Clasen v. Pruhs*, 69 Neb. 278, 95 N.W. 640 (1903). It is a question of fact to be determined by the jury whether or not the punishment inflicted was, under all the circumstances and surroundings, reasonable or excessive. *Id.* In 1972, the common-law rule was codified as Neb. Rev. Stat. § 28-1413 (Reissue 1995). In *Cornhusker Christian Ch. Home v. Dept. of Soc. Servs.*, 227 Neb. 94, 106, 416 N.W.2d 551, 560 (1987), the court stated that "the rule found in *Clasen v. Pruhs, supra*, is a restatement of the common-law rule that was later codified in the criminal defense provision of § 28-1413 of the Nebraska Revised Statutes."

[4] Nguth alleges that the district court erred in overruling his request for a jury instruction on justification of parental discipline based on § 28-1413, which provides in part:

> The use of force upon or toward the person of another is justifiable if:
>
> (1) The actor is the parent or guardian or other person similarly responsible for the general care and supervision of a minor or a person acting at the request of such parent, guardian, or other responsible person and:
>
> (a) Such force is used for the purpose of safeguarding or promoting the welfare of the minor, including the prevention or punishment of his or her misconduct; and
>
> (b) Such force used is not designed to cause or known to create a substantial risk of causing death, serious bodily harm, disfigurement, extreme pain or mental distress, or gross degradation.

[5] The trial court denied Nguth's request for a jury instruction on justification of parental discipline, reasoning that there was no evidence to support such an instruction because Nguth consistently denied the allegations and stated, "I was not in position to punish [G.K.K.] but I was in position to tell him what he did is wrong." However, the standard for whether an instruction is proper is not determined only by the defendant's evidence or

theory of the case. The law is that if there is any evidence to support the giving of the instruction, it must be given. For example, it has been held that a trial court must instruct the jury on the issue of self-defense when there is any evidence adduced which raises a legally cognizable claim of self-defense. See *State v. Kinser*, 252 Neb. 600, 567 N.W.2d 287 (1997). There is abundant evidence from G.K.K. that Nguth was angry with G.K.K. and punishing him for attending the basketball game without permission or notification and that the injuries at issue occurred as a result. Additionally, the evidence was that G.K.K. lived with Nguth and his family since Nguth came to the United States from Africa and that G.K.K.'s parents were in Sudan. The statute does not require a formal guardianship; rather, § 28-1413 includes "other person similarly responsible for the general care and supervision of a minor," which language clearly describes the evidence of the relationship between G.K.K. and Nguth.

[6] The two most significant cases involving § 28-1413 are *State v. Beins*, 235 Neb. 648, 456 N.W.2d 759 (1990), and *State v. Miner*, 216 Neb. 309, 343 N.W.2d 899 (1984). In *Miner, supra*, the defendant was convicted of manslaughter in connection with the death of his girl friend's 3-year-old son who died as the result of a kick to his epigastric region. The defendant waived a jury, and after his conviction, he argued on appeal that his act was privileged under the provisions of § 28-1413. The Supreme Court in *Miner, supra*, assumed that the defendant had standing to invoke the statute and held that whether the act committed by the defendant was privileged, or whether it constituted an assault and was therefore unlawful, presented a question of fact which was resolved against the defendant. In *Beins, supra*, the defendant was convicted of third degree assault for hitting and choking his 15-year-old daughter. The defendant argued on appeal that his actions toward his daughter were privileged under § 28-1413. However the *Beins* court quickly disposed of the argument by noting that an instruction posing such defense under the statute was given to the jury, which apparently resolved such issue against the defendant. Finally, we note that the Supreme Court discussed § 28-1413 in *Cornhusker Christian Ch. Home v. Dept. of Soc. Servs.*, 227 Neb. 94, 102, 416 N.W.2d 551, 558 (1987), as follows:

> [Section] 28-1413 does not create or confer an affirmative right to use physical or corporal punishment, but, rather, the statute only provides a defense against criminal liability. Section 28-1413 extends the defense to a "parent or guardian" when the parent or guardian is caring for or supervising a minor.

Here, an instruction utilizing § 28-1413 was not given, as it was in *Beins*, although there was a request for such an instruction. In *Miner* and *Beins*, the defendants admitted the conduct at issue but claimed the statutory defense, whereas in the instant case, Nguth denies striking G.K.K. in the course of disciplining him and claims that G.K.K.'s injuries resulted from a fall while getting into bed. Nonetheless, we have rejected the lower court's finding that Nguth's denial precluded the instruction because G.K.K.'s testimony provided the evidence that the injuries were inflicted via discipline.

[7,8] To establish reversible error from a court's refusal to give a requested instruction, an appellant has the burden to show that (1) the tendered instruction is a correct statement of the law, (2) the tendered instruction is warranted by the evidence, and (3) the appellant was prejudiced by the court's refusal to give the tendered instruction. *State v. Kinser*, 252 Neb. 600, 567 N.W.2d 287 (1997); *Kent v. Crocker*, 252 Neb. 462, 562 N.W.2d 833 (1997). See *State v. Glantz*, 251 Neb. 947, 560 N.W.2d 783 (1997). The defense in § 28-1413 applies only when "[s]uch force used is not designed to cause or known to create a substantial risk of causing death, serious bodily harm, disfigurement, extreme pain or mental distress, or gross degradation." Clearly, this portion of the statute implicates the intent of the actor. A commonly used and approved jury instruction provides that intent is a mental process, which generally remains hidden within the mind where it is conceived, and that such intent is rarely if ever susceptible of proof by direct evidence, although it may be inferred from the words and acts of the defendant and from the facts and circumstances surrounding his conduct. See *State ex rel. NSBA v. Veith*, 238 Neb. 239, 470 N.W.2d 549 (1991). Whether a defendant possesses the requisite state of mind is a question of fact and may be proved by circumstantial evidence. See *State v. Meyer*, 236 Neb. 253, 460 N.W.2d 656 (1990).

In determining whether the evidence required that the justification defense be submitted to the jury, we note that there was evidence of a parental or guardianship type of relationship plus evidence of punishment of G.K.K. by Nguth. Additionally, the evidence of the injuries sustained is not such that we could say as a matter of law that the force used was designed to cause, or known to create, a substantial risk of causing death, serious bodily harm, disfigurement, extreme pain or mental distress, or gross degradation. Thus, the key fact question, if the jury rejects Nguth's denial and accepts G.K.K.'s version, is still the intent of Nguth. In other words, when hitting G.K.K. with the cord, did Nguth intend to cause, or did he know, that such actions created a substantial risk of causing death, serious bodily harm, disfigurement, extreme pain or mental distress, or gross degradation. Included in our consideration of this issue is evidence that G.K.K. was struck only once. The police officer testified that G.K.K. told her that he was struck with the cord "once," and the emergency room doctor admitted that the written emergency room record stated, " 'Struck him one time with electric cord.' " Clearly, how a fact finder would view the parental justification defense is dependent, at least in part, on the number of times G.K.K. was struck. And there is widely varying evidence on this point. The trial court erred in failing to instruct the jury on the parental justification defense set forth in § 28-1413, and such failure was obviously prejudicial to Nguth.

Lesser-Included Offense.

[9-11] Nguth also alleges that the district court erred in overruling his request that negligent child abuse be instructed as a lesser-included offense, and we take up this issue because it is likely to recur upon our remand.

> [A] court must instruct on a lesser-included offense if (1) the elements of the lesser offense for which an instruction is requested are such that one cannot commit the greater offense without simultaneously committing the lesser offense and (2) the evidence produces a rational basis for acquitting the defendant of the greater offense and convicting the defendant of the lesser offense.

State v. Williams, 243 Neb. 959, 965, 503 N.W.2d 561, 566 (1993). Accord *State v. Weaver*, 267 Neb. 826, 677 N.W.2d 502 (2004).

> If the first prong of the *Williams* test is not satisfied, it is unnecessary to analyze the second prong. . . . When applying *Williams*, a court is to look initially not to the evidence, but to the statutory elements of the crimes at issue. . . . The process is a comparison of criminal statutes to determine if it is impossible to commit the greater offense without at the same time committing the lesser offense.

(Citations omitted.) *State v. McKimmey*, 10 Neb. App. 595, 599, 634 N.W.2d 817, 821 (2001).

[12] The Nebraska Supreme Court has held that misdemeanor child abuse is a lesser-included offense of felony child abuse under § 28-707. See *State v. Parks*, 253 Neb. 939, 573 N.W.2d 453 (1998). The *Parks* court reasoned: "The proscribed conduct for each offense is exactly the same; it is the actor's state of mind which differentiates the offenses. If the abuse is committed knowingly and intentionally, it is a felony; if committed negligently, it is a misdemeanor. [O]ne state of mind can be included within another." *Id.* at 947, 573 N.W.2d at 459. Because the "elements" prong of the *Williams* test has been satisfied, we move on to the second prong of the test.

[13] We turn to whether the evidence produces a rational basis for acquitting Nguth of the greater offense and convicting him of the lesser offense. In *State v. Schwartz*, 219 Neb. 833, 838, 366 N.W.2d 766, 770 (1985), the court discussed whether a lesser-included instruction was required and stated:

> [I]f there is evidence in some form (whether it be evidence offered by defendant, evidence developed in cross-examination of the State's witnesses, or evidence adduced from other witnesses) before the jury, which directly disputes the additional element differentiating the same conduct as to degree, an instruction on the lesser-included offense is proper.

"The intent with which an act is committed may be inferred from the words and acts of the defendant and from the circumstances surrounding the incident." *State v. Parks*, 253 Neb. at 949, 573 N.W.2d at 460. The evidence reflects that Nguth was angry because G.K.K. did not tell Nguth that G.K.K. was going to play basketball and because Nguth did not know where G.K.K. was. G.K.K. testified that Nguth hit G.K.K. 15 to 20 times with a

cord, hitting him on his face, hands, back, and legs. The emergency room doctor testified that G.K.K. had a linear abrasion on his face which would be consistent with the report that he had been struck by a rope or cord. However, as recounted earlier, there was evidence that G.K.K. was struck only once, from which evidence a fact finder could reasonably conclude that the injuries inflicted were the result of negligence, not intentionally cruel punishment as charged. Thus, while we recognize that Nguth denies striking G.K.K. at all, we consider all the evidence regardless of source, and when G.K.K.'s statements to the police officer and emergency room personnel are put into the mix, there is a rational basis for a fact finder to conclude that negligence was at work, rather than intentional cruel punishment. While in *Parks, supra*, the defendant's testimony indicated, in effect, that the child was injured by him, but that the act was not done in anger or as punishment because the fracture of the leg occurred accidentally when the defendant repositioned the child to change his diaper, the evidence of negligence here comes from the victim. But, that does not change the outcome, because the jury could believe that Nguth struck G.K.K., but only once, and that thus, the punishment was negligent abuse, not intentionally cruel abuse. Therefore, the trial court was required to instruct the jury on the lesser-included offense of negligent child abuse.

Sufficiency of Evidence.

[14] Nguth alleges that the evidence presented at trial was insufficient to convict him of felony child abuse. We address this assignment only in the context of whether Nguth may be retried after our reversal. See *State v. Noll*, 3 Neb. App. 410, 527 N.W.2d 644 (1995), *overruled on other grounds, State v. Anderson*, 258 Neb. 627, 605 N.W.2d 124 (2000) (if defendant appeals conviction and obtains reversal based on trial error, Double Jeopardy Clause does not forbid retrial so long as sum of evidence offered by State and admitted by trial court, whether erroneously or not, would have been sufficient to sustain guilty verdict).

The evidence offered by the State included testimony from G.K.K. that Nguth hit G.K.K. 15 to 20 times with a cord, hitting him on his face, hands, back, and legs. G.K.K. described the cord as a white electrical cord with the plug missing. The

emergency room doctor testified that G.K.K. had a linear abrasion on his face which would be consistent with the report that he had been struck by a rope or cord. Clearly, there was sufficient evidence to support Nguth's conviction, and as a result, he may be retried.

CONCLUSION

Because the evidence was sufficient to sustain the conviction but there was trial error in failing to properly instruct the jury, we reverse the conviction and sentence and remand the cause for a new trial.

REVERSED AND REMANDED FOR A NEW TRIAL.

BILLY TYLER, APPELLANT, V. NEBRASKA DEPARTMENT OF CORRECTIONAL SERVICES, APPELLEE.

701 N.W.2d 847

Filed August 16, 2005. No. A-04-1418.

1. **Affidavits: Appeal and Error.** A district court's denial of in forma pauperis status under Neb. Rev. Stat. § 25-2301.02 (Cum. Supp. 2004) is reviewed de novo on the record based on the transcript of the hearing or the written statement of the court.
2. **Actions: Words and Phrases.** A frivolous legal position pursuant to Neb. Rev. Stat. § 25-2301.02 (Cum. Supp. 2004) is one wholly without merit, that is, without rational argument based on the law or on the evidence.
3. **Sentences: Words and Phrases.** For the purpose of Neb. Rev. Stat. § 83-1,106(1) (Reissue 1999), "in custody" means judicially imposed physical confinement in a governmental facility authorized for detention, control, or supervision of a defendant before, during, or after a trial on a criminal charge.
4. **Sentences: Appeal and Error.** It is error for a trial court, when imposing a straight jail sentence, to permit or require a defendant to serve his or her sentence intermittently.
5. **Sentences: Time: Prisoners.** Where a prisoner is discharged from a penal institution, without any contributing fault on his or her part, and without violation of conditions of parole, his or her sentence continues to run while he or she is at liberty.
6. **Motions to Dismiss: Pleadings: Appeal and Error.** An appellate court reviews a district court's grant of a motion to dismiss de novo, accepting all the allegations in the complaint as true and drawing all reasonable inferences in favor of the nonmoving party.
7. **Actions: Pleadings.** In determining whether a complaint states a cause of action, an appellate court is free to ignore legal conclusions, unsupported conclusions, unwarranted inferences, and sweeping legal conclusions cast in the form of factual allegations.
8. **Pleadings.** Complaints should be liberally construed in the plaintiff's favor.

9. **Actions: Appeal and Error.** Principles of liberal construction apply to the review of a denial of a motion to proceed in forma pauperis upon the ground that the complaint was frivolous.

Appeal from the District Court for Lancaster County: KAREN FLOWERS, Judge. Reversed and remanded with directions.

Billy Tyler, pro se.

No appearance for appellee.

INBODY, Chief Judge, and SIEVERS and CASSEL, Judges.

CASSEL, Judge.

INTRODUCTION

This matter comes before the court on Billy Tyler's motion for summary reversal. For the reasons that (1) summary reversal pursuant to Neb. Ct. R. of Prac. 7C (rev. 2001) is not proper in this case because there is no stipulation of the parties, (2) Tyler is incarcerated and has waived oral argument, and (3) Nebraska's Department of Correctional Services (Department) declined to file a brief, precluding it from presenting oral argument, we order this case submitted without oral argument pursuant to this court's authority under Neb. Ct. R. of Prac. 11B(1) (rev. 2000). After considering the merits of this case, we conclude that the trial court erred in denying Tyler's motion to proceed in forma pauperis on the ground that his proposed complaint is frivolous.

BACKGROUND

On November 22, 2004, Tyler filed a pleading entitled "Declaratory Judgement Action Motion to Proceed In Forma Pauperis." Therein, he alleged that his 10-year sentence commenced to run in November 1995 and that after serving 7 years 8 months of his sentence, he was released on bail for 1 year 3 months 27 days pursuant to a successful habeas action. The Department appealed that decision and prevailed. Tyler also alleged in his pleading that because the Department claimed Tyler never left the system and was not subject to reclassification, he was immediately put in disciplinary segregation (where he was prior to release) upon being returned to the Nebraska State Penitentiary rather than being taken to the Diagnostic and

Evaluation Center (D&E) for reclassification into the prison system. The pleading further alleged that any mistakes or miscalculations were attributable to the court that "ordered [Tyler] released conditionally in constructive custody on bail and to [the Department's] appealing necessitating [Tyler] to post bail." Tyler requested the court to declare (1) that his sentence expires in 2005; (2) that such sentence has run continuously and uninterrupted since its imposition; (3) that he should have been taken to D&E upon his return to prison; (4) that his release under the circumstances set forth above did not toll the running of his sentence; (5) that the Department did not have the power to toll the running of the sentence; (6) that under the circumstances, Tyler's bail was tantamount to parole or work release and his sentence thus continued to run; and (7) that a proper reclassification at D&E would require that he "be classified work release or house arrest." Tyler attached to his pleading a poverty affidavit and requested that he be allowed to proceed in forma pauperis.

On November 24, 2004, the district court filed an order denying leave to proceed in forma pauperis, on the basis that Tyler's complaint for declaratory judgment was frivolous. The court stated that "[t]ime on bond is not time in custody" and that when Tyler was returned to custody to complete his sentence, he had no statutory or constitutional right to be reclassified. Tyler timely filed a notice of appeal.

ASSIGNMENT OF ERROR

Tyler asserts that the district court erred in denying the relief he sought.

STANDARD OF REVIEW

[1] A district court's denial of in forma pauperis status under Neb. Rev. Stat. § 25-2301.02 (Cum. Supp. 2004) is reviewed de novo on the record based on the transcript of the hearing or the written statement of the court. § 25-2301.02(2); *Glass v. Kenney*, 268 Neb. 704, 687 N.W.2d 907 (2004).

ANALYSIS

[2] The district court denied Tyler's motion to proceed in forma pauperis for the reason that his action for declaratory

judgment was frivolous. A frivolous legal position pursuant to § 25-2301.02 is one wholly without merit, that is, without rational argument based on the law or on the evidence. *Cole v. Blum*, 262 Neb. 1058, 637 N.W.2d 606 (2002). Citing no case law in support of its decision, the district court stated, "Time on bond is not time in custody."

[3] If Tyler's claim concerned custody prior to sentencing, the district court clearly would be correct. In *State v. Jordan*, 240 Neb. 919, 485 N.W.2d 198 (1992), the trial court sentenced the defendant to 3 years' probation involving intensive supervision, which included a 90-day period of electronic monitoring. The defendant completed the 90-day period of electronic monitoring prior to his probation's being revoked. At the sentencing hearing, the court rejected the defendant's request that he be given credit for the 90-day period of electronic monitoring and sentenced him to imprisonment for 1 to 2 years. The Nebraska Supreme Court examined the meaning under Neb. Rev. Stat. § 83-1,106(1) (Reissue 1999) of "in custody" for purposes of determining credit against a sentence and held that " 'in custody' means judicially imposed physical confinement in a governmental facility authorized for detention, control, or supervision of a defendant before, during, or after a trial on a criminal charge." 240 Neb. at 923, 485 N.W.2d at 201. Certainly, if the issue concerned custody prior to sentencing, *Jordan* would support the district court's order, because Tyler's time on bond would not be time spent in physical confinement in a governmental facility authorized for detention, control, or supervision of a defendant. However, *Jordan* is distinguishable in the sense that the 90-day period of electronic monitoring was served before the subsequent sentence of imprisonment was even imposed, whereas in the instant case, Tyler began serving his sentence of imprisonment before his conditional release on bond.

[4,5] We think the interruption of the serving of a sentence represents a key distinction. The Nebraska Supreme Court has held that it is error for a trial court, when imposing a straight jail sentence, to permit or require a defendant to serve his or her sentence intermittently. See *State v. Texel*, 230 Neb. 810, 433 N.W.2d 541 (1989). This principle suggests that a sentence must run continuously from the commencement of incarceration. We

are unable to find any Nebraska statutory or case law allowing a sentence to be tolled after the prisoner has begun serving it, particularly where said sentence is not interrupted by escape or some other fault of the prisoner. In looking to case law from other jurisdictions, we observe that in the oft-cited case of *White v. Pearlman*, 42 F.2d 788, 789 (10th Cir. 1930), the Court of Appeals for the 10th Circuit stated:

> A prisoner has some rights. A sentence of five years means a continuous sentence, unless interrupted by escape, violation of parole, or some fault of the prisoner, and he cannot be required to serve it in installments. . . . It is our conclusion that where a prisoner is discharged from a penal institution, without any contributing fault on his part, and without violation of conditions of parole, that his sentence continues to run while he is at liberty.

See, also, *Luther v. Vanyur*, 14 F. Supp. 2d 773 (E.D.N.C. 1997); *McCorvey v. State*, 675 So. 2d 81 (Ala. Crim. App. 1995). Cf. *Free v. Miles*, 333 F.3d 550 (5th Cir. 2003) (holding that prisoner was not entitled to credit on federal sentence for mistakenly serving first 6 months of federal sentence prior to completing service of state sentence and stating that sole purpose of rule against piecemeal incarceration is to prevent government from abusing its coercive power to imprison person by artificially extending duration of sentence through releases and reincarceration).

[6-9] Concerning the case before us, Tyler attempted to commence the action after the rules for notice pleading had become effective. See Neb. Ct. R. of Pldg. in Civ. Actions 1 (rev. 2004). The Nebraska Supreme Court recently stated that an appellate court reviews a district court's grant of a motion to dismiss de novo, accepting all the allegations in the complaint as true and drawing all reasonable inferences in favor of the nonmoving party. *Kellogg v. Nebraska Dept. of Corr. Servs.*, 269 Neb. 40, 690 N.W.2d 574 (2005). In so reviewing, an appellate court is "'"free to ignore legal conclusions, unsupported conclusions, unwarranted inferences and sweeping legal conclusions cast in the form of factual allegations."'" *Id.* at 44, 690 N.W.2d at 578. Accord *Farm Credit Services v. American State Bank*, 339 F.3d 764 (8th Cir. 2003) (quoting *Wiles v. Capitol Indem. Corp.*, 280

F.3d 868 (8th Cir. 2002)). Complaints should be liberally construed in the plaintiff's favor. *Kellogg v. Nebraska Dept. of Corr. Servs., supra.* We recognize that we are not addressing a motion to dismiss in the instant case. Nonetheless, we believe that those principles of liberal construction would apply to the review of a denial of a motion to proceed in forma pauperis upon the ground that the complaint was frivolous.

Liberally construed, Tyler's complaint alleges that he had served over 7 years of a 10-year sentence before being released —through no fault of his own—for over a year, during which time it does not appear he violated any of the conditions of his release. Upon his return to the penitentiary, he was informed that his sentence did not continue to run during the time that he was conditionally released on bond. In reviewing the decision of the district court de novo, we conclude that the court erred in stating that Tyler's "[c]omplaint lacks any legal merit" and in deeming it to be frivolous. We emphasize that in determining that Tyler's complaint is not frivolous, we are not expressing any view concerning the ultimate merit of Tyler's claim.

CONCLUSION

For the reasons set forth above, we reverse the decision of the district court and remand the cause with directions to grant Tyler leave to proceed in forma pauperis.

REVERSED AND REMANDED WITH DIRECTIONS.

ELEANOR M. EDLUND, APPELLANT, V. 4-S, LLC, A NEBRASKA LIMITED LIABILITY COMPANY, APPELLEE.

702 N.W.2d 812

Filed August 23, 2005. No. A-03-1425.

1. **Rules of the Supreme Court: Appeal and Error.** Neb. Ct. R. of Prac. 9D(4) (rev. 2001) provides that where the brief of appellee presents a cross-appeal, it shall be noted on the cover of the brief and it shall be set forth in a separate division of the brief. This division shall be headed "Brief on Cross-Appeal" and shall be prepared in the same manner and under the same rules as the brief of appellant.
2. ____: ____. The rules regarding the manner of presenting a cross-appeal are the same as the rules applicable to an appellant's brief.
3. **Appeal and Error.** Errors argued but not assigned will not be considered on appeal.

4. **Equity: Boundaries: Appeal and Error.** An action to ascertain and permanently establish corners and boundaries of land under Neb. Rev. Stat. § 34-301 (Reissue 2004) is an equity action.
5. **Equity: Appeal and Error.** In an appeal from an equity action, an appellate court tries factual questions de novo on the record and reaches a conclusion independent of the findings of the trial court, provided that 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 judge heard and observed the witnesses and accepted one version of the facts rather than another.
6. **Evidence: Trial: Rules of the Supreme Court.** Admissions that a party has not sought to withdraw or amend conclusively establish the matter admitted.
7. **Property: Quiet Title: Proof.** A party who seeks to have title in real estate quieted in him or her on the ground that it is accretion to land to which he or she has title has the burden of proving the accretion by a preponderance of the evidence.
8. **Waters: Boundaries.** Under Nebraska law, title to riparian lands runs to the thread of the contiguous stream.
9. **Waters: Boundaries: Words and Phrases.** The thread, or center, of a channel is the line which would give the landowners on either side access to the water, whatever its stage might be and particularly at its lowest flow. The thread of the stream is that portion of a waterway which would be the last to dry up.
10. **Real Estate: Waters: Boundaries.** Where the thread of a stream is the boundary between estates and that stream has two channels, the thread of the main channel is the boundary between the estates.
11. ____: ____: ____. Where the thread of the main channel of a river is the boundary line between two estates and it changes by the slow and natural processes of accretion and reliction, the boundary follows the channel.

Appeal from the District Court for Dawson County: JAMES E. DOYLE IV, Judge. Affirmed in part, and in part reversed and remanded with directions.

Patrick J. Nelson, of Jacobsen, Orr, Nelson, Wright & Lindstrom, P.C., for appellant.

Larry R. Baumann, of Kelley, Scritsmier & Byrne, P.C., for appellee.

INBODY, Chief Judge, and SIEVERS and CASSEL, Judges.

CASSEL, Judge.

INTRODUCTION

Eleanor M. Edlund brought this action pursuant to Neb. Rev. Stat. § 34-301 (Reissue 2004) to ascertain and establish the corners and boundaries between her land and the land of 4-S, LLC. The parties agree that the controlling boundary is the thread of

the stream of the Platte River, main channel, but disagree on the location of such thread. Both parties claim land by accretion—Edlund from the south bank and 4-S from the north bank. Following a bench trial, the court rejected 4-S' defense asserting adverse possession and determined that the boundary was a line delineated by points equidistant from the thread of the "middle channel" and the thread of "channel 3." Edlund appeals, and 4-S attempts to cross-appeal. Because the conclusive effect of 4-S' answers to requests for admission raises a compelling inference that the thread is located in the middle channel and because 4-S, in its brief, sets forth no assignment of error in its purported cross-appeal, we affirm in part, and in part reverse and remand with directions.

BACKGROUND

Two main channels of the Platte River are at issue, and they have been referenced in a number of different ways in the proceedings discussed below. For the sake of uniformity and clarity, throughout this opinion, we shall use the trial court's designations of "middle channel" to refer to the northern channel at issue and "channel 3" to refer to the southern channel at issue. Edlund brought an action against 4-S seeking to ascertain and establish corners and boundaries of her land. In its answer, 4-S alleged that it and its predecessors had adversely possessed the land south of its property to channel 3 of the Platte River for longer than the requisite time period. Neither party pled mutual recognition and acquiescence. Because adverse possession is not an issue on appeal, we shall omit discussion of the stipulation and evidence pertinent to that issue.

The court held a bench trial on July 29 and 30, 2003. The parties stipulated to, and the court accepted, the legal descriptions of lands owned by Edlund and by 4-S. The Edlund land is composed of certain government lots located in Dawson and Phelps Counties and all Platte River accretion lands deriving from and adjacent to such government lots. The 4-S land is north of the Edlund land and is composed of certain government lots located in Dawson and Buffalo Counties and all Platte River accretion lands deriving from and adjacent to such government lots. The parties further stipulated that (1) the south boundary line of the

Edlund land is not in dispute, (2) the southwest corner of the Edlund land is the west terminus of the south boundary of the Edlund land, (3) the southeast corner of the Edlund land is the east terminus of the south boundary of the Edlund land, (4) the east and west boundary lines of the Edlund land are not in dispute (except as to real estate which 4-S claimed to own as a result of adverse possession), and (5) the boundary line between the Edlund land and the 4-S land is the thread of the stream of the Platte River, main channel. The parties expressly stated that they did not stipulate to the present exact location of such thread of the stream. In dispute is the northern border of the Edlund land.

Of particular significance are four surveys: the original Dawson and Phelps Counties government survey, the original Buffalo County government survey, the Nebraska Public Power District (NPPD) survey, and the Buffalo Surveying Corporation (BSC) survey. The court received each survey into evidence without objection. The original government surveys were filed with the Surveyor General's office in January 1868, and each depict thereon the Platte River, main channel. The Buffalo County survey also shows a "South Channel" of the Platte River to the south of the Platte River, main channel.

The NPPD survey depicts land in Phelps and Dawson Counties which is located immediately to the west of the lands belonging to Edlund and to 4-S and shows the west boundary of the Edlund land. The surveyor's certificate shows that a registered land surveyor performed the survey, that the plat was completed June 19, 1992, and that the plat was revised that same year on July 23, July 29, and August 14. On the right side of the survey under a heading of "Lines of Title," three different lines are set forth to represent "line of title," "accretion," and "thread of stream." Just below that is a "Legend." The legend contains a marking for, among other things, the "thread of main channel river - June 19, 1992," and the "thread of north channel river - June 19, 1992." The line on the survey corresponding to that in the legend for the "thread of main channel river - June 19, 1992," has the label "Main Channel Platte River" below it, and above the line is the label "Thread" with an arrow pointing to the line. North of the "Main Channel Platte River" is a line

labeled "Present North Channel," and to the south is a line labeled "Thread of South Channel 1992."

The BSC survey was performed at the request of Edlund's counsel by members of BSC, including Mitchell Humphrey, a licensed registered land surveyor and president of BSC. BSC surveyed the Edlund land from August 6 through December 11, 2002. The BSC survey also depicted the 4-S land, but the legal description on the survey contained only the Edlund land. The BSC survey depicted the "Centerline of Existing River Channel," which was north of the lot line of two of 4-S' government lots, largely north of a third lot line, and south of a fourth lot line. One of the "Surveyor's Notes" states: "No attempt was made to determine the thread of the stream of any channel of the Platte River for purposes of this survey. The centerline of the existing Platte River channel described herein was determined, as was the existing high bank of such Platte River channel described herein."

Humphrey testified that in preparing the BSC survey, his crew reestablished the points as they were established on the original government surveys. In connection with the pertinent surveying work, Humphrey was asked to assume (1) the accuracy of the NPPD survey, (2) that the west boundary line of the Edlund land was not in dispute, and (3) that the channel of the Platte River containing the thread of the stream of the Platte River, main channel, had not changed since the NPPD survey was conducted. Because Humphrey was asked to assume the accuracy of the NPPD survey, he did not determine the location of the thread of the stream of the Platte River, main channel, nor did he determine in which channel of the Platte River the thread of the stream was located. Humphrey testified that he was not asked to survey the thread of any channel of the Platte River but that he was asked to determine the centerline of the main channel of the Platte River, which task he accomplished by surveying the north and south bank lines and computing the centerline based upon such bank lines. Humphrey testified that the north boundary line of the Edlund land is the centerline of the existing river channel—depicted on the BSC survey as the middle channel—but not the thread of the stream of the channel. Humphrey testified, "I assumed that . . . the thread of the stream as depicted on [the NPPD] survey was the channel that we were going to match in

to. And, in fact, once we did that survey work[,] that did match. . . . As far as the center line of our channel is concerned."

When asked about the relationship between the thread of the stream of the Platte River, main channel, as depicted on the NPPD survey (which would be the middle channel) and the north boundary line of the Edlund land, Humphrey testified that the westerly point of the BSC survey matches the easterly point of the NPPD survey. In other words, the northwest corner of the Edlund land as reflected on the BSC survey is the same point as the thread of the stream of the Platte River, main channel, depicted on the NPPD survey. Humphrey testified that assuming the accuracy of the NPPD survey's depiction of the thread of the stream of the Platte River, main channel, the middle channel is a channel of the Platte River that contains the thread of the stream.

When asked if it were possible to find and plot a thread of the stream of the Platte River, Humphrey answered, "Probably not. . . . Because that line changes all the time. As the river flows." Humphrey testified that the bottom of the river's channels are constantly changing and that sometimes the bank lines change as well. Humphrey testified, "At any given moment you might be able to tell what the thread is. But practically speaking you couldn't tell which channel would go dry on a day to day basis. . . . Until they went dry." Humphrey testified that both the middle channel and channel 3 are well-defined channels. Humphrey testified that without making any assumptions as to prior surveys, he could make an educated guess as to the location of the thread of the stream by considering which channel carried the most water, which had the fastest flow of water, and which channel was the deepest. Based on Humphrey's visual observations, he opined that the middle channel was swifter, carried more water, and appeared to be deeper than channel 3. Humphrey also testified that the middle channel was the wider of the two channels.

Doug Stunkel, a member of 4-S along with his three sons, testified that he could cross the middle channel by walking. Stunkel testified that channel 3 and the middle channel were both about "[a] foot and a half" high on the Sunday before the trial. Stunkel testified that his understanding was that his property line was the geographic centerline of channel 3 or about 200 yards south of that channel. Stunkel testified that sometime after he purchased

the property, he spoke with one of Edlund's grandsons-in-law, who said that he thought the boundary was at the 214 marker of the NPPD survey, which marker is south of the line identified in the legend as "thread of main channel river - June 19, 1992."

Dave Moats testified that he had hunted in the area, that he had often canoed in both the middle channel and channel 3, and that he had waded across both channels on many occasions since the early 1970's. Based on those experiences, Moats believed that channel 3 was the main channel. He testified that channel 3 had always been referred to as the main channel by others. Gary Dyer testified that he is familiar with the land owned by 4-S and that he had hunted on Edlund's land with her permission. According to Dyer, Edlund told the "guys" that she did not like where they put a duckblind near channel 3 because she did not own that land. Another individual that hunted in the area testified that he considered channel 3 to be the main channel. Another grandson-in-law of Edlund testified that he has a duckblind near channel 3 and that although he had never seen that channel go completely dry, it had been close.

Prior to 1962 or 1963, Dawson County did not tax the Platte River accretion land. The Dawson County assessor testified that the county assessor's office assessed 281 acres—of which 258 acres was accretion—to 4-S for its four southernmost government lots. The Dawson County treasurer testified that 4-S paid the 2001 taxes on such land. The Dawson County surveyor testified that the cadastral maps utilized for taxation purposes are "rough approximation[s]" and are not intended to be used as surveys.

Without objection, the court received into evidence certain of Edlund's requests for admission and the responses of 4-S, including an admission that the NPPD survey is genuine and that it correctly and accurately depicts what it purports to depict. In its responses, 4-S admitted that the channel of the Platte River separating the Edlund land from the 4-S land is depicted on both the original Dawson and Phelps Counties government survey and the original Buffalo County government survey and that it "is labeled on each of such surveys as 'Platte River Main Channel.' " In addition, 4-S admitted that the location of the channel of the Platte River labeled "Channel B" on the copy of

the enlarged 1993 aerial photograph had not changed to a significant extent since June 20, 1993, and that likewise, the location of the channel of the Platte River labeled "Channel B" on the copy of the enlarged 1999 aerial photograph had not changed to a significant extent since April 6, 1999. It appears that the channel labeled "Channel B" in both photographs would be the middle channel.

The court entered its decree on October 31, 2003. Because the parties agreed on many corners, the only points that needed to be determined were the northwest and northeast corners of the property claimed by Edlund and the bearings and length of the boundary line between the north line of Edlund's property and the south line of 4-S' property. With regard to the claim of adverse possession, the court determined that 4-S did not sustain its burden to establish the concurrent existence of all the elements of adverse possession. The court found that 4-S admitted that the NPPD survey correctly and accurately " 'depicts what it purports to depict,' " but the court rejected Edlund's claim that 4-S had admitted either that the middle channel is the Platte River, main channel, or that the middle channel is the thread of the Platte River, stating:

> The court does not accept the reasoning that the depiction on [the NPPD survey] of [the] line labeled "thread of main channel river" is a factual determination rather than a label employed by the surveyor. Further, even if there was evidence to support a finding that the description "thread of main channel river" on [the NPPD survey] was the expression of an opinion by the surveyor as to the location of the "main channel" and the location of the "thread of main channel river", such opinions, without sufficient factual and scientific bases of support, cannot be accepted as the factual determination of which channel, if any, is the "main" channel or the "thread" of the stream.

The court found that the evidence was insufficient to conclude that any of the channels exhibited any other characteristics to establish any one of the channels as the main channel or the " 'thread of the stream.' " The court stated that "the greater weight of the evidence establishes that the Platte River is composed of at least three main threads at this location which, when

combined, support the determination that the Platte River is a 'braided' river." The court determined that " 'the thread of the channel where the waters flowed' " referred to the line on the land mass between the middle channel and channel 3, which line is delineated by the points equidistant from the thread of the middle channel and the thread of channel 3, and which line the court called the " 'division line.' " The court found that as to the land mass between the middle channel and channel 3, Edlund was entitled to ownership of the land extending from the thread of channel 3 to the division line, and that 4-S was entitled to the land extending from the thread of the middle channel to the division line. Edlund timely appealed.

ASSIGNMENTS OF ERROR

Edlund alleges that the court erred (1) in finding that the NPPD survey did not correctly and accurately depict the location of the thread of the stream of the Platte River, main channel; (2) in finding that the NPPD surveyor's depiction of the thread of the Platte River, main channel, was not a factual determination by the surveyor; (3) in failing to find that the middle channel contained the thread of the stream of the Platte River, main channel; (4) in failing to find that the thread of the stream of the middle channel is the north boundary of the Edlund land; and (5) in finding that the geographical centerline between the thread of the middle channel and the thread of channel 3 is the boundary line between the Edlund land and the 4-S land.

[1] It appears that 4-S intended to file a cross-appeal. Neb. Ct. R. of Prac. 9D(4) (rev. 2001) provides:

> Where the brief of appellee presents a cross-appeal, it shall be noted on the cover of the brief and it shall be set forth in a separate division of the brief. This division shall be headed "Brief on Cross-Appeal" and shall be prepared in the same manner and under the same rules as the brief of appellant.

[2,3] The brief of 4-S states on the cover only that it is the brief of appellee. The section entitled "Brief on Cross-Appeal" essentially states that 4-S wished to incorporate the brief of appellee by reference, and it fails to comply in most respects with the procedural rules for bringing a cross-appeal. Most significantly, the

brief on cross-appeal fails to assign any error. The rules regarding the manner of presenting a cross-appeal are the same as the rules applicable to an appellant's brief. *Genetti v. Caterpillar, Inc.*, 261 Neb. 98, 621 N.W.2d 529 (2001). Errors argued but not assigned will not be considered on appeal. *Demerath v. Knights of Columbus*, 268 Neb. 132, 680 N.W.2d 200 (2004). We therefore decline to address the merits of the purported cross-appeal.

STANDARD OF REVIEW

[4,5] An action to ascertain and permanently establish corners and boundaries of land under § 34-301 is an equity action. *Anderson v. Cumpston*, 258 Neb. 891, 606 N.W.2d 817 (2000). In an appeal from an equity action, an appellate court tries factual questions de novo on the record and reaches a conclusion independent of the findings of the trial court, provided that 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 judge heard and observed the witnesses and accepted one version of the facts rather than another. *Id.*

ANALYSIS

Depiction of Platte River, Main Channel, on NPPD Survey.

Edlund argues that the trial court erred in finding that the NPPD survey did not correctly and accurately depict the location of the thread of the stream of the Platte River, main channel, and in finding that such depiction was not a factual determination by the surveyor.

In its responses to Edlund's requests for admissions, 4-S admitted (1) that the NPPD survey was genuine and that it correctly and accurately depicted what it purported to depict; (2) that the channel of the Platte River separating the Edlund land from the 4-S land is depicted on the original Dawson and Phelps Counties government survey and the original Buffalo County government survey, which channel "is labeled on each of such surveys as 'Platte River Main Channel' "; (3) that the location of the channel of the Platte River labeled "Channel B" (which appears to be the middle channel) on the copy of the enlarged 1993 aerial photograph had not changed to a significant extent since June 20, 1993; and (4) that the location of the channel of the Platte River labeled "Channel B" on the copy of the enlarged

1999 aerial photograph had not changed to a significant extent since April 6, 1999.

[6] Neb. Ct. R. of Discovery 36(b) (rev. 2000) states in pertinent part that "[a]ny matter admitted under this rule is conclusively established unless the court on motion permits withdrawal or amendment of the admission." Admissions that a party has not sought to withdraw or amend conclusively establish the matter admitted. *Omega Chemical Co. v. Rogers*, 246 Neb. 935, 524 N.W.2d 330 (1994). We find no request by 4-S or any action by the court permitting withdrawal or amendment of these admissions. Therefore, we must consider the matters admitted to be conclusively established, and thus, the NPPD survey correctly and accurately depicts the thread of the Platte River, main channel, for purposes of this litigation. We conclude that the trial court erred in rejecting the depiction of the thread of the main channel on the NPPD survey as a factual determination.

Which Channel is Main Channel?

[7-11] The parties stipulated that the boundary line between the Edlund land and the 4-S land is the thread of the stream of the Platte River, main channel. A party who seeks to have title in real estate quieted in him or her on the ground that it is accretion to land to which he or she has title has the burden of proving the accretion by a preponderance of the evidence. *State v. Matzen*, 197 Neb. 592, 250 N.W.2d 232 (1977); *Madson v. TBT Ltd. Liability Co.*, 12 Neb. App. 773, 686 N.W.2d 85 (2004). Under Nebraska law, title to riparian lands runs to the thread of the contiguous stream. *Anderson v. Cumpston*, 258 Neb. 891, 606 N.W.2d 817 (2000). The thread, or center, of a channel is the line which would give the landowners on either side access to the water, whatever its stage might be and particularly at its lowest flow. *Id.* The thread of the stream is that portion of a waterway which would be the last to dry up. *Id.* Where the thread of a stream is the boundary between estates and that stream has two channels, the thread of the main channel is the boundary between the estates. *Monument Farms, Inc. v. Daggett*, 2 Neb. App. 988, 520 N.W.2d 556 (1994). Where the thread of the main channel of a river is the boundary line between two estates and it changes by the slow and natural processes of accretion and reliction, the

boundary follows the channel. *Id.* A braided river or stream does not have one deep thread, but covers a very large area and contains many channels which move around in its normal bed; such interoperative channels cross one another and are subject to rapid change. *Anderson v. Cumpston, supra.*

The obstacle in this case is determining which channel is the main channel. As discussed above, it is conclusively established that the NPPD survey correctly and accurately depicts the thread of the Platte River, main channel. The NPPD survey does not directly determine the location of the thread of the Platte River, main channel, forming the boundary between the Edlund land and the 4-S land, because that survey depicts the land and the river channels immediately to the west of the government lots and river channels at issue. But the conclusive determination that the thread exists in the middle channel at the western boundary of the land at issue raises a compelling inference that the thread continues in that channel as the stream crosses the boundary and continues between the lands belonging to Edlund and to 4-S.

Humphrey testified that the northwest corner of the Edlund land on the BSC survey is the same point as the thread of the stream of the Platte River, main channel, depicted on the NPPD survey. Indeed, we observe that the NPPD survey shows a set of coordinates—"S71°02'15"E" and "818.09'"—on the line designated the "thread of main channel river - June 19, 1992," and those same coordinates appear on the BSC survey along the line labeled "Centerline of Existing River Channel." The BSC survey was overlaid on an aerial photograph—received into evidence for illustrative purposes only—which shows the line labeled "Centerline of Existing River Channel" to be in the middle channel. Further, Humphrey testified that assuming the accuracy of the NPPD survey's depiction of the thread of the stream of the Platte River, main channel (which accuracy has been conclusively established), the middle channel contained the thread of the stream. Based on Humphrey's visual observations, he opined that the middle channel was swifter, carried more water, appeared to be deeper, and was wider than channel 3. In addition, the evidence provides no basis for determining that the thread—conclusively located in the middle channel at the point the stream enters between the Edlund land and the 4-S

land—somehow moves or changes its location to channel 3 or some other location.

As set forth above, Edlund had the burden of proving the accretion by a preponderance of the evidence. Upon our de novo review, we conclude that a preponderance of the evidence supports Edlund's position that the thread of the stream of the Platte River, main channel, is located in the middle channel. Having established that the middle channel carries the thread of the stream, it necessarily follows that the northern boundary of the Edlund land is established by the thread of the stream of the middle channel.

CONCLUSION

For the foregoing reasons, we do not consider 4-S' purported cross-appeal, and we thus affirm that part of the trial court's decree which rejected 4-S' adverse possession defense. We also conclude that Edlund established by a preponderance of the evidence that the middle channel contains the thread of the stream of the Platte River, main channel. We therefore reverse that part of the decision of the trial court and remand the cause with directions to quiet title to the disputed property in Edlund, establishing the northern boundary line at the thread of the stream of the middle channel.

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

IN RE ESTATE OF GARY LEE MATTHEWS, DECEASED. MELISSA MATTHEWS, PERSONAL REPRESENTATIVE OF THE ESTATE OF GARY LEE MATTHEWS, DECEASED, APPELLANT, V. DENISE NICOLE MATTHEWS-BAKER, APPELLEE.

702 N.W.2d 821

Filed August 30, 2005. No. A-04-022.

1. **Decedents' Estates: Appeal and Error.** An appellate court reviews probate cases for error appearing on the record made in the county court.
2. **Judgments: Appeal and Error.** When reviewing a judgment for errors appearing on the record, the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable.

3. **Wills.** When a patent ambiguity exists in a will, a court must resolve such ambiguity as a matter of law.
4. **Judgments: Appeal and Error.** On a question of law, an appellate court is obligated to reach a conclusion independent of the determination reached by the court below.
5. **Wills: Intent.** The cardinal rule in construing a will is to ascertain and effectuate the intention of the testator if such intention is not contrary to the law.
6. **Wills: Words and Phrases.** Ambiguity exists in an instrument, including a will, when a word, phrase, or provision in the instrument has, or is susceptible of, at least two reasonable interpretations or meanings.
7. ____: ____. A patent ambiguity is one which exists on the face of an instrument.
8. ____: ____. Construction includes the process of determining the correct sense, real meaning, or proper explanation of an ambiguous term, phrase, or provision in a written instrument.
9. **Decedents' Estates: Wills: Intent.** To arrive at a testator's intention expressed in a will, a court must examine the will in its entirety, consider and liberally interpret every provision in the will, employ the generally accepted literal and grammatical meanings of words used in the will, and assume that the maker of the will understood words stated in the will.
10. **Parol Evidence: Wills: Intent.** Parol evidence is inadmissible to determine the intent of a testator as expressed in his or her will, unless there is a latent ambiguity therein which makes his or her intention obscure or uncertain.
11. **Wills.** A latent ambiguity exists in a will when a beneficiary is erroneously described, where no such beneficiary has ever existed as so described, or when two or more persons or organizations answer the description imperfectly.
12. ____. The presumption that one making a will intended to fully dispose of his or her estate by that document does not overcome the rule requiring an express provision or necessary implication to disinherit one's heirs.

Appeal from the County Court for Dakota County: KURT RAGER, Judge. Affirmed.

Thomas A. Fitch, of Fitch Law Firm, for appellant.

Shannon J. Samuelson, of Law Offices of Richard L. Alexander, for appellee.

IRWIN, SIEVERS, and CASSEL, Judges.

CASSEL, Judge.

INTRODUCTION

Melissa Matthews appeals from an order construing a holographic will and determining that part of the estate passes pursuant to intestacy. The sole devise of the will stated: "I want Melissa to get all proceeds from the money that is left and from all contents in the house." The county court determined that the

will did not dispose of the decedent's interest in real estate being purchased under contract and occupied as the decedent's personal residence. We affirm.

BACKGROUND

No appeal was taken from an earlier order admitting the decedent's holographic will to formal probate. See Neb. Rev. Stat. § 30-2328 (Reissue 1995) (defining holographic will). The instant proceeding commenced with Melissa's petition, as personal representative of the estate, for interpretation of the will and directions concerning distribution of assets of the estate. Denise Nicole Matthews-Baker filed an answer asserting that the holographic will does not address proceeds from the sale of the decedent's house.

The county court conducted an evidentiary hearing. In addition to receiving a copy of the will previously admitted to probate, the evidence included testimony and exhibits addressing the state of the decedent's relationship with Denise prior to the decedent's death.

By order entered November 24, 2003, the court determined that "the contents of the decedent's house should be sold and the proceeds distributed to Melissa . . . in accordance with the terms of the decedent's holographic will." The court also determined that the remainder of the decedent's estate should pass one-half to Melissa and one-half to Denise pursuant to the rules of intestacy. The court made no factual findings but set forth a detailed legal analysis.

ASSIGNMENT OF ERROR

Melissa assigns that the county court erred in failing to interpret the decedent's will as devising to Melissa the proceeds from the sale of the decedent's house.

STANDARD OF REVIEW

[1] An appellate court reviews probate cases for error appearing on the record made in the county court. *In re Estate of Mecello*, 262 Neb. 493, 633 N.W.2d 892 (2001).

[2] When reviewing a judgment for errors appearing on the record, the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable. *Id.*

[3] When a patent ambiguity exists in a will, a court must resolve such ambiguity as a matter of law. *In re Estate of Johnson*, 260 Neb. 91, 615 N.W.2d 98 (2000).

[4] On a question of law, an appellate court is obligated to reach a conclusion independent of the determination reached by the court below. *Id.*

ANALYSIS

[5-8] The cardinal rule in construing a will is to ascertain and effectuate the intention of the testator if such intention is not contrary to the law. *Id.* By suggesting alternative meanings drawn from the face of the document, Melissa implicitly concedes that a patent ambiguity exists. Ambiguity exists in an instrument, including a will, when a word, phrase, or provision in the instrument has, or is susceptible of, at least two reasonable interpretations or meanings. *In re Estate of Walker*, 224 Neb. 812, 402 N.W.2d 251 (1987). A patent ambiguity is one which exists on the face of an instrument. *Id.* Construction includes the process of determining the correct sense, real meaning, or proper explanation of an ambiguous term, phrase, or provision in a written instrument. *Id.*

[9] To arrive at a testator's intention expressed in a will, a court must examine the will in its entirety, consider and liberally interpret every provision in the will, employ the generally accepted literal and grammatical meanings of words used in the will, and assume that the maker of the will understood words stated in the will. *In re Estate of Johnson, supra.*

Applying the ordinary rules of grammar, the devise sets forth two related provisions. One provision states: "I want Melissa to get all proceeds . . . from all contents in the house." The parties agree that this provision devises to Melissa all of the proceeds from a sale of the personal property within the decedent's house.

The other provision states: "I want Melissa to get all proceeds from the money that is left." As Melissa concedes, on its face, this provision is susceptible of more than one interpretation. Melissa asserts three possible interpretations of the phrase "proceeds from the money that is left" as follows: (1) "the liquid assets of the decedent's estate after the payment of all of his bills," (2) "the money left after a total liquidation of the decedent's estate," or (3) "a sale of the decedent's home." Brief for appellant at 7-8.

Melissa also requests that we consider the extrinsic evidence adduced at the hearing. Melissa argues that a court can consider evidence outside the will, not for the purpose of interpreting the will, but, rather, for the purpose of considering the circumstances under which it was made. Melissa cites two cases in support of this proposition. She first cites *Allemand v. Weaver*, 208 Neb. 618, 305 N.W.2d 7 (1981), for the proposition that the object and purpose of the court is to carry out and enforce the true intention of the testator as shown by the will itself, in the light of attendant circumstances under which it was made. An examination of that case, however, reveals that the Nebraska Supreme Court therein considered a patent ambiguity, which it resolved from within the four corners of the will and without consideration of extrinsic evidence.

Melissa also cites *In re Estate of Dimmitt*, 141 Neb. 413, 3 N.W.2d 752 (1942), for the proposition that declarations of the testator may be admissible, not to show direct expressions of his or her intentions, but to show the facts and circumstances surrounding the situation under which he or she executed the will. However, that case concerned whether a separate document—an undelivered deed of real estate—was incorporated into and made a part of the will by specific language therein. In that case, the Supreme Court was faced with determining under what conditions an extrinsic document may be incorporated into a will. In the case before us, the will purports to be complete on its face and makes no reference to any extrinsic document. We find *In re Estate of Dimmitt* to be distinguishable from the case before us.

[10,11] More recently, the Nebraska Supreme Court has stated that parol evidence is inadmissible to determine the intent of a testator as expressed in his or her will, unless there is a latent ambiguity therein which makes his or her intention obscure or uncertain. *Scriven v. Scriven*, 153 Neb. 655, 45 N.W.2d 760 (1951). A latent ambiguity exists in a will when a beneficiary is erroneously described, where no such beneficiary has ever existed as so described, or when two or more persons or organizations answer the description imperfectly. *In re Estate of Bernstrauch*, 210 Neb. 135, 313 N.W.2d 264 (1981). This court has also contrasted a patent ambiguity, where the same word in a will has two meanings discernible from the face of the will

itself, with a latent ambiguity, where a word has two meanings but only when extrinsic evidence is brought to bear. See *In re Estate of Smatlan*, 1 Neb. App. 295, 501 N.W.2d 718 (1992). Because the ambiguity in the instant case is patent, we reject Melissa's contention that we may consider extrinsic evidence and we confine our analysis to the four corners of the will.

Melissa also argues that normal rules of construction may not necessarily apply to holographic wills and that a construing court should take extra steps to determine or ascertain the intention of the testator. In making this argument, Melissa relies upon *Roberts v. Snow Redfern Memorial Foundation*, 196 Neb. 139, 242 N.W.2d 612 (1976). We believe Melissa draws more from *Roberts* than its language and facts support. Rather, we believe the Nebraska Supreme Court succinctly set forth the proper approach in *Dumond v. Dumond*, 155 Neb. 204, 207, 51 N.W.2d 374, 375-76 (1952), where the court stated:

> In determining the intent of the testator when he [or she] used the controverted words, the court should place itself in the shoes of the testator, ascertain his [or her] intention, and enforce it. In so doing, it is important to remember at all times that the testator was unskilled in the field of will drafting.

With these principles in mind, we now consider the ambiguous provision, employing the generally accepted literal and grammatical meanings of the words used in the statement "I want Melissa to get all proceeds from the money that is left." Examination of the phrase discloses three key words: "proceeds," "money," and "left."

The word "proceeds" has been defined as (1) "that which results or accrues," (2) "the total sum derived from a sale or other transaction," or (3) "the profits or returns from a sale, investment, etc." Webster's Encyclopedic Unabridged Dictionary of the English Language 1147 (1989). Although there are numerous definitions of the word "money," we believe the most apt definition in the present circumstances is "any circulating medium of exchange, including coins, paper money, and demand deposits." *Id.* at 924. Further, in the present context, the word "left" clearly means "leftover" or "remaining from a larger amount" after the decedent's death. *Id.* at 818.

We do know that the decedent distinguished between "proceeds from the money that is left" and "proceeds . . . from all contents in the house." We therefore reject the interpretation of the former phrase to include all property of the estate, because the decedent clearly treated the contents of the house separately and could not have intended the contested phrase to comprise all property of the estate, including those contents.

[12] We also reject an interpretation that the phrase in question includes proceeds from the sale of the house. The other phrase in the decedent's will establishes that the decedent understood the concept of his "house" as a form of property. The decedent's will addressed two types of property that he "want[ed] Melissa to get." The language of the contested phrase does not extend so far as Melissa contends. The presumption that one making a will intended to fully dispose of his or her estate by that document does not overcome the rule requiring an express provision or necessary implication to disinherit one's heirs. *In re Estate of Corrigan*, 218 Neb. 723, 358 N.W.2d 501 (1984). The contested phrase fails to meet that requirement.

Melissa requests us to construe the provision as devising to her the proceeds from the sale of the decedent's house. The question she presents does not require us to determine the precise contours of the contested phrase. Our rejection of her interpretation is sufficient to decide the appeal.

CONCLUSION

Because we reject Melissa's contention regarding the proper interpretation of the decedent's will, Melissa's assignment of error lacks merit. We therefore affirm the order of the county court.

AFFIRMED.

ROBERT HELVERING, APPELLANT, V.
UNION PACIFIC RAILROAD COMPANY, APPELLEE.
703 N.W.2d 134

Filed August 30, 2005. No. A-04-266.

1. **Summary Judgment: Appeal and Error.** In reviewing a summary judgment, an appellate court views the evidence in a light most favorable to the party against whom

the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence.

2. **Summary Judgment: Proof.** The party moving for summary judgment has the burden to show that no genuine issue of material fact exists and must produce sufficient evidence to demonstrate that the moving party is entitled to judgment as a matter of law.
3. **Fair Employment Practices.** The Nebraska Fair Employment Practice Act, Neb. Rev. Stat. §§ 48-1101 to 48-1126 (Reissue 2004), furthers the policy of Nebraska to foster the employment of all employable persons in the state on the basis of merit and to safeguard their right to obtain and hold employment without discrimination.
4. **Fair Employment Practices: Proof.** The well-known order and allocation of proof and burdens set forth in *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 101 S. Ct. 1089, 67 L. Ed. 2d 207 (1981), are applicable to discriminatory employment treatment claims, as well as retaliation claims.
5. **Fair Employment Practices: Discrimination: Proof.** The plaintiff in an employment discrimination action bears the burden to first prove to the fact finder by a preponderance of the evidence a prima facie case of discrimination.
6. ____: ____: ____. If the plaintiff in an employment discrimination action proves a prima facie case, the defendant has the burden to articulate a legitimate nondiscriminatory reason for the employment decision to rebut the inference of discrimination raised by the plaintiff's prima facie claims.
7. ____: ____: ____. Once the defendant in an employment discrimination action produces a legitimate nondiscriminatory reason for the employment decision, the plaintiff then has the burden to prove by a preponderance of the evidence that the legitimate reason offered by the defendant was but a pretext for discrimination.
8. ____: ____: ____. At all times, the plaintiff in an employment discrimination action retains the ultimate burden of persuading the fact finder that he has been the victim of intentional impermissible conduct.
9. **Fair Employment Practices: Discrimination: Intent: Proof.** It is now incumbent upon an employee to prove not only falsity of the proffered reasons given by the employer, but also that discriminatory motive was the true reason for the discharge.
10. ____: ____: ____: ____. The trier of fact in a discriminatory employment case may rely on inferences rather than direct evidence of intentional acts, but intent must be proven by a preponderance of the evidence, whether direct, circumstantial, or otherwise.
11. **Fair Employment Practices: Discrimination: Actions.** Neb. Rev. Stat. § 20-148 (Reissue 1997) authorizes a private civil cause of action for private acts of discrimination by private employers.
12. **Fair Employment Practices: Discrimination.** The Nebraska Fair Employment Practice Act makes it unlawful for an employer to discriminate against its employee on the basis of the employee's opposition to an unlawful practice.
13. **Fair Employment Practices.** The "unlawful" practices covered by Neb. Rev. Stat. § 48-1114 (Reissue 2004) are activities related to the employment.
14. **Fair Employment Practices: Words and Phrases.** The term "practice" in Neb. Rev. Stat. § 48-1114(3) (Reissue 2004) refers to an unlawful practice of the employer, not unlawful or prohibited actions of coemployees.

15. **Fair Employment Practices: Statutes.** The Nebraska Fair Employment Practice Act is not a general bad acts statute, and there are many abuses not proscribed by legislative acts of the same type, including discharge for opposition to racial discrimination by other employees against the public and discharge for opposition to discrimination based on an employee's sexual orientation.
16. **Fair Employment Practices: Proof.** The elements of a prima facie case for retaliation are that the plaintiff must show that (1) he or she was engaging in a protected activity, (2) he or she suffered an adverse employment decision, and (3) there was a causal link between the protected activity and the adverse employment decision.
17. **Fair Employment Practices: Discrimination: Proof.** An employee is not required to prove the merits of the underlying discrimination charge which forms the basis for the alleged retaliatory treatment so long as the employee possessed a good faith belief that the offensive conduct violated the law.
18. **Fair Employment Practices: Discrimination.** An individual who has opposed discriminatory employment practices is protected under Neb. Rev. Stat. § 48-1114(1) (Reissue 2004).
19. ____: ____. Neb. Rev. Stat. § 48-1114(2) (Reissue 2004) prohibits discrimination against an employee who has made a charge under the Nebraska Fair Employment Practice Act.
20. **Fair Employment Practices.** Neb. Rev. Stat. § 48-1104(1) (Reissue 2004) makes it unlawful for an employer to harass any individual because of sex, and Neb. Rev. Stat. § 48-1102(14) (Reissue 1998) includes the creation of a hostile working environment as harassment because of sex.
21. ____. The evil addressed by Neb. Rev. Stat. § 48-1114(3) (Reissue 2004) is the exploitation of the employer's power over the employee when used to coerce the employee to endorse, through participation or acquiescence, the unlawful acts of the employer.
22. ____. An employee's opposition to any unlawful act of the employer, whether or not the employer pressures the employee to actively join in the illegal activity, is protected under Neb. Rev. Stat. § 48-1114(3) (Reissue 2004).
23. **Fair Employment Practices: Time.** Sometimes, the timing of one incident of adverse employment action following protected activity suffices to establish causal connection.
24. ____: ____. The cases that accept mere temporal proximity between an employer's knowledge of protected activity and an adverse employment action as sufficient evidence of causality to establish a prima facie case of retaliation uniformly hold that the temporal proximity must be very close.
25. **Fair Employment Practices: Discrimination: Time.** Although temporal proximity may be sufficient to demonstrate a prima facie case of employment discrimination, temporal proximity alone is not sufficient to satisfy the burden to show pretext.
26. **Fair Employment Practices: Discrimination: Proof.** A prima facie case of gender discrimination requires the plaintiff to prove that he or she (1) is a member of a protected class, (2) was qualified to perform the job, (3) suffered an adverse employment action, and (4) was treated differently from similarly situated persons of the opposite sex.
27. ____: ____: ____. In reverse discrimination cases, the first element of the prima facie case is modified to require proof that background circumstances support the

suspicion that the defendant is that unusual employer who discriminates against the majority.

28. **Fair Employment Practices: Discrimination.** In an employment discrimination action, the test to determine whether employees are similarly situated to warrant a comparison to a plaintiff is a rigorous one.
29. ____: ____. In an employment discrimination action, the individuals used for comparison must have dealt with the same supervisor, been subject to the same standards, and engaged in the same conduct without any mitigating or distinguishing circumstances.
30. ____: ____. In an employment discrimination action, employees are considered similarly situated when they are involved in or accused of the same offense and are disciplined in different ways.
31. **Fair Employment Practices: Discrimination: Proof.** In an employment discrimination action, the plaintiff has the burden of demonstrating that there were individuals similarly situated in all relevant aspects to her by a preponderance of the evidence.
32. ____: ____: ____. To establish a prima facie case of age discrimination, the plaintiff must establish that (1) he or she was in the protected group, (2) he or she was subjected to an adverse employment action, (3) he or she was qualified for the employment position or benefit adversely denied, and (4) other similarly situated persons not in the protected group were treated differently.
33. **Fair Employment Practices: Discrimination.** Nebraska's Act Prohibiting Unjust Discrimination in Employment Because of Age, Neb. Rev. Stat. § 48-1001 et seq. (Reissue 2004), makes it unlawful to discriminate against a person who is at least 40 but fewer than 70 years of age, unless such age distinction is made for legitimate and reasonable purposes.

Appeal from the District Court for Douglas County: JOSEPH S. TROIA, Judge. Affirmed.

Thomas F. Hoarty, Jr., and Scott A. Calkins, of Byam & Hoarty, for appellant.

Marlon A. Polk, Margot J. Wickman, and Dana E. Christian, of Polk, Waldman, Wickman & Council, P.C., L.L.O., for appellee.

IRWIN, SIEVERS, and CASSEL, Judges.

IRWIN, Judge.

I. INTRODUCTION

Robert Helvering appeals from an order of the district court granting summary judgment to Union Pacific Railroad Company (UP) on Helvering's amended petition alleging that his employment with UP was wrongfully terminated for discriminatory reasons, including retaliation, gender discrimination, and age

discrimination. Helvering challenges the district court's grant of summary judgment as to each of his claims. We conclude that Helvering failed to satisfy his burden of proof with respect to each of the claims and that UP was therefore entitled to a judgment as a matter of law on each of the claims. Accordingly, we affirm the order of the district court granting UP summary judgment on each of Helvering's claims.

II. BACKGROUND

Helvering began his employment with UP in 1972. Helvering was transferred to Omaha in August 1990, at which time he was promoted from the position of dispatcher to the position of corridor manager, the direct supervisor of train dispatchers assigned to his area. Prior to 2000, there had been no complaints or disciplinary actions taken against Helvering.

On January 8, 2000, Don Murray, the director of human resources for UP's dispatching center in Omaha, received an electronic mail (e-mail) communication informing him of sexual harassment complaints made against Helvering. Murray was responsible for investigating complaints regarding alleged violations of UP's business conduct and equal employment opportunity (EEO) policies, and he initially investigated the complaints made against Helvering. As part of that investigation, a meeting was held on March 3, attended by Helvering, Murray, Mark Payne (Helvering's supervisor), and Dennis Jacobson (the vice president of UP's Omaha dispatching center).

During the meeting on March 3, 2000, the allegations in the complaint were explained to Helvering. Helvering was informed that he "had been seen touching, fondling, [or] caressing females in the workplace." The allegations against Helvering apparently also included "talking in a demeaning manner [and] belittling female train dispatchers," although Helvering denies that he was informed of such allegations. Helvering denied the allegations made against him. Helvering was counseled to make sure his behavior complied with UP's business conduct and EEO policies and warned that any conduct violating the policies would result in termination of his employment.

According to Helvering, he was directed to act in a professional manner with women and all employees at all times, not to

be involved in any touching of any kind with any employees, to treat others as he would want to be treated, and not to become involved in meetings where just he and a female train dispatcher were present. Helvering testified in a deposition that he told the others at the meeting it was impossible for him, because of his job duties, not to be involved in meetings where just he and a female train dispatcher were present and that he was instructed to "try not to find [him]self in a compromising position." According to Payne, Helvering was instructed "not to touch other employees or meet privately with female employees." According to Jacobson, Helvering was told that "he needed to be very, very careful in his work"; that he should engage in no touching, only business; not to get into any personal issues with anybody; and to stay on business and "not put himself in a position where he [would be] alone with any female employees." Helvering acknowledged that he was told that any further complaints involving his conduct could result in his dismissal from UP.

Payne testified in a deposition that Murray had told him that the allegations against Helvering were "not substantiated in [the] investigation." Similarly, Jacobson testified in a deposition that Murray had told him that the allegations against Helvering could not be substantiated. Kathleen Vance, UP's director of EEO and affirmative action, however, testified in a deposition that she did not agree that none of the allegations could be substantiated. Vance testified that what was found was that "there was only one woman who was willing to at that time meet with the EEO manager to follow up on sort of vague allegations." Vance stated, "It was more of personality issues and perhaps some racial insensitivity [concerning that woman, rather than a substantiation of sexual misconduct], but . . . as far as [that woman] went, she repeated complaints that she heard from other people, but she herself did not have any sexual harassment complaints . . . ." Vance further testified that "there were certainly a lot of allegations floating around that were difficult to prove, because people were unwilling to come forward and give their names and give their details." According to Vance, however, "there was certainly enough that was being said that was disturbing and was worrisome in terms of the behavior of a person in charge of supervising train dispatchers."

Christine Hampton was hired by UP in September 1999. Hampton was a train dispatcher. Hampton testified in a deposition that in January or February 2000, Hampton was warned by a manager of train dispatchers that Helvering "would probably make a pass at [her]" and that Helvering would retaliate against her when she rejected him. The manager also told Hampton about "other females that [Helvering] had approached, that [he] had touched," and told Hampton about an incident where Helvering allegedly "put his hand on [a woman's] breast" when posing for a photograph.

Hampton testified in a deposition that Helvering told a story during a UP safety meeting in March 2000. Helvering testified in a deposition that he believed the safety meeting occurred in February 2000. According to Hampton, Helvering prefaced the story by saying that it was a story Hampton "would like." According to Hampton, the story told by Helvering referenced Helvering's "being a referee and seeing a female in the stands wearing a short skirt with no undergarments. He said her legs were spread apart and he couldn't take his attention away from that particular situation." According to Helvering, the story was about a woman in the stands wearing a short skirt, but Helvering specifically denied having said that the story was for Hampton's benefit. Additionally, Vance testified in a deposition that she thought the version of the story she heard from Helvering while investigating this case did not include a "lack of underwear." Helvering testified in a deposition that he told the story as an illustration of the importance of staying focused while working and "just simply . . . keep[ing] your mind on what you're doing."

Hampton testified in a deposition that she had been required to "go on a road trip" for UP in March 2000 "to . . . visit and ride trains, ride with track inspectors and see the territories of your area that you're dispatching." Hampton testified that it was brought to her attention that Helvering "was telling the corridor managers and directors . . . that [Hampton] wanted him to attend this road trip with [her]." Hampton denied ever making such a request, and she informed a director that she "under no circumstances want[ed] to go on a road trip with . . . Helvering." Helvering did not accompany Hampton on the trip. Helvering

testified in a deposition that he never asked to accompany Hampton on the trip.

Hampton testified in a deposition that on May 25, 2000, as she was preparing to leave work for the day, Helvering asked her whether she had "a few minutes to talk." Hampton testified that she told Helvering she did not have time to talk, but that after Helvering asked a second time, she said, "[O]kay." According to Hampton, Helvering asked to talk "on the patio" or "by the security desk, or out front." According to Hampton, Helvering met her outside the building and asked, "[W]hat do you think of me?" Hampton testified that she answered Helvering by commenting on his capabilities as a "trainman," but that he asked her again what she thought of him and that her impression was that "he wanted something personal." Hampton testified that she again answered Helvering by commenting on his capabilities as a "trainman." According to Hampton, Helvering continued the conversation by telling Hampton about a female employee who had filed "an [Equal Employment Opportunity Commission] complaint" against him, the allegations of which could not be proven. Hampton recalled that "without taking a breath," Helvering then said to Hampton, "[A]ny red-blooded male would want to touch, I would want to touch you, would you consider meeting me outside of work[?]" Hampton testified that Helvering repeated the comment and again asked her whether they could "meet outside of work." Hampton testified that she said "absolutely not" and walked off.

Helvering testified in a deposition that when he was asked why he met with Hampton alone "after [being] told . . . not to," he answered, "I just plain forgot." Helvering testified that Hampton had approached him and asked to talk about something and that they had walked out of the building together. Helvering specifically denied having asked Hampton whether he could touch her or whether they could meet outside of work. The record indicates that there were other employees walking past Helvering and Hampton during this encounter.

Hampton testified in a deposition that she asked "to be moved out of the . . . region" where Helvering was corridor manager. Hampton also called Murray and left a voice mail message to

that effect on May 25 or 26, 2000. Hampton was interviewed by UP about her allegations against Helvering on May 26. On May 30, Payne and Jacobson met with Helvering to discuss Hampton's complaint. At that meeting, Helvering acknowledged having met with Hampton and was suspended, with pay, pending the outcome of an investigation into Hampton's complaint.

During the investigation, another female employee of UP alleged that on at least one occasion, Helvering had "placed his hand on her bare knee" at work. That employee, however, did not want the allegation pursued.

On May 28, 2000, Helvering sent an e-mail to Vance and Payne relating incidents of inappropriate language being used by female UP employees in his presence. In the e-mail, Helvering indicated that on May 19, one female employee had "said in a loud voice[,] 'YOU CAN KISS MY ASS.' " Helvering testified in a deposition that the statement was not directed at him and that he reported it to Payne and Vance because he heard that he had been accused of saying something in response and he wanted to provide his position on the statement.

In the e-mail, Helvering also indicated that on May 27, 2000, a female corridor manager had whispered some vulgar "directives" toward him. According to Helvering, the female corridor manager said, "I feel like I've been fucked all night, but when I fuck, I like to have hands-on." Helvering testified in a deposition that the comment was directed at him and was offensive and humiliating but did not interfere with his ability to do his job. Helvering testified that he reported the comment because it "was untimely" and because it was "convenient" to add a report of the comment to his e-mail.

In the e-mail, Helvering also complained about other "sexual n-u-indoes" by a female employee at the workplace. Helvering testified in a deposition that the sexual innuendoes he was referring to were primarily by two female employees. Helvering testified that one of the female employees' job differed from his and that the innuendoes involved laughing and making jokes and included such statements as one female employee's commenting, "I like it hard and fast, bring it on hard and fast." Helvering testified that the other female employee's job was the same as his and that "around [19]95" and "during [19]98," the employee

had commented on UP's "business casual" dress code by saying, "I don't wear underwear anyway, you want to feel?"

The record does not indicate that the female employees mentioned in Helvering's e-mail had been the subject of any prior complaints. After an investigation, the female employees mentioned in Helvering's e-mail were "disciplined accordingly." Vance testified in a deposition that the female employees were interviewed and provided with a review of EEO policies and counseling about appropriate language in the workplace. Helvering testified in a deposition that he learned that the female employees were "chastised" and that they "promised they would watch themselves from then on."

Helvering testified in a deposition that he met with Payne on May 30, 2000, and that Payne asked Helvering why he had e-mailed Vance. According to Helvering, Payne indicated that if Helvering had not sent the e-mail to Vance, UP "could have handled [Helvering's complaint] internally," but that because he did send the e-mail, UP had "to have a full-blown investigation." Helvering also testified that on some unspecified date when he had met with Murray, Murray had said that Helvering was "a middle-aged white male" and was "very vulnerable."

On June 16, 2000, Helvering's employment with UP was terminated. Payne testified in a deposition that he made the decision to terminate Helvering's employment. Payne testified that the investigation of the March 2000 complaint did not factor into his decision, but that he based his decision on Helvering's having been warned in March 2000 to be very careful and not put himself in a "precarious" position and on Payne's subsequently receiving "a very serious charge in May" that Helvering was making sexual advances toward a female employee. Payne further testified that the factors upon which he based the decision to terminate Helvering's employment were Helvering's going outside the building with Hampton, Helvering's use of the story during the safety meeting, Hampton's desire to be transferred rather than work with Helvering, and the other female employee's report that Helvering had placed his hand upon her knee. Payne testified that he "saw sexual harassment in the workplace, so [he] made a determination for termination" of Helvering's employment.

Jacobson testified in a deposition that the decision to terminate Helvering's employment was a consensus decision. Vance testified in a deposition that the decision about how to respond to the allegations against Helvering was discussed by Vance, Murray, Payne, and Jacobson. Jacobson testified that he believed Hampton and that Helvering was terminated because he had sexually harassed Hampton. Jacobson testified that he believed Helvering was trying to use his position to get sexual favors from Hampton. Payne indicated in an affidavit that the decision to terminate Helvering's employment was not influenced by Helvering's complaints about female employees' using inappropriate language and that Helvering's age and gender were not factors in the decision to terminate Helvering's employment.

On November 1, 2000, Helvering filed an amended petition. In the amended petition, Helvering alleged that his employment had been wrongfully terminated in retaliation for his filing a complaint against the use of inappropriate language by female employees, because of gender discrimination, and because of age discrimination. UP filed an answer on November 15, and Helvering filed a reply on November 20.

On February 3, 2004, the district court entered an order granting UP summary judgment as to each of Helvering's causes of action. The district court found that Helvering had failed to demonstrate a causal connection between the termination of his employment and his complaint about the language used by the female employees, that UP had demonstrated a legitimate nondiscriminatory reason for terminating his employment, and that he had failed to demonstrate that UP's proffered reason for terminating his employment was pretextual; as such, the court granted summary judgment against Helvering on his retaliation claim. The district court found that Helvering had previously been told not to be alone with female employees but had violated that order by being alone with Hampton, that Helvering and the female employees about whom he had complained were not similarly situated, and that he was "not likely" to sustain his gender discrimination claim; as such, the court granted summary judgment against Helvering on his gender discrimination claim. The district court found that Helvering had not obeyed an order not to be alone with female employees, that he had not been replaced by

a younger employee, and that he was "not likely" to sustain his age discrimination claim; as such, the court granted summary judgment against Helvering on his age discrimination claim. This appeal followed.

III. ASSIGNMENTS OF ERROR

On appeal, Helvering has assigned eight errors, which we consolidate for discussion to three. First, Helvering asserts that the district court erred in granting UP summary judgment on his retaliation claim. Second, Helvering asserts that the district court erred in granting UP summary judgment on his gender discrimination claim. Third, Helvering asserts that the district court erred in granting UP summary judgment on his age discrimination claim.

IV. ANALYSIS

1. Generally Applicable Principles of Law

Although Helvering's assignments of error concern the district court's grant of summary judgment on three different causes of action, each of Helvering's causes of action is premised upon an assertion of discrimination in the decision to terminate his employment. While each cause of action is separate and unique, the principles of law governing summary judgment proceedings, and some other general principles of law, apply equally to each of the three causes of action.

(a) Summary Judgment

[1,2] In reviewing a summary judgment, an appellate court views the evidence in a light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence. *Wolfe v. Becton Dickinson & Co.*, 266 Neb. 53, 662 N.W.2d 599 (2003). The party moving for summary judgment has the burden to show that no genuine issue of material fact exists and must produce sufficient evidence to demonstrate that the moving party is entitled to judgment as a matter of law. *Id.*

(b) Discrimination Claims

[3] The Nebraska Fair Employment Practice Act (FEPA), Neb. Rev. Stat. §§ 48-1101 to 48-1126 (Reissue 2004), furthers "the

policy of [Nebraska] to foster the employment of all employable persons in the state on the basis of merit . . . and to safeguard their right to obtain and hold employment without discrimination." § 48-1101. FEPA is patterned from that part of the Civil Rights Act of 1964 contained in 42 U.S.C. § 2000e et seq. (2000), and it is appropriate to look to federal court decisions construing similar and parent federal legislation. See, *Airport Inn v. Nebraska Equal Opp. Comm.*, 217 Neb. 852, 353 N.W.2d 727 (1984); *Zalkins Peerless Co. v. Nebraska Equal Opp. Comm.*, 217 Neb. 289, 348 N.W.2d 846 (1984); *Richards v. Omaha Public Schools*, 194 Neb. 463, 232 N.W.2d 29 (1975). See, also, *Rose v. Vickers Petroleum*, 4 Neb. App. 585, 546 N.W.2d 827 (1996).

[4-8] The well-known order and allocation of proof and burdens set forth in *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 101 S. Ct. 1089, 67 L. Ed. 2d 207 (1981), are applicable to discriminatory employment treatment claims, as well as retaliation claims. *Harris v. Misty Lounge, Inc.*, 220 Neb. 678, 371 N.W.2d 688 (1985); *Rose v. Vickers Petroleum, supra*. The plaintiff bears the burden to first prove to the fact finder by a preponderance of the evidence a prima facie case of discrimination. See, *Texas Dept. of Community Affairs v. Burdine, supra*; *Rose v. Vickers Petroleum, supra*. If the plaintiff proves a prima facie case, the defendant has the burden to articulate a legitimate nondiscriminatory reason for the employment decision to rebut the inference of discrimination raised by the plaintiff's prima facie claims. See *id.* Once the defendant produces such a reason, the plaintiff then has the burden to prove by a preponderance of the evidence that the legitimate reason offered by the defendant was but a pretext for discrimination. See *id.* At all times, the plaintiff retains the ultimate burden of persuading the fact finder that he has been the victim of intentional impermissible conduct. See *id.* This same analysis has also been referred to as the "*McDonnell Douglas* test," applied in disparate treatment cases. See *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973). See, also, *Billingsley v. BFM Liquor Mgmt.*, 264 Neb. 56, 645 N.W.2d 791 (2002) (age discrimination action); *Father Flanagan's Boys' Home v. Agnew*, 256 Neb. 394, 590 N.W.2d 688 (1999) (gender discrimination action).

[9,10] The U.S. Supreme Court in *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 113 S. Ct. 2742, 125 L. Ed. 2d 407 (1993), heightened the employee's burden in discrimination cases. It is now incumbent upon an employee to prove not only falsity of the proffered reasons given by the employer, but also that discriminatory motive was the true reason for the discharge. See *id.* See, also, *Ventura v. State*, 246 Neb. 116, 517 N.W.2d 368 (1994). The trier of fact may rely on inferences rather than direct evidence of intentional acts, but intent must be proven by a preponderance of the evidence, whether direct, circumstantial, or otherwise. See, *Texas Dept. of Community Affairs v. Burdine, supra*; *Board of Trustees v. Sweeney*, 439 U.S. 24, 99 S. Ct. 295, 58 L. Ed. 2d 216 (1978); *Rose v. Vickers Petroleum, supra.*

2. Retaliation Claim

Helvering first asserts that the district court erred in granting UP summary judgment on Helvering's claim that UP's termination of his employment was unlawful retaliation. Although we conclude that Helvering satisfied his burden of adducing sufficient evidence to demonstrate a prima facie case of discrimination, we conclude that UP demonstrated a legitimate nondiscriminatory basis for terminating Helvering's employment and that Helvering failed to satisfy his burden of demonstrating that the proffered basis was merely pretextual. As such, we conclude that the district court correctly granted UP summary judgment on the retaliation claim.

(a) Helvering's Prima Facie Case

It was Helvering's burden to first demonstrate a prima facie case of discrimination. See, *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 101 S. Ct. 1089, 67 L. Ed. 2d 207 (1981); *Rose v. Vickers Petroleum*, 4 Neb. App. 585, 546 N.W.2d 827 (1996). Although we disagree with some factual conclusions reached by the district court on what we conclude were genuine disputes of fact, we ultimately conclude that the district court correctly made an implicit finding that Helvering satisfied his initial burden, demonstrating a prima facie case of discrimination, by showing that he engaged in arguably protected activity, namely sending an e-mail notifying UP about inappropriate language being used by female employees; by showing that he suffered an

adverse employment action when his employment was terminated; and by demonstrating circumstantially a causal connection between his activity and the adverse action by virtue of the very close temporal proximity between those two events.

[11] In his amended petition, Helvering asserted that his retaliation claim was brought under Neb. Rev. Stat. § 20-148 (Reissue 1997) and § 48-1114. Section 20-148 authorizes a private civil cause of action for private acts of discrimination by private employers. See *Cole v. Clarke*, 8 Neb. App. 614, 598 N.W.2d 768 (1999). Section 48-1114 provides, in pertinent part:

> It shall be an unlawful employment practice for an employer to discriminate against any of his or her employees . . . because he or she (1) has opposed any practice made an unlawful employment practice by [FEPA], (2) has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under [FEPA], or (3) has opposed any practice or refused to carry out any action unlawful under federal law or the laws of [Nebraska].

[12-15] FEPA makes it unlawful for an employer to discriminate against its employee on the basis of the employee's opposition to an unlawful practice. § 48-1114; *Wolfe v. Becton Dickinson & Co.*, 266 Neb. 53, 662 N.W.2d 599 (2003). The Nebraska Supreme Court has held that the "unlawful" practices covered by § 48-1114 are activities related to the employment. See *Wolfe v. Becton Dickinson & Co., supra*. As such, seen in the context of the entirety of FEPA and in light of the apparent purposes FEPA is meant to serve, the term "practice" in § 48-1114(3) refers to an unlawful practice of the employer, not unlawful or prohibited actions of coemployees. *Wolfe v. Becton Dickinson & Co., supra*. FEPA is not a general bad acts statute, and there are many abuses not proscribed by FEPA-type legislative acts, including discharge for opposition to racial discrimination by other employees against the public and discharge for opposition to discrimination based on an employee's sexual orientation. *Wolfe v. Becton Dickinson & Co., supra*. See, also, *Hamner v. St. Vincent Hosp. and Health Care Center*, 224 F.3d 701 (7th Cir. 2000); *Wimmer v. Suffolk County Police Dept.*, 176 F.3d 125 (2d Cir. 1999).

[16,17] In analyzing the evidence in a retaliation case, the elements of a prima facie case for retaliation are that the plaintiff

must show that (1) he or she was engaging in a protected activity, (2) he or she suffered an adverse employment decision, and (3) there was a causal link between the protected activity and the adverse employment decision. *Rose v. Vickers Petroleum*, 4 Neb. App. 585, 546 N.W.2d 827 (1996). See *Wolfe v. Becton Dickinson & Co., supra* (prima facie case consists of discharge following protected activity of which employer was aware). See, also, *Ruggles v. California Polytechnic State University*, 797 F.2d 782 (9th Cir. 1986). Although there is authority to the contrary, the majority view is that an employee is not required to prove the merits of the underlying discrimination charge which forms the basis for the alleged retaliatory treatment so long as the employee possessed a good faith belief that the offensive conduct violated the law. *Rose v. Vickers Petroleum, supra.* See *Wolfe v. Becton Dickinson & Co., supra* (belief must be reasonable but need not necessarily be correct to form underlying basis for retaliation claim).

Helvering asserted that the termination of his employment was motivated by his complaint that female employees were using inappropriate language. The district court found that this assertion was "an unsupported allegation," that UP had sufficient reason to terminate Helvering's employment before he made the complaint, and that Helvering failed to meet his burden to show that UP's reason for terminating his employment was pretextual. The issues on appeal are whether the evidence presented to the district court demonstrates a genuine issue of material fact concerning the elements of Helvering's retaliation claim and whether UP was entitled to judgment as a matter of law.

(i) Protected Activity

It is not entirely clear what protected activity Helvering is alleging he engaged in to form the underlying basis for his retaliation claim. His petition referenced only § 48-1114(3), and his argument on appeal references only his "complaint" in an e-mail about the inappropriate language used by female employees of UP. See brief for appellant at 18. It is not entirely clear that Helvering's complaint was protected activity, although we will assume, without expressly so concluding, that it was. The district court did not grant summary judgment on the basis of Helvering's

activity's not being protected, and our resolution of other issues with respect to the retaliation claim makes an express determination on this element unnecessary.

[18] An individual who has opposed discriminatory employment practices is protected under § 48-1114(1). *Rose v. Vickers Petroleum, supra.* Helvering has not asserted that UP was engaging in any discriminatory employment practices and has not asserted that he voiced any opposition to a discriminatory employment practice when he sent the e-mail discussing the use of inappropriate language by female employees. As such, it does not appear that Helvering is asserting a protected activity under § 48-1114(1), and Helvering does not even reference § 48-1114(1) in either his petition or his brief on appeal.

[19,20] Section 48-1114(2), although not referenced by Helvering in either his petition or his brief on appeal, prohibits discrimination against an employee who "has made a charge" under FEPA. Section 48-1104(1) makes it unlawful for an employer to harass any individual because of sex, and § 48-1102(14) includes the creation of a hostile working environment as "[h]arass[ment] because of sex." As such, it is arguable that Helvering's assertion that he was fired for making a "complaint" about inappropriate language being used by female employees constitutes a charge that UP was allowing a hostile working environment. The difficulty in this position, however, is that Helvering's e-mail discussing the inappropriate language did not actually request UP to take any action, and Helvering's own testimony in a deposition indicated that the e-mail was not sent with the purpose of having UP take any action; rather, Helvering testified that the e-mail was sent to get his side of the story out and because of the timing of the female employees' comments.

[21,22] The evil addressed by § 48-1114(3) is the exploitation of the employer's power over the employee when used to coerce the employee to endorse, through participation or acquiescence, the unlawful acts of the employer. *Wolfe v. Becton Dickinson & Co.*, 266 Neb. 53, 662 N.W.2d 599 (2003). The text of § 48-1114(3) and reasonable policy dictate that an employee's opposition to any unlawful act of the employer, whether or not the employer pressures the employee to actively join in the illegal activity, is protected under § 48-1114(3). *Wolfe v. Becton*

Dickinson & Co., supra. Helvering specifically references § 48-1114(3) in both his petition and his brief on appeal. He has not, however, made any assertion or offered any evidence to indicate that UP in any way coerced him to endorse, through participation or acquiescence, any unlawful acts by UP.

We determine that it is unnecessary to explicitly determine whether Helvering has demonstrated that he engaged in a protected activity. Although the specific subsection of the statute referenced by Helvering in both his petition and his brief on appeal does not seem applicable, and although the applicability of the remaining subsections of § 48-1114 is questionable, we will assume for the purpose of discussion that Helvering's e-mail constituted a complaint that UP was allowing a hostile working environment by allowing female employees to use inappropriate language.

(ii) Adverse Employment Decision

There is no dispute in this case that Helvering suffered an adverse employment decision. Helvering's employment with UP was terminated. As such, it is clear that Helvering sufficiently alleged and demonstrated this element of his prima facie case.

(iii) Causal Connection

The final element of Helvering's prima facie case for retaliation is that Helvering was required to demonstrate that there was a causal link between the allegedly protected activity and the adverse employment decision. The district court specifically found that Helvering had "offered no evidence that [his e-mail complaint concerning inappropriate language by female employees] caused his termination. This is merely an unsupported allegation by him." The district court also found that UP had sufficient reason to terminate Helvering prior to the date of his e-mail, namely "[a]n investigation resulting in [Helvering's] being warned that he could be terminated if he met with a female employee outside the presence of other employees, which he admitted to, and the allegation by [Hampton] that he propositioned her." We disagree with the district court's implicit determination that there was no genuine issue of fact concerning UP's having a sufficient reason to terminate Helvering's employment prior to his e-mail.

The record indicates, contrary to the district court's implicit conclusion, that there is a genuine issue of fact concerning whether Helvering was warned that his employment could be terminated if he met with a female employee outside the presence of other employees, whether Helvering actually "violated" any such prohibition, and whether Helvering propositioned Hampton as she alleged. Although Jacobson testified in a deposition that Helvering had been told that "he should not put himself in a position where he is alone with any female employees," Helvering testified in a deposition that he had told Payne, Jacobson, and Murray it was "impossible" for him never to be in meetings alone with a female and that they had told him to "try not to find [himself] in a compromising position." Additionally, the testimony was conflicting about what actually happened when Helvering met with Hampton, and the evidence indicated that the meeting was not in private but had occurred with other employees coming and going in the same vicinity. Finally, although Hampton alleged that Helvering had propositioned her during the meeting, Helvering specifically denied the allegation. As such, whether there was a sufficient basis to terminate Helvering's employment prior to the date when he sent the e-mail requires resolution of facts about which there is a genuine dispute.

[23,24] More important, however, is the fact that Helvering presented evidence that the temporal proximity between his allegedly protected activity and the adverse employment action was very close. In *Smith v. Allen Health Systems, Inc.*, 302 F.3d 827 (8th Cir. 2002), the Eighth Circuit Court of Appeals discussed the possibility that temporal proximity between protected activity and an adverse employment action can be sufficient to circumstantially demonstrate causality. The court noted that sometimes, "the timing of one incident of adverse employment action following protected activity suffice[s] to establish causal connection." *Id.* at 832. " 'The cases that accept mere temporal proximity between an employer's knowledge of protected activity and an adverse employment action as sufficient evidence of causality to establish a prima facie case uniformly hold that the temporal proximity must be very close.' " *Id.* at 833 (quoting *Clark County School Dist. v. Breeden*, 532 U.S. 268, 121 S. Ct. 1508, 149 L. Ed. 2d 509 (2001) (per curiam)).

For example, in *Sprenger v. Federal Home Loan Bank of Des Moines*, 253 F.3d 1106, 1113 (8th Cir. 2001), the court held that proximity of a "matter of weeks" between disclosure of a potentially disabling condition and adverse employment action was sufficient to complete a prima facie case of discrimination. Similarly, in *Smith v. Allen Health Systems, Inc., supra*, the court concluded that proximity of approximately 2 weeks between the beginning of family leave and adverse employment action was sufficient, if barely so, to establish causation and complete a prima facie case of discrimination.

In the present case, Helvering sent his e-mail, which event we have above assumed for discussion to constitute protected activity, on May 28, 2000, and his employment was terminated on June 16, a proximity of fewer than 3 weeks. Under the precedent established by the Eighth Circuit, we conclude that this temporal proximity alone is sufficient evidence to circumstantially establish the causal connection needed to complete Helvering's prima facie case. The district court recognized as much by noting that "[s]tanding alone, the fact that [Helvering] was terminated two weeks after submitting a complaint may circumstantially establish a causal connection between the protected activity and the subsequent adverse employment action." Notwithstanding the district court's contrary statement that Helvering's allegation of a causal connection was "unsupported," the district court appeared to recognize that Helvering had demonstrated a sufficient causal connection by demonstrating the very close temporal proximity between the allegedly protected activity and the adverse employment action.

(iv) Conclusion on Prima Facie Case

We conclude that the district court improperly resolved genuine issues of fact concerning the causal connection between the allegedly protected activity and the adverse employment action. Nonetheless, it is apparent that the district court implicitly found that Helvering had satisfied his burden to demonstrate a prima facie case of discrimination, at least sufficiently so to survive summary judgment. For the purpose of our analysis, we agree with the district court's implicit conclusion that Helvering engaged in protected activity, suffered an adverse employment action, and demonstrated a causal connection between the two, at

least circumstantially based on the temporal proximity between the two.

(b) UP's Legitimate Nondiscriminatory Basis

Because Helvering demonstrated a prima facie case of discrimination, it became UP's burden to demonstrate a legitimate nondiscriminatory basis for terminating Helvering's employment. See, *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 101 S. Ct. 1089, 67 L. Ed. 2d 207 (1981); *Rose v. Vickers Petroleum*, 4 Neb. App. 585, 546 N.W.2d 827 (1996). UP asserted in its answer to Helvering's amended petition that Helvering's complaint should be "barred by his own conduct in creating a hostile work environment in direct violation of" §§ 48-1114 and 20-148. We agree with the district court's implicit conclusion that UP demonstrated a legitimate nondiscriminatory basis for terminating Helvering's employment, because the evidence indicates that Helvering's employment was terminated because of suspicion of sexual harassment.

Payne testified in a deposition that he made the decision to terminate Helvering's employment. Payne testified that the incidents he relied on "as creating a hostile environment by" the actions of Helvering were as follows:

> I met with . . . Helvering in early March [2000] and told him to be very careful, not put himself in a position, precarious position, with respect to others, Golden Rule. And I get a very serious charge in May from this dispatcher, [Helvering] is making sexual advances to her.
>
> In my investigation, I started uncovering stories here and there of sexual behavior, so I decided to terminate him.

Payne also testified that Helvering used bad judgment in using the "basketball story," which referenced females, at the safety meeting. Payne testified that "[b]ased on [his] gathering of the facts as [he] could, [he] saw sexual harassment in the workplace, so [he] made a determination for termination." Payne acknowledged that he determined that terminating Helvering's employment was appropriate based on "Helvering's bad judgment in going outside the building . . . with Hampton[,] based upon [Helvering's] use of the basketball story at the safety meeting, and . . . based upon Hampton's request not to work with

Helvering and [the] statement that Helvering had put his hand on [another female employee's] knee."

Jacobson testified in a deposition that the decision to terminate Helvering's employment was "a consensus decision" and that had it not been, he "would have forced it." Jacobson testified that Helvering's employment was terminated "[b]ecause he sexually harassed" Hampton. To support his conclusion that Helvering was guilty of sexual harassment, Jacobson pointed to Helvering's alleged attempts to take a road trip with Hampton, Helvering's telling of an offcolor story at the safety meeting, Helvering's meeting with Hampton, and Hampton's trying to get away from Helvering. Jacobson testified that he believed Hampton. According to Jacobson, Helvering was "trying to use his position to get sexual favors with . . . Hampton."

Based on the evidence presented, it is apparent that UP sufficiently demonstrated a legitimate nondiscriminatory basis for terminating Helvering's employment. Although the district court did not specifically discuss UP's legitimate nondiscriminatory basis, the court did conclude that Helvering failed to meet his burden to demonstrate that UP's "reason" for terminating Helvering's employment was pretextual, implicitly finding that UP had demonstrated a legitimate nondiscriminatory basis for terminating Helvering's employment. Based on the evidence presented, we agree that UP satisfied its burden in this regard.

(c) Helvering's Demonstration of Pretext

Because UP demonstrated a legitimate nondiscriminatory basis for terminating Helvering's employment, it became Helvering's burden to demonstrate that the proffered basis was merely pretextual. See, *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 101 S. Ct. 1089, 67 L. Ed. 2d 207 (1981); *Rose v. Vickers Petroleum*, 4 Neb. App. 585, 546 N.W.2d 827 (1996). We agree with the district court that Helvering failed to satisfy this burden, because he presented no evidence, other than the temporal proximity between the allegedly protected activity and the adverse employment action, to suggest that the real reason UP terminated his employment was discriminatory and not legitimate.

We have noted that the U.S. Supreme Court in *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 113 S. Ct. 2742, 125 L.

Ed. 2d 407 (1993), heightened the employee's burden in discrimination cases. It is now incumbent upon an employee to prove not only falsity of the proffered reasons given by the employer, but also that discriminatory motive was the true reason for the discharge. See *id.* See, also, *Ventura v. State*, 246 Neb. 116, 517 N.W.2d 368 (1994). The trier of fact may rely on inferences rather than direct evidence of intentional acts, but intent must be proven by a preponderance of the evidence, whether direct, circumstantial, or otherwise. See, *Texas Dept. of Community Affairs v. Burdine, supra*; *Board of Trustees v. Sweeney*, 439 U.S. 24, 99 S. Ct. 295, 58 L. Ed. 2d 216 (1978); *Rose v. Vickers Petroleum, supra.*

[25] Further, in *Smith v. Allen Health Systems, Inc.*, 302 F.3d 827 (8th Cir. 2002), the court specifically held that although temporal proximity may be sufficient to demonstrate a prima facie case of discrimination, temporal proximity alone is not sufficient to satisfy the burden to show pretext. The court held that although strong evidence of a prima facie case can also be considered to establish pretext, proof of pretext or actual discrimination requires more substantial evidence. As such, although the plaintiff may attempt to establish intentional discrimination by showing that the employer's proffered explanation is unworthy of credence and the trier of fact may consider the evidence establishing the prima facie case, see *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 120 S. Ct. 2097, 147 L. Ed. 2d 105 (2000), where temporal proximity is the only evidence establishing causality, such temporal proximity alone is usually insufficient to establish pretext. See *E.E.O.C. v. Kohler Co.*, 335 F.3d 766 (8th Cir. 2003).

In the present case, as we noted above, Helvering demonstrated the very close temporal proximity between his allegedly protected activity and the termination of his employment. Other than this temporal proximity, however, there is no evidence in the record indicating that UP was actually motivated by a desire to retaliate or discriminate against Helvering rather than by a conclusion that Helvering was guilty of sexual harassment. Helvering failed to satisfy the heightened burden of proof required to demonstrate pretext or intentional discrimination.

(d) Conclusion on Retaliation

Although we conclude that Helvering arguably demonstrated a prima facie case of discrimination, we conclude that UP demonstrated a legitimate nondiscriminatory basis for terminating Helvering's employment and that Helvering failed to demonstrate that UP's proffered basis was pretextual. Helvering demonstrated a prima facie case of discrimination by showing that he had engaged in an arguably protected activity, namely submitting an e-mail about inappropriate language being used by female employees; by showing that he suffered an adverse employment action when his employment was terminated; and by circumstantially demonstrating a causal connection between his activity and the adverse action by virtue of the very close temporal proximity between those two events. UP, however, demonstrated a legitimate nondiscriminatory basis for terminating Helvering's employment by showing that Helvering's employment was terminated because UP believed that he was guilty of sexual harassment. Helvering failed to adduce sufficient evidence to satisfy his burden to demonstrate that UP's proffered basis was merely pretextual, and UP was therefore entitled to judgment as a matter of law on Helvering's retaliation claim. As such, we find no merit to Helvering's assertions on appeal that the district court erred in granting UP summary judgment on the retaliation claim.

3. Gender Discrimination Claim

Helvering next asserts that the district court erred in granting UP summary judgment on Helvering's claim that UP's termination of his employment was unlawful gender discrimination. Because we conclude that Helvering failed to satisfy his burden of adducing sufficient evidence to demonstrate that he was treated differently from similarly situated persons of the opposite sex, and because we conclude that UP demonstrated a legitimate nondiscriminatory basis for terminating Helvering's employment and Helvering failed to satisfy his burden of demonstrating that the proffered basis was merely pretextual, we conclude that the district court correctly granted UP summary judgment on the gender discrimination claim.

(a) Helvering's Prima Facie Case

[26] It was Helvering's burden to first demonstrate a prima facie case of gender discrimination. See *Father Flanagan's Boys' Home v. Agnew*, 256 Neb. 394, 590 N.W.2d 688 (1999). See, also, *Riggs v. County of Banner*, 159 F. Supp. 2d 1158 (D. Neb. 2001). We conclude that Helvering failed to demonstrate that UP discriminated against Helvering, a member of the "majority" class of male employees, and conclude that Helvering failed to demonstrate that any similarly situated female employees were treated differently. A prima facie case of gender discrimination requires the plaintiff to prove that he or she (1) is a member of a protected class, (2) was qualified to perform the job, (3) suffered an adverse employment action, and (4) was treated differently from similarly situated persons of the opposite sex. *Riggs v. County of Banner, supra.*

(i) Protected Class

[27] On the record presented at the summary judgment hearing, Helvering failed to satisfy the first element of a prima facie case because he failed to demonstrate that he was a member of a protected class or that UP discriminated against male employees. In reverse discrimination cases, the first element of the prima facie case is modified to require proof " 'that background circumstances support the suspicion that the defendant is that unusual employer who discriminates against the majority.' " *Riggs v. County of Banner*, 159 F. Supp. 2d at 1165 (quoting *Duffy v. Wolle*, 123 F.3d 1026 (8th Cir. 1997), *cert. denied* 523 U.S. 1137, 118 S. Ct. 1839, 140 L. Ed. 2d 1090 (1998)). See, also, *Notari v. Denver Water Dept.*, 971 F.2d 585 (10th Cir. 1992).

In the present case, Helvering adduced no evidence to suggest that UP is that "unusual employer who discriminates against the majority." See *Riggs v. County of Banner, supra*. There is no evidence in the record to suggest any background circumstances supporting a suspicion that UP tends to discriminate against males. As such, it is apparent that Helvering failed to satisfy the first element of his prima facie case.

(ii) Helvering's Qualifications

The record does not contain any dispute about Helvering's qualifications to perform the job of corridor manager. Helvering

had been employed by UP since 1972, and the record does not indicate any suggestion of prior performance problems. Even if the allegations of sexual harassment could be somehow construed to call into question his qualifications to continue his employment, the record indicates that Helvering, at a minimum, presented sufficient evidence to generate a genuine factual issue about his qualifications when he testified in a deposition that he had denied the allegations against him. As such, this element was arguably satisfied.

(iii) Adverse Employment Action

Once again, there is no dispute that Helvering suffered an adverse employment action when his employment was terminated. As such, this element does not appear to be disputed and this element was satisfied.

(iv) Disparate Treatment

The district court specifically found that Helvering had failed to adduce sufficient evidence to support a finding that he was treated differently from similarly situated female employees of UP. We agree with the district court's conclusion that Helvering failed to demonstrate that he was treated differently from similarly situated female employees because Helvering failed to establish that the female employees who were the subject of his e-mail were similarly situated to him.

[28-31] The test to determine whether employees are similarly situated to warrant a comparison to a plaintiff is a rigorous one. *E.E.O.C. v. Kohler Co.*, 335 F.3d 766 (8th Cir. 2003). Specifically, the individuals used for comparison must have dealt with the same supervisor, been subject to the same standards, and engaged in the same conduct without any mitigating or distinguishing circumstances. *Id.* For discriminatory discipline claims, employees are considered similarly situated when they are involved in or accused of the same offense and are disciplined in different ways. *Id.* The plaintiff has the burden of demonstrating that there were individuals similarly situated in all relevant aspects to her by a preponderance of the evidence. *Id.*

In the present case, Helvering failed to satisfy this burden. Helvering's assertion is that the female employees who used

inappropriate language and who were referenced in his e-mail were similarly situated to him. However, Helvering failed to demonstrate that those employees had the same supervisor or were subject to the same standards. In fact, Helvering's own testimony in a deposition indicated that at least some of the female employees had different positions from his at UP. Of even more importance, however, is that Helvering failed to demonstrate that the alleged misconduct was the same. Helvering was accused of sexual harassment and was alleged, inter alia, to have told a sexually harassing story at a safety meeting and to have propositioned a female employee. Helvering alleged in his e-mail that the female employees had used inappropriate language. Helvering has failed to demonstrate how these allegations involve the same conduct.

Additionally, as the district court found, the record indicates that Helvering and the female employees were not similarly situated, because Helvering had previously been accused of sexual harassment and had previously been investigated for sexual harassment, whereas the record does not indicate any prior complaints or investigations concerning the female employees. Indeed, the record indicates that when Helvering was first accused of sexual harassment, he was spoken to by UP and was counseled to comply with UP's policies and not to put himself into a difficult position; when Helvering sent his e-mail concerning the female employees, they were spoken to by UP and were counseled to comply with UP's policies. It is arguable whether Helvering and the female employees were even treated differently, inasmuch as Helvering was terminated only upon the second accusation and investigation of sexual harassment. As such, Helvering failed to demonstrate that he was treated differently from similarly situated female employees.

(b) Conclusion on Gender Discrimination

Helvering failed to demonstrate a prima facie case of gender discrimination. Helvering failed to demonstrate that he is in a protected class or that UP discriminates against male employees, and he failed to demonstrate that he was treated differently from similarly situated female employees; he failed to demonstrate both that the female employees were treated differently and that they were similarly situated to him. As such, we find no merit to

Helvering's assertions concerning his gender discrimination claim. UP was entitled to a judgment as a matter of law, and the district court did not err in granting UP summary judgment on Helvering's gender discrimination claim.

4. Age Discrimination Claim

Helvering next asserts that the district court erred in granting UP summary judgment on his claim that UP's termination of his employment was unlawful age discrimination. We conclude that even if Helvering demonstrated a prima facie case of age discrimination, Helvering failed to adduce sufficient evidence to demonstrate that the legitimate nondiscriminatory reason proffered by UP for terminating his employment was pretextual. As such, we conclude that the district court did not err in granting UP summary judgment on Helvering's age discrimination claim.

(a) Helvering's Prima Facie Case

[32] It was Helvering's burden to first demonstrate a prima facie case of age discrimination. See, *Billingsley v. BFM Liquor Mgmt.*, 264 Neb. 56, 645 N.W.2d 791 (2002); *Allen v. AT&T Technologies*, 228 Neb. 503, 423 N.W.2d 424 (1988); *Apland v. Northeast Community College*, 8 Neb. App. 621, 599 N.W.2d 233 (1999). We conclude that the record does not establish sufficient evidence for us to find that Helvering demonstrated a prima facie case. To establish a prima facie case of age discrimination, the plaintiff must establish that (1) he or she was in the protected group, (2) he or she was subjected to an adverse employment action, (3) he or she was qualified for the employment position or benefit adversely denied, and (4) other similarly situated persons not in the protected group were treated differently. See *id.* We conclude that Helvering failed to satisfy his burden with respect to the last element, disparate treatment.

(i) Protected Group

[33] There is no dispute in this case that Helvering was within the relevant protected age group. Nebraska's Act Prohibiting Unjust Discrimination in Employment Because of Age, Neb. Rev. Stat. § 48-1001 et seq. (Reissue 2004), makes it unlawful to discriminate against a person who is at least 40 but fewer than 70 years of age, unless such age distinction is made for legitimate

and reasonable purposes. See *Apland v. Northeast Community College, supra*. Helvering alleged in his amended petition that he was approximately 48 years of age at the time his employment was terminated, and UP admitted this allegation in the answer. As such, this element of Helvering's prima facie case was satisfied.

(ii) Adverse Employment Action

There is also no dispute that Helvering suffered an adverse employment action when his employment with UP was terminated. As such, this element of Helvering's prima facie case was also satisfied.

(iii) Helvering's Qualifications

As we previously mentioned, the record does not contain any dispute about Helvering's qualifications to perform the job of corridor manager. Helvering had been employed by UP since 1972, and the record does not indicate any suggestion of prior performance problems. Even if the allegations of sexual harassment could be somehow construed to call into question his qualifications to continue his employment, the record indicates that Helvering, at a minimum, presented sufficient evidence to generate a genuine factual issue about his qualifications when he testified in a deposition that he had denied the allegations against him. As such, this element was arguably satisfied.

(iv) Disparate Treatment

Helvering alleged in his amended petition that the female employees who were the subject of his e-mail were "30 to 40" years of age and that they were treated differently from Helvering because they were not terminated. Our review of the record does not indicate that any evidence was adduced concerning the ages of any of the female employees, and we note that Helvering's brief on appeal cites only to his allegation in the transcript in support of his argument that the female employees "were younger." Brief for appellant at 38. In addition, as discussed in some detail above, Helvering failed to adduce sufficient evidence to show, in demonstration of disparate treatment, that the female employees were similarly situated to Helvering. Finally, the record does not demonstrate that Helvering was replaced by an employee outside of the protected group.

As such, it is apparent that Helvering failed to adduce sufficient evidence to demonstrate this element, and Helvering thus failed to demonstrate a prima facie case of age discrimination. UP was therefore entitled to a judgment as a matter of law, and the district court did not err in granting UP summary judgment on the age discrimination claim.

(b) UP's Legitimate Nondiscriminatory Basis

Assuming that Helvering could be found to have demonstrated a prima facie case of age discrimination, the burden would shift to UP to demonstrate a legitimate nondiscriminatory basis for terminating Helvering's employment. See, *Billingsley v. BFM Liquor Mgmt.*, 264 Neb. 56, 645 N.W.2d 791 (2002); *Allen v. AT&T Technologies*, 228 Neb. 503, 423 N.W.2d 424 (1988); *Apland v. Northeast Community College*, 8 Neb. App. 621, 599 N.W.2d 233 (1999). In this case, as discussed in more detail above, UP demonstrated that Helvering's employment was terminated because UP believed that Helvering was guilty of sexually harassing a female employee. As such, and for the reasons discussed in more detail above, we conclude that UP would have satisfied its burden to demonstrate a legitimate nondiscriminatory basis for terminating Helvering's employment even if Helvering could be found to have demonstrated a prima facie case of age discrimination.

(c) Helvering's Demonstration of Pretext

Because UP demonstrated a legitimate nondiscriminatory basis for terminating Helvering's employment, the burden would have shifted back to him to demonstrate that the proffered basis was merely pretext. See, *Billingsley v. BFM Liquor Mgmt., supra*; *Allen v. AT&T Technologies, supra*; *Apland v. Northeast Community College, supra*. Even if Helvering could be found to have satisfied his burden to demonstrate a prima facie case of age discrimination, we agree with the district court that Helvering failed to demonstrate that UP's proffered basis for terminating his employment was merely pretextual. Helvering presented no evidence to suggest that the real reason UP terminated his employment was discriminatory and not legitimate.

As noted above, the U.S. Supreme Court in *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 113 S. Ct. 2742, 125 L. Ed. 2d

407 (1993), heightened the employee's burden in discrimination cases, and it is now incumbent upon an employee to prove not only falsity of the proffered reasons given by the employer, but also that discriminatory motive was the true reason for the discharge. See, also, *Ventura v. State*, 246 Neb. 116, 517 N.W.2d 368 (1994). The trier of fact may rely on inferences rather than direct evidence of intentional acts, but intent must be proven by a preponderance of the evidence, whether direct, circumstantial, or otherwise. See, *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 101 S. Ct. 1089, 67 L. Ed. 2d 207 (1981); *Board of Trustees v. Sweeney*, 439 U.S. 24, 99 S. Ct. 295, 58 L. Ed. 2d 216 (1978); *Rose v. Vickers Petroleum*, 4 Neb. App. 585, 546 N.W.2d 827 (1996).

In the present case, Helvering testified in a deposition that Murray had once said to Helvering that Helvering was "a middle-aged white male [and was] very vulnerable." It is not clear from the record when Murray allegedly made this comment. Additionally, Helvering testified that UP had "a history of terminating people that are nearing retirement to save the officers' pension." Helvering was questioned about former employees whose employment he was alleging had been terminated when they neared retirement, and he identified two former employees. Helvering acknowledged that one had had a disability and received disability benefits at the time his employment was terminated, but he acknowledged that he did not know whether the other had lost any benefits which had vested prior to the termination of his employment.

We conclude that the meager evidence presented by Helvering was insufficient as a matter of law to meet the heightened burden to demonstrate pretext. The evidence is insufficient to demonstrate that UP's proffered reason for terminating Helvering's employment, because of a belief that he had sexually harassed a female employee, was false and that the true motive for terminating his employment was discrimination. As such, we conclude that Helvering failed to satisfy his burden of proof and that UP was entitled to a judgment as a matter of law. The district court did not err in granting UP summary judgment on Helvering's age discrimination claim.

(d) Conclusion on Age Discrimination

Helvering failed to demonstrate a prima facie case of age discrimination because he failed to demonstrate disparate treatment. Helvering failed to adduce sufficient evidence to show that similarly situated employees not in the protected age group were treated differently from him; he failed to demonstrate both that the female employees were similarly situated to him and that they were not in the protected age group. In addition, even if Helvering could be found to have demonstrated a prima facie case, UP demonstrated a legitimate nondiscriminatory basis for terminating his employment upon a belief that he had sexually harassed a female employee, and Helvering failed to adduce sufficient evidence to demonstrate that UP's proffered reason was merely pretextual. As such, we find no merit to Helvering's assertions concerning his age discrimination claim. UP was entitled to a judgment as a matter of law, and we conclude that the district court did not err in granting UP summary judgment on the age discrimination claim.

V. CONCLUSION

The district court did not err in granting UP summary judgment on Helvering's retaliation claim, Helvering's gender discrimination claim, and Helvering's age discrimination claim. Helvering failed to satisfy his burden of proof with respect to each of the claims, and UP was entitled to a judgment as a matter of law on each. The order of the district court granting UP summary judgment on each of the claims is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V.
RYAN E. LYKENS, APPELLANT.
703 N.W.2d 159

Filed August 30, 2005. No. A-04-844.

1. **Motions to Suppress: Investigative Stops: Warrantless Searches: Probable Cause: Appeal and Error.** A trial court's ruling on a motion to suppress evidence, apart from determinations of reasonable suspicion to conduct investigatory stops and probable cause to perform warrantless searches, is to be upheld on appeal unless its

findings of fact are clearly erroneous. In making this determination, an appellate court does not reweigh the evidence or resolve conflicts in the evidence, but, rather, recognizes the trial court as the finder of fact and takes into consideration that it observed the witnesses.

2. **Motions for New Trial: Appeal and Error.** A motion for new trial is addressed to the discretion of the trial court, whose decision will be upheld in the absence of an abuse of that discretion.
3. **Judges: Words and Phrases.** A judicial abuse of discretion exists only when the reasons or rulings of a trial judge are clearly untenable, unfairly depriving a litigant of a substantial right and denying a just result in matters submitted for disposition.
4. **Prosecuting Attorneys: Evidence.** The prosecutor has a duty to disclose evidence material to the guilt or punishment of the defendant even if no requests are made for the evidence. The prosecution does not have a duty to provide defense counsel with unlimited disclosure of all information known by the prosecutors, but if the subject matter is material or if a substantial basis for claiming it is material exists, it is reasonable to require the prosecutor to furnish the information.
5. **Motions for New Trial: Evidence: Proof.** One moving for new trial on the basis of newly discovered evidence must show that the evidence was uncovered since the trial, that the evidence was not equally available before the trial, and that the evidence was not simply discovered by the exercise of belated diligence.
6. **Evidence: Words and Phrases.** Generally, newly discovered evidence is evidence material to the defense that could not with reasonable diligence have been discovered and produced in the prior proceedings.
7. **Prosecuting Attorneys: Evidence: Constitutional Law.** The prosecution does not have a duty to provide defense counsel with unlimited disclosure of all information known by the prosecutors, but if the subject matter is material or if a substantial basis for claiming it is material exists, it is reasonable to require the prosecutor to furnish the information. The duty of disclosure is not measured by the actions of the prosecutor, but is based upon the character of the evidence. The U.S. Constitution does not demand discovery of all information which might influence the jury. The mere possibility that an item of undisclosed information might have aided the defense or might have affected the outcome of the trial does not establish materiality of the evidence in a constitutional sense.
8. **Criminal Law: Evidence: New Trial.** In cases when the evidence alleged to be newly discovered was withheld by the State, a defendant is entitled to a new trial if the omitted evidence could have created a reasonable doubt that he or she committed the alleged crime or crimes.

Appeal from the District Court for Dodge County: JOHN E. SAMSON, Judge. Reversed and remanded for a new trial.

Avis R. Andrews for appellant.

Jon Bruning, Attorney General, and Kimberly A. Klein for appellee.

INBODY, Chief Judge, and IRWIN and SIEVERS, Judges.

INBODY, Chief Judge.

INTRODUCTION

After a jury trial in the district court for Dodge County, Nebraska, Ryan E. Lykens was convicted of one count of robbery; he now appeals that conviction. For the reasons set forth herein, we reverse Lykens' conviction and remand the cause for a new trial.

STATEMENT OF FACTS

On November 1, 2003, an individual entered a convenience store in Fremont, Nebraska. The individual displayed a gun to the clerk on duty and demanded that she give him the money out of the cash register and a carton of cigarettes. The clerk gave the individual roughly $130 in cash and a carton of cigarettes. The individual then left the store and fled on foot. When police responded to the scene, the clerk described the individual as a white male, approximately 22 years of age, 5 feet 7 inches tall and 140 pounds with a line of blond facial hair. The clerk said that the individual was wearing a dark-colored, waist-length jacket.

On November 3, 2003, Lykens entered a Fremont police station. He intended to surrender himself, as he believed that there was an outstanding warrant for his arrest on an unrelated offense. Sgt. Robert Buer of the Fremont Police Department saw Lykens and believed that Lykens fit the general description of the individual who had committed the robbery at the convenience store. Sergeant Buer asked Lykens about his whereabouts during the time of the robbery, and Lykens indicated that he was en route from Ohio to Nebraska at the time of the robbery. Lykens did confirm that he was currently living with his sister in Fremont. Lykens consented to having his picture taken to be placed in a photographic lineup. After Sergeant Buer completed his questioning of Lykens, Lykens was arrested on an outstanding arrest warrant for a March 2003 offense of "driving under the influence."

Lykens was charged with the robbery by an information filed on December 9, 2003. On January 9, 2004, Lykens filed two motions to suppress; one of the motions was to suppress the statements he made to police officers on November 3, 2003, and the other motion was to suppress the physical evidence gathered by law enforcement personnel "for the reason that said evidence was

obtained pursuant to an illegal search and seizure or was otherwise obtained without sufficient probable cause." On February 24, 2004, both motions to suppress were overruled. A trial was held in the instant case on May 4 through 7. On May 5, Lykens made a motion for a mistrial based on juror misconduct, and that motion was denied.

On May 7, 2004, the jury found Lykens guilty of robbery. On May 17, Lykens filed a motion for new trial, alleging that there was irregularity in the proceedings of the court, that the verdict was not sustained by sufficient evidence or was contrary to law, and that an error of law occurred at the trial. On June 16, the district court sentenced Lykens to 2 to 5 years' imprisonment for the robbery conviction. On June 21, Lykens filed a supplemental motion for new trial on the basis of "[n]ewly discovered evidence material for [Lykens] which he could not with reasonable diligence have discovered and produced at the trial." On July 1, the district court denied both the motion for new trial and the supplemental motion for new trial. Lykens timely appealed to this court. Additional facts will be discussed during our analysis of Lykens' assignments of error.

ASSIGNMENTS OF ERROR

Lykens assigns as error the district court's failure to grant his motion to dismiss at the end of the State's case in chief, his motion for a mistrial, his motion to suppress the statements he made to police, and his supplemental motion for a new trial.

STANDARD OF REVIEW

[1] A trial court's ruling on a motion to suppress evidence, apart from determinations of reasonable suspicion to conduct investigatory stops and probable cause to perform warrantless searches, is to be upheld on appeal unless its findings of fact are clearly erroneous. *State v. Faber*, 264 Neb. 198, 647 N.W.2d 67 (2002). In making this determination, an appellate court does not reweigh the evidence or resolve conflicts in the evidence, but, rather, recognizes the trial court as the finder of fact and takes into consideration that it observed the witnesses. *Id.*

[2] A motion for new trial is addressed to the discretion of the trial court, whose decision will be upheld in the absence of an

abuse of that discretion. *State v. Hudson*, 268 Neb. 151, 680 N.W.2d 603 (2004).

[3] A judicial abuse of discretion exists only when the reasons or rulings of a trial judge are clearly untenable, unfairly depriving a litigant of a substantial right and denying a just result in matters submitted for disposition. *State v. Hall*, 268 Neb. 91, 679 N.W.2d 760 (2004).

ANALYSIS

Motion to Suppress.

We first address Lykens' assertion that the district court's ruling on his motion to suppress statements he made to police was clearly erroneous. As noted above, a trial court's ruling on a motion to suppress evidence, apart from determinations of reasonable suspicion to conduct investigatory stops and probable cause to perform warrantless searches, is to be upheld on appeal unless its findings of fact are clearly erroneous. *State v. Faber, supra*. In making this determination, an appellate court does not reweigh the evidence or resolve conflicts in the evidence, but, rather, recognizes the trial court as the finder of fact and takes into consideration that it observed the witnesses. *Id.*

In its order overruling Lykens' motion to suppress, the district court found:

> During the late night hours of November 3, 2003, [Lykens] voluntarily entered the public lounge area of the Fremont Police Station and told the officers on duty that he came to surrender himself on what he suspected was an outstanding warrant. Officers . . . of the Fremont Police Department contacted the dispatcher to determine if, in fact, there was a warrant for [Lykens]. Sergeant Buer of the Fremont Police Department observed [Lykens] in the public lounge area and believed that he matched the general description given of the robbery suspect at the [convenience store]. While the dispatcher was attempting to verify the existence of an outstanding warrant for [Lykens], Sergeant Buer asked [Lykens] several questions. He inquired as to where [Lykens] was currently residing and [asked] several questions regarding [Lykens'] whereabouts during the [convenience store] robbery on November 1,

> 2003. [Lykens] was cooperative and cool during the question[s] by Sergeant Buer. . . . After the question-and-answer period between Sergeant Buer and [Lykens], Sergeant Buer left the police station.
>
> During the questioning by Sergeant Buer, [Lykens] was not in handcuffs and was in the public lounge area of the police station, which was unlocked. He had previously not been a suspect of the robbery and was free to leave at any time during the questioning by Sergeant Buer.
>
> . . . No Miranda warnings were given to [Lykens] prior to the questioning by Sergeant Buer.

The district court then noted that Lykens' motion to suppress alleged that "since no Miranda warnings were given to him . . . any statements made by him violated [his] uncounseled Fifth Amendment privilege against self-incrimination." In overruling Lykens' motion, the district court noted that Lykens voluntarily went to the police station, that there was no arrest or restraint on Lykens' freedom of movement, and that all questioning took place in an unlocked public lobby in the police station. The court then found that "from the totality of the circumstances, all statements made by [Lykens] in the lounge of the Fremont Police Station were . . . not the result of a custodial interrogation and, therefore, not a violation of [Lykens'] privilege against self-incrimination."

After a thorough review of the record, we are unable to say that the district court's findings of fact were clearly erroneous. There is ample evidence in the record to support the trial court's findings that Lykens' statements were made voluntarily and that they were not the result of custodial interrogation. Accordingly, the district court's ruling on Lykens' motion to suppress his statements was proper.

Supplemental Motion for New Trial Based on Newly Discovered Evidence.

Lykens next alleges that the district court abused its discretion when it overruled his supplemental motion for a new trial based on newly discovered evidence. He originally filed a motion for a new trial on May 17, 2004, and then filed a supplemental motion for new trial on June 21. In his supplemental motion, Lykens

asserted that he had "[n]ewly discovered evidence material for [Lykens] which he could not with reasonable diligence have discovered and produced at the trial."

The supplemental motion was supported by the affidavits of Dawn Lykens, who is Lykens' mother, and Avis Andrews, who is Lykens' attorney. In Dawn's affidavit, she asserts that she

> visited [Lykens] in the Dodge County Jail; that on one such visit in March, 2004, [Dawn] was in the visitation room and happened to talk to a man also in the visitation room waiting for a visit with his son, later identified as Thomas Brainard; that a third individual, . . . also present in the visitation room, initiated a conversation with Thomas Brainard that was overheard by [Dawn]; that Thomas Brainard stated he was visiting his son, Joseph Brainard, who had been sentenced to ten days for robbery; that [Dawn] then said her son, [Lykens], was accused of robbing [the convenience store]; that Thomas Brainard then said that it was his son[, Joseph Brainard,] who had robbed [the convenience store] and that [Joseph Brainard] had done it once before too; [and that] at that point, the inmates were brought in for visitation and no further conversation among the three waiting took place.

Dawn further stated in her affidavit that she "was contacted by [detectives] regarding this conversation in April 2004; that [she] related the incident as set forth [above] to the detectives; [and] that [she] also told them that [the third individual] had heard the conversation."

Andrews also filed an affidavit. In her affidavit, Andrews asserts that "law enforcement investigated the information regarding statements made by Thomas Brainard and[,] following said investigation, the results were conveyed to [Andrews] by the [Dodge] County Attorney in a letter dated April 27, 2004." The letter notes:

> Law enforcement has figured out that the person who made the comment to [Dawn] was Thomas Brainard of Hooper, Nebraska. [He] advised the police that he recalled meeting [Dawn] while visiting his son[, Joseph Brainard,] in the county jail in March, 2004. When he asked [Dawn] why her son was in jail, she said he was charged with the

> [convenience store] robbery. [Thomas] Brainard replied to her that [Joseph Brainard] had robbed [that convenience store] also. When the police asked him what he meant by that comment, he said he was referring to an earlier shoplifting incident when . . . Joseph Brainard had stolen some beer from the [convenience store].
>
> . . . Apparently Thomas Brainard, Joseph [Brainard's] father, would equate the term of shoplifting and robbery or robbing, which is what he explained to the detectives when they spoke with him.

The affidavit of Andrews further asserts that she "attempted to contact Thomas Brainard independently but was only able to locate a message number for him [and] did not receive a call from [him] until after both sides had rested at the trial[,] at which time he made a statement similar" to that described in the county attorney's letter.

Andrews further asserted in her affidavit that "on June 10, 2004, [she] first became aware that Joseph Brainard was interviewed by the Fremont Police Department on April 27, 2004, upon reading the same as part of the presentence investigation report prepared by the Probation Office for use in this case." Andrews alleged that the interview with Joseph Brainard

> constitutes newly discovered evidence material to this cause of action in light of the statements of Thomas Brainard, the resemblance of Joseph Brainard to the perpetrator, the statement by Joseph Brainard that he is a smoker and owns a BB gun shaped like a pistol, and his history of theft from [a similar convenience store].

A hearing on the motion for new trial and supplemental motion for new trial was held on June 28, 2004. At the hearing, the court took judicial notice of the affidavits filed by Andrews and Dawn and accepted a transcript of the April 27 interview of Joseph Brainard conducted by officers of the Fremont Police Department into evidence. A thorough review of the transcript of the interview indicates that at the time of the interview, he was 18 years old, stood 5 feet 7 inches to 5 feet 8 inches tall, had facial hair, had a history of shoplifting, including an incident when he shoplifted from a similar convenience store, was a smoker, had access to a gun similar to the one described by the

clerk in the instant case's convenience store robbery, and occasionally wore hats. The interview also indicates that the officers conducting the interview took pictures of Joseph Brainard, but the pictures were not included with the transcript.

At the hearing on the supplemental motion for new trial, Andrews asserted:

> [O]ur whole defense was that . . . Lykens did not commit this crime and, therefore, someone else must have committed this — did commit this crime. And late in the progress of this case, the name of Joseph Brainard came up through comments made by [Thomas Brainard], as indicated in the affidavits. And, in fact, [the transcript of Joseph Brainard's interview] itself indicates a connection with [a similar convenience store], that he is basically the same age [and] height as the individual that robbed [the convenience store], that he's a smoker, that he had access to a BB gun, which was alleged to be the . . . weapon used in the robbery, all of these very similar to the identity of the traits used to identify the suspect in this particular case. That's why we feel that this additional information is important. I think it[s] importance is borne out by the fact that it was included in the [presentence investigation report] and that it would serve as a basis for a new trial.

The district court took the matter under advisement at the conclusion of the hearing and subsequently denied both of Lykens' motions for new trial on July 1, 2004.

[4] We first note that in a motion for discovery, Lykens had specifically requested "[t]he name, address, recent photo and the criminal history of each male known to local law enforcement meeting the general description given of the perpetrator of the alleged robbery and having a criminal history of any nature." While this specific request was denied by the trial court, the Nebraska Supreme Court has previously noted:

> [T]he prosecutor has a duty to disclose evidence material to the guilt or punishment of the defendant even if no requests are made for the evidence. [T]he prosecution does not have a duty to provide defense counsel with unlimited disclosure of all information known by the prosecutors, but if the subject matter is material or if a substantial basis for claiming

> it is material exists, it is reasonable to require the prosecutor to furnish the information.

State v. Atwater, 245 Neb. 746, 752, 515 N.W.2d 431, 435 (1994). See *United States v. Agurs*, 427 U.S. 97, 96 S. Ct. 2392, 49 L. Ed. 2d 342 (1976). Thus, if the newly discovered evidence relied upon by Lykens is material or if a substantial basis for claiming it is material exists, the lack of a discovery order is irrelevant.

[5,6] Neb. Rev. Stat. § 29-2101 (Cum. Supp. 2004) provides:

> A new trial, after a verdict of conviction, may be granted, on the application of the defendant, for any of the following grounds affecting materially his or her substantial rights: . . . (5) newly discovered evidence material for the defendant which he or she could not with reasonable diligence have discovered and produced at the trial . . . .

One moving for new trial on the basis of newly discovered evidence must show that the evidence was uncovered since the trial, that the evidence was not equally available before the trial, and that the evidence was not simply discovered by the exercise of belated diligence. *State v. Jackson*, 264 Neb. 420, 648 N.W.2d 282 (2002). Generally, newly discovered evidence is evidence material to the defense that could not with reasonable diligence have been discovered and produced in the prior proceedings. *Id.*

We next address whether or not the evidence relied upon by Lykens is in fact "newly discovered evidence." The record shows that Dawn became aware of an alternate suspect, namely Joseph Brainard, in March 2004. She notified the police about the possibility of this alternate suspect. On or about April 27, Andrews was contacted by letter by the county attorney for Dodge County. The letter notified her that the police had identified the individual Dawn spoke with as Thomas Brainard, the father of Joseph Brainard, and that Thomas Brainard apparently "would equate the term of shoplifting and robbery or robbing, which is what he explained to the detectives when they spoke with him." Further, the record shows that Andrews made reasonable efforts to contact Thomas Brainard, but that she only had a message number for him and that her efforts were unsuccessful until after the prosecution and defense had rested at trial on May 6.

The record reflects that on April 27, 2004, police interviewed Joseph Brainard at the Fremont police station. He denied committing the robbery for which Lykens was convicted. However, he did appear to match the physical description of the individual who committed the robbery, had access to a gun similar to the one used in the robbery, and had committed numerous shoplifting offenses, including from a similar convenience store, in the past. The transcript of this interview was first seen by the defense after the trial, when it was included in the presentence investigation report. In light of this, we conclude that the transcript of the interview with Joseph Brainard does constitute newly discovered evidence because it is evidence material to the defense that could not with reasonable diligence have been discovered and produced in the prior proceedings. We next address whether the district court abused its discretion when it denied Lykens' supplemental motion for new trial based upon this newly discovered evidence.

[7] In *State v. Atwater*, 245 Neb. 746, 515 N.W.2d 431 (1994), the Nebraska Supreme Court dealt with the issue of when a motion for new trial based on newly discovered evidence is properly granted. The court first provided the following regarding a defendant's constitutional rights when the State fails to disclose information:

> In *United States v. Agurs*, 427 U.S. 97, 96 S. Ct. 2392, 49 L. Ed. 2d 342 (1976), the [U.S. Supreme] Court held that the prosecutor has a duty to disclose evidence material to the guilt or punishment of the defendant even if no requests are made for the evidence. At the same time, the Court held that the prosecution does not have a duty to provide defense counsel with unlimited disclosure of all information known by the prosecutors, but if the subject matter is material or if a substantial basis for claiming it is material exists, it is reasonable to require the prosecutor to furnish the information. The duty of disclosure is not measured by the actions of the prosecutor, but is based upon the character of the evidence. The U.S. Constitution does not demand discovery of all information which might influence the jury. The mere possibility that an item of undisclosed information might have aided the defense or might

> have affected the outcome of the trial does not establish materiality of the evidence in a constitutional sense. *Id.*

State v. Atwater, 245 Neb. at 752, 515 N.W.2d at 434-35. Therefore, if the subject matter of the information that the State fails to disclose is material or if a substantial basis for claiming it is material exists, the State is required to furnish that information.

The Nebraska Supreme Court then indicated what must be shown by a criminal defendant in order to justify the grant of a new trial based on newly discovered evidence:

> In Nebraska, a criminal defendant who seeks a new trial on the basis of newly discovered evidence must show that if the evidence had been admitted at the former trial, it would probably have produced a substantially different result. *State v. Boppre*, 243 Neb. 908, 503 N.W.2d 526 (1993). However, under [*United States v.*] *Agurs*, [427 U.S. 97, 96 S. Ct. 2392, 49 L. Ed. 2d 342 (1976),] when the evidence has been withheld by the prosecutor, the proper standard is that a constitutional error has been committed if the omitted evidence creates a reasonable doubt of guilt that otherwise did not exist. The *Agurs* Court stated that the defendant should not have to satisfy the severe burden of demonstrating that newly discovered evidence would probably have resulted in acquittal.
>
> The *Agurs* standard is used when the newly discovered evidence was available to the prosecution and is not evidence that was discovered from a neutral source after the trial. For this reason, the defendant's burden is less than a demonstration that the evidence would probably result in an acquittal. Thus, [the *Atwater* defendant] would be entitled to a new trial if the evidence involving the revolver [at issue in his newly discovered evidence claim] would have created a reasonable doubt that [he] committed the robberies. However, "[i]f there is no reasonable doubt about guilt whether or not the additional evidence is considered, there is no justification for a new trial." *Agurs*, 427 U.S. at 112-13.

State v. Atwater, 245 Neb. 746, 752-53, 515 N.W.2d 431, 435 (1994).

A literal reading of *Atwater*, then, indicates the following: When the "newly discovered" evidence has been withheld by the prosecutor, a motion for new trial based on newly discovered evidence is properly granted if the omitted evidence *would have created* a reasonable doubt that the defendant committed the alleged crime or crimes.

However, such a standard would not reduce the burden on a defendant when the State withholds evidence; in fact, it would raise the burden. Normally, when the "newly discovered" evidence is attained from a neutral source, a criminal defendant who seeks a new trial on the basis of newly discovered evidence must show that if the evidence had been admitted at the former trial, it *would probably have produced a substantially different result.* This is a less strenuous burden for a defendant than is proving that the omitted evidence *would have created a reasonable doubt* that the defendant committed the alleged crime or crimes.

[8] A careful reading of *Atwater, supra*, indicates that the Nebraska Supreme Court intended to make it easier, not harder, for defendants to be granted a new trial based on newly discovered evidence when that evidence is withheld by the prosecution. Because a literal reading of *Atwater* would produce an unreasonable result, we interpret the Nebraska Supreme Court's opinion to mean that in cases when the evidence alleged to be newly discovered was withheld by the State, a defendant is entitled to a new trial if the omitted evidence *could have created* a reasonable doubt that he or she committed the alleged crime or crimes.

A review of the interview with Joseph Brainard suggests that he matched the physical description given by the clerk on duty at the convenience store at the time of the robbery as closely as, if not more closely than, did Lykens. The interview also indicates that Joseph Brainard had access to a BB gun matching the description of the gun used in the robbery. He further had a history of shoplifting, including from a similar convenience store. We further note that the transcript of the interview provided in the presentence investigation report is missing a page. At the bottom of page 7 of the transcript of the interview, Joseph Brainard claims to be "5′7″, 5′8″ about," and then at the top of page 9, he is discussing the kinds of cigarettes he prefers. It appears from the record before us that Lykens has professed his

innocence in the instant case since the time he was first accused. Had he been able to provide the jury with an alternate suspect who could have committed the crime in the instant case, reasonable doubt could have been created in the minds of the jurors. After thoroughly reviewing the transcript of the police interview with Joseph Brainard, we conclude that the district court did in fact abuse its discretion when it denied Lykens' supplemental motion for new trial. Lykens' conviction is therefore reversed, and the cause is remanded for a new trial.

CONCLUSION

We find that the district court properly denied Lykens' motion to suppress the statements he made to police. However, we further find that the district court abused its discretion when it denied Lykens' supplemental motion for new trial based upon newly discovered evidence. Because we find that Lykens' conviction must be reversed on that ground, we decline to address Lykens' additional assignments of error. We reverse Lykens' conviction and remand the cause for a new trial.

REVERSED AND REMANDED FOR A NEW TRIAL.

STATE OF NEBRASKA, APPELLEE, V.
CARY LYN HUGHAN, APPELLANT.
703 N.W.2d 263

Filed August 30, 2005. No. A-05-039.

1. **Constitutional Law: Criminal Law: Right to Counsel.** The Sixth Amendment to the U.S. Constitution gives one accused of a crime the right to the assistance of counsel.
2. ____: ____: ____. Neb. Const. art. I, § 11, confers on criminal defendants the right to appear and defend in person or by counsel.
3. **Right to Counsel: Appeal and Error.** In *Douglas v. California*, 372 U.S. 353, 83 S. Ct. 814, 9 L. Ed. 2d 811 (1963), the U.S. Supreme Court held that in first appeals as of right, states must appoint counsel to represent indigent defendants.
4. **Criminal Law: Courts: Appeal and Error.** Neb. Rev. Stat. § 25-2728 (Cum. Supp. 2002) confers upon a defendant in a criminal case the right to appeal from the final judgment of the county court to the district court of the county where the county court is located.
5. ____: ____: ____. On appeal from a county court in a criminal case, a district court acts as an intermediate appellate court, rather than as a trial court.

6. **Constitutional Law: Courts: Legislature: Appeal and Error.** Neb. Const. art. I, § 23, confers the right to appeal to the Nebraska Court of Appeals or to the Nebraska Supreme Court, as provided by the Legislature.
7. **Right to Counsel: Appeal and Error.** The right to appointed counsel extends to the first appeal as of right, and no further.

Appeal from the District Court for Buffalo County, JOHN P. ICENOGLE, Judge, on appeal thereto from the County Court for Buffalo County, GRATEN D. BEAVERS, Judge. Motion for court-appointed counsel overruled.

Cary Lyn Hughan, pro se.

Jon Bruning, Attorney General, for appellee.

IRWIN, SIEVERS, and CASSEL, Judges.

CASSEL, Judge.

INTRODUCTION

In this appeal from the district court for Buffalo County, we consider the motion of Cary Lyn Hughan, who asserts indigence, for court-appointed counsel. Because we conclude that Hughan's constitutional right to appointed counsel extends only to her first appeal as a matter of right, which was the appeal from county court to district court, we overrule her motion.

BACKGROUND

Hughan was convicted in the county court for Buffalo County upon a plea of no contest to a misdemeanor offense of driving under the influence of alcohol and was subsequently sentenced. Hughan appealed to the district court, where the public defender appeared on her behalf. On December 8, 2004, the district court affirmed Hughan's conviction and sentence.

On January 3, 2005, Hughan filed notice of her intent to appeal to this court and filed a poverty affidavit and a request for counsel. Hughan later filed a motion to proceed in forma pauperis. On January 7, the public defender filed a "Declination of Further Representation." In an order entered January 7, the district court found that the public defender's office was not obligated to represent Hughan on her appeal to this court and declined to appoint further legal representation for Hughan. The

public defender filed a motion with this court requesting to withdraw as Hughan's counsel, and this court granted the motion. Later, Hughan filed with this court a motion for court-appointed counsel, which we now consider.

ANALYSIS

[1-3] The Sixth Amendment to the U.S. Constitution gives one accused of a crime the right to the assistance of counsel. See *Gideon v. Wainwright*, 372 U.S. 335, 83 S. Ct. 792, 9 L. Ed. 2d 799 (1963). Similarly, Neb. Const. art. I, § 11, confers on criminal defendants the right to appear and defend in person or by counsel. In *Douglas v. California*, 372 U.S. 353, 83 S. Ct. 814, 9 L. Ed. 2d 811 (1963), the U.S. Supreme Court held that in first appeals as of right, states must appoint counsel to represent indigent defendants. Later, the U.S. Supreme Court made clear that its holding in *Douglas* did not extend to discretionary appeals to a state's highest court. *Ross v. Moffitt*, 417 U.S. 600, 94 S. Ct. 2437, 41 L. Ed. 2d 341 (1974).

[4,5] Neb. Rev. Stat. § 25-2728 (Cum. Supp. 2002) confers upon a defendant in a criminal case the right to appeal from the final judgment of the county court to the district court of the county where the county court is located. On appeal from a county court in a criminal case, a district court acts as an intermediate appellate court, rather than as a trial court. *State v. Sparr, ante* p. 144, 688 N.W.2d 913 (2004). Thus, upon her conviction and sentence in the county court, Hughan was entitled to appeal to the district court as a matter of right.

[6] Neb. Const. art. I, § 23, confers the right to appeal to this court or to the Nebraska Supreme Court, as provided by the Legislature. The Legislature has implemented the right to appeal from the district court, Neb. Rev. Stat. § 25-1912 (Cum. Supp. 2004), and most cases, including the case before us, are docketed in the Court of Appeals. See Neb. Rev. Stat. § 24-1106 (Reissue 1995).

The instant case requires us to consider whether Hughan's constitutional right to appointed counsel applies only to her first appeal as a matter of right, i.e., the appeal from county court to district court, or whether the right to appointed counsel extends to a second appeal taken as a matter of right. Surprisingly, the

Nebraska appellate courts have not previously considered this precise question.

In *Evitts v. Lucey*, 469 U.S. 387, 105 S. Ct. 830, 83 L. Ed. 2d 821 (1985), the U.S. Supreme Court addressed whether, in light of *Douglas, supra*, the Due Process Clause of the 14th Amendment guaranteed effective assistance of counsel to criminal defendants on initial appeals as of right. The *Evitts* court stated that the right to counsel as described in *Douglas* "is limited to the first appeal as of right." 469 U.S. at 394.

[7] In *Pennsylvania v. Finley*, 481 U.S. 551, 107 S. Ct. 1990, 95 L. Ed. 2d 539 (1987), the U.S. Supreme Court held that a criminal defendant had no equal protection or due process right to counsel in collateral postconviction proceedings. In so holding, the *Finley* Court reiterated, "Our cases establish that the right to appointed counsel extends to the first appeal of right, and no further. Thus, we have rejected suggestions that we establish a right to counsel on discretionary appeals." 481 U.S. at 555.

Although in *Halbert v. Michigan*, 545 U.S. 605, 125 S. Ct. 2582, 162 L. Ed. 2d 552 (2005), the U.S. Supreme Court recently considered *Douglas v. California*, 372 U.S. 353, 83 S. Ct. 814, 9 L. Ed. 2d 811 (1963), and *Ross v. Moffitt*, 417 U.S. 600, 94 S. Ct. 2437, 41 L. Ed. 2d 341 (1974), again, that decision sheds no light upon the question before us.

One court of another state has directly addressed whether the Sixth Amendment right to counsel applies to second appeals as of right. In *State v. Buell*, 70 Ohio St. 3d 1211, 639 N.E.2d 110 (1994), the criminal defendant claimed that he had received ineffective assistance of counsel on a further direct appeal to the Ohio Supreme Court after his initial appeal to that state's intermediate appellate court. The Ohio Supreme Court held that the defendant's appeal to the supreme court was a second appeal as of right. See *Taylor v. Mitchell*, 296 F. Supp. 2d 784 (N.D. Ohio 2003). The *Buell* court relied on *Finley, supra*, and *Evitts, supra*, for the proposition that the right to appointed counsel extends to the first appeal as of right, and no further. The *Buell* court concluded, "Having no constitutional right to counsel on a second appeal, [the defendant] had no constitutional right to the effective assistance of counsel." 70 Ohio St. 3d at 1212, 639 N.E.2d at 110.

Hernandez v. Greiner, 305 F. Supp. 2d 216 (E.D.N.Y. 2004), examined the foregoing jurisprudence and determined that neither the U.S. Supreme Court nor the Second Circuit had ever been presented with the issue of whether the right to counsel attaches to all appeals as of right on direct review of a criminal conviction. The *Hernandez* court acknowledged the holding in *Buell*, but declined to follow it, noting that *Buell* simply cited to and relied upon dicta in *Finley, supra*, and *Evitts, supra*. The *Hernandez* court determined that it was best left to the Second Circuit to determine whether to follow the broad implications of *Finley* and *Evitts* and submitted to the Second Circuit the question of whether an indigent is entitled to assigned counsel for second appeals as of right. The Second Circuit has not yet addressed the question.

As the court in *Hernandez* observed, the U.S. Supreme Court has not expressly extended the federal constitutional right to counsel to second appeals as of right. The Nebraska Supreme Court has held that the Nebraska Constitution's provision for assistance of counsel in a criminal case is no broader than its counterpart in the federal Constitution. *State v. Stewart*, 242 Neb. 712, 496 N.W.2d 524 (1993) (rejecting criminal defendant's claim of ineffective assistance of counsel in postconviction proceeding), *cert. denied, Abdullah v. Nebraska*, 510 U.S. 829, 114 S. Ct. 97, 126 L. Ed. 2d 64 (1993). See, also, *State v. Dean*, 246 Neb. 869, 523 N.W.2d 681 (1994) (finding no authority stating that Nebraska Constitution grants defendant broader right to counsel which requires more rigorous waiver than that necessary to waive right to counsel under federal constitutional provisions), *overruled on other grounds, State v. Burlison*, 255 Neb. 190, 583 N.W.2d 31 (1998).

CONCLUSION

Because the U.S. Supreme Court has repeatedly stated that the constitutional right to appointed counsel extends only to a defendant's first appeal as a matter of right, and no further, and because the Nebraska Supreme Court has held that the Nebraska Constitution confers no greater right to counsel than that provided by the Sixth Amendment, we conclude that Hughan's appeal as a matter of right from county court to district court was

her only appeal subject to the Sixth Amendment right to counsel. It then follows that even though Hughan has a right to a further appeal to this court pursuant to Neb. Const. art. I, § 23, she has no further right to appointed counsel. We therefore overrule Hughan's motion for appointment of counsel.

MOTION FOR COURT-APPOINTED COUNSEL OVERRULED.

STEVEN E. SCOTT, APPELLEE, V. STATE OF NEBRASKA, DEPARTMENT OF MOTOR VEHICLES, APPELLANT.

703 N.W.2d 266

Filed September 6, 2005. No. A-04-710.

1. **Administrative Law: Motor Vehicles: Judgments: Appeal and Error.** Decisions of the director of the Department of Motor Vehicles, pursuant to Nebraska's Administrative License Revocation statutes, are appealed under the Administrative Procedure Act.
2. **Administrative Law: Final Orders: Appeal and Error.** A final order rendered by a district court in a judicial review pursuant to the Administrative Procedure Act may be reversed, vacated, or modified by an appellate court for errors appearing on the record.
3. ____: ____: ____. When reviewing an order of a district court under the Administrative Procedure Act for errors appearing on the record, the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable.
4. **Administrative Law: Statutes: Appeal and Error.** Interpretation of statutes presents a question of law, and an appellate court is obligated to reach an independent conclusion, irrespective of the decision made by the court below, with deference to an agency's interpretation of its own regulations, unless plainly erroneous or inconsistent.
5. **Administrative Law: Motor Vehicles: Licenses and Permits: Revocation: Evidence: Jurisdiction.** The sworn report of the arresting officer shall be received into the record by the hearing officer as the jurisdictional document of a license revocation hearing, and upon receipt of the sworn report, the director of the Department of Motor Vehicles' order of revocation has prima facie validity.
6. **Administrative Law: Motor Vehicles: Licenses and Permits: Revocation: Evidence: Proof.** As a general rule, the offer by the Department of Motor Vehicles of a sworn report at a license revocation hearing establishes the department's prima facie case and the burden shifts to the driver to refute such evidence.
7. **Administrative Law: Motor Vehicles: Licenses and Permits: Evidence: Drunk Driving.** The sworn report offered at a license revocation hearing must state (1) that the person whose license is at issue was arrested as described in Neb. Rev. Stat.

> § 60-6,197(2) (Supp. 2003) (upon reasonable grounds to believe such person was driving under the influence), and the reasons for such arrest; (2) that the person was requested to submit to the required test; and (3) that the person submitted to a test, the type of test to which he or she submitted, and that such test revealed the presence of alcohol in a concentration of .08 of 1 gram or more per 100 milliliters of blood or per 210 liters of breath.

Appeal from the District Court for Douglas County: GREGORY M. SCHATZ, Judge. Reversed and remanded with directions.

Jon Bruning, Attorney General, and Laura L. Neeson for appellant.

No appearance for appellee.

IRWIN, SIEVERS, and CASSEL, Judges.

SIEVERS, Judge.

The State of Nebraska, Department of Motor Vehicles (the Department), appeals the judgment of the district court for Douglas County, which reversed an order of the Department revoking the driver's license of Steven E. Scott (Steven) for 90 days. We reverse the decision of the district court and reinstate the order of the Department.

FACTUAL AND PROCEDURAL BACKGROUND

On November 30, 2003, at approximately 1 a.m., Officer Vincent J. Salerno of the Omaha Police Department received a radio call for assistance from Officer Harold Scott. Officer Scott, while en route to another call (regarding an unrelated assault), had observed and stopped Steven for erratic driving behavior. Officer Scott wanted Officer Salerno to conduct a drunk driving investigation while he (Officer Scott) continued with the assault investigation. Thus, Officer Salerno contacted Steven in the parking lot of an apartment complex in Omaha where Steven resided. When Officer Salerno arrived, Steven was standing outside of his vehicle with Officer Scott. Officer Scott advised Officer Salerno of his observations and identified Steven as the erratic driver. Officer Salerno identified Steven with a Nebraska driver's license.

Officer Salerno noticed that Steven's eyes were bloodshot and watery, that his speech and balance were impaired, and that he

had a strong odor of alcohol about him. Steven showed impairment on field sobriety tests and failed a preliminary breath test. Officer Salerno arrested Steven for suspicion of driving under the influence of alcohol and took him to a hospital, where Steven's blood alcohol content tested at .147 grams of alcohol per 100 milliliters of blood.

Officer Salerno completed a sworn report and filed it with the Department. Steven was given a temporary license, valid for 30 days from the date of notice.

A petition for administrative hearing was received from Steven by the Department on December 12, 2003, and a hearing was scheduled for December 31. Also on December 12, Steven filed his request that the rules of evidence be applied at his administrative hearing, and such request was granted by the Department on December 15. On December 31, an administrative license revocation (ALR) hearing was held before a hearing officer for the Department to determine whether Steven was operating or in the actual physical control of a motor vehicle while under the influence of alcohol, in violation of Neb. Rev. Stat. § 60-6,196 (Supp. 2003). The hearing officer's report states that the hearing was conducted without the rules of evidence because neither party requested use of such. However, as stated previously, Steven did make a request for use of the rules of evidence at the hearing, and such request was granted by the Department. Thus, our review is on the basis that the hearing was a "rules of evidence hearing." "In hearings for which the rules of evidence have been requested and granted, the hearing shall be conducted according to the Nebraska rules of evidence applicable in district courts." 247 Neb. Admin. Code, ch. 1, § 019.02 (2001). Officer Scott did not appear at the ALR hearing. Officer Salerno was present, and he testified.

The Department offered Officer Salerno's signed sworn report at the hearing, and such was received into evidence over Steven's hearsay and foundation objections. The hearing officer recommended that Steven's "driver's license and/or operating privileges" be revoked for the statutory period, and the director of the Department entered such an order, revoking Steven's driver's license or operating privileges for 90 days.

On February 6, 2004, Steven filed his "Petition for Judicial Review of Administrative Order" in the district court for Douglas County. In his petition, Steven alleges that "the Order of the Director is unsupported by competent, material, and substantial evidence; is in violation of [Steven's] constitutional right to due process and to confront and cross-examine; and is premised upon errors of law" because there was no proof that he was operating or in the actual physical control of a motor vehicle. Steven referenced the hearing officer's report, which stated that Steven had established that Officer Salerno did not see Steven drive and did not see him in a vehicle. Steven requested that the district court reverse the director's order and reinstate his driver's license and operating privileges.

A hearing on Steven's petition for judicial review was held on April 28, 2004. On May 12, the district court entered an order reversing the Department's January 7 order of revocation and reinstating Steven's driver's license and operating privileges. The district court found that prior to the ALR hearing, Steven had filed a formal request pursuant to Neb. Rev. Stat. § 84-914(1) (Reissue 1999) that the rules of evidence be applied at the hearing and the Department had granted such request. The district court found that Officer Scott, who observed Steven prior to his arrest, did not testify at the hearing, and that the Department relied on hearsay testimony from Officer Salerno, who formally arrested Steven, to establish that Steven was operating a motor vehicle at the time in question. The district court noted that Steven made a timely hearsay objection to Officer Salerno's testimony, but that the hearing officer overruled Steven's objection. The district court found that the testimony was "clearly hearsay, and inadmissible under the rules of evidence." The district court held that without that testimony, there was insufficient evidence to show that Steven was operating a motor vehicle, and that the revocation of Steven's driving privileges should thus have been dismissed. The Department now appeals, but Steven has not filed a brief.

ASSIGNMENT OF ERROR

The Department alleges that the district court erred by ruling that the record lacked sufficient evidence that Steven was in fact

operating a motor vehicle pursuant to Neb. Rev. Stat. § 60-498.01 (Supp. 2003), thereby misplacing the burden of proof on the Department to establish that Steven was in fact operating a motor vehicle, rather than allocating the burden to Steven to disprove the Department's prima facie case.

STANDARD OF REVIEW

[1-3] Decisions of the director of the Department, pursuant to Nebraska's ALR statutes, are appealed under the Administrative Procedure Act. *Reiter v. Wimes*, 263 Neb. 277, 640 N.W.2d 19 (2002). A final order rendered by a district court in a judicial review pursuant to the Administrative Procedure Act may be reversed, vacated, or modified by an appellate court for errors appearing on the record. Neb. Rev. Stat. § 84-918(3) (Reissue 1999); *Trackwell v. Nebraska Dept. of Admin. Servs.*, 8 Neb. App. 233, 591 N.W.2d 95 (1999). When reviewing an order of a district court under the Administrative Procedure Act for errors appearing on the record, the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable. *Id.*

[4] Interpretation of statutes presents a question of law, and an appellate court is obligated to reach an independent conclusion, irrespective of the decision made by the court below, with deference to an agency's interpretation of its own regulations, unless plainly erroneous or inconsistent. *Morrissey v. Department of Motor Vehicles*, 264 Neb. 456, 647 N.W.2d 644 (2002).

ANALYSIS

The district court found that the hearsay objection to Officer Salerno's testimony of Officer Scott's having observed Steven driving in an erratic manner should have been sustained and that once it had been sustained, the Department had not produced any evidence that Steven was operating a motor vehicle. The district court's decision is an error of law because it fails to recognize that the introduction of the sworn report—even if offered only for jurisdictional purposes—creates a prima facie case for revocation which the driver must disprove.

[5-7] "The sworn report of the arresting officer shall be received into the record by the Hearing Officer as the jurisdictional document of the hearing, and upon receipt of the sworn report,

the Director's order of revocation has prima facie validity." 247 Neb. Admin. Code, ch. 1, § 006.01 (2001). See § 60-498.01(7). See, also, *Morrissey, supra* (as general rule, offer by Department of sworn report at ALR hearing establishes Department's prima facie case and burden shifts to driver to refute such evidence; this rule having been adopted with knowledge that in some circumstances, officer may not have personal knowledge of every fact stated in sworn report). However, "[t]he rule presupposes a proper report, that is, a sworn report which comports with statutes and the relevant administrative rules and regulations." *Id.* at 459, 647 N.W.2d at 649. There was no contention at the ALR hearing that Officer Salerno's report was not a "proper" sworn report under *Morrissey*, and without an appellee's brief, there is no such contention before us. In any event, we note that the required recitations are as follows: (1) that the person whose license is at issue was arrested as described in Neb. Rev. Stat. § 60-6,197(2) (Supp. 2003) (upon reasonable grounds to believe such person was driving under the influence), and the reasons for such arrest; (2) that the person was requested to submit to the required test; and (3) that the person submitted to a test, the type of test to which he or she submitted, and that such test revealed the presence of alcohol in a concentration of .08 of 1 gram or more per 100 milliliters of blood or per 210 liters of breath. See § 60-498.01(3). The sworn report in this case contains such recitations.

As stated earlier, this was a rules of evidence hearing, as was *Mahlendorf v. Department of Motor Vehicles*, 4 Neb. App. 108, 538 N.W.2d 773 (1995), which is a case very much on point. In *Mahlendorf*, the Department offered the testimony of Officer Benjamin Penick, who testified that he filed a sworn report with the Department as a result of his contact with Charles L. Mahlendorf. The Department offered the sworn report into evidence. Mahlendorf objected on the basis of foundation, and such objection was sustained. The Department told the hearing officer that

> the [report] was not offered "to prove the truth of the matter assertive [sic] therein but to show that Officer Penick did file it with the Department . . . and that it stated the things contained on the face of it when it was submitted, but that

> the [report] is not being offered as proof of anything. It's not being offered to prove the truth of the matter assertive [sic] on the [report], rather simply to show that it was filed with the Department . . . on this day. And that the Director has jurisdiction over this matter."

Id. at 110, 538 N.W.2d at 775. This court then recounted:

> Mahlendorf's attorney stated he had no objection if the offer of the report was only for that purpose, and the hearing officer then accepted the report into evidence "to establish jurisdictional grounds and to show that the sworn report was filed by Officer Penick but will not be considered for the truth of the matters asserted therein." The [D]epartment did not offer further evidence, and Mahlendorf offered no evidence at the hearing. The director of the [D]epartment ordered that Mahlendorf's license be revoked for 90 days, effective May 19, 1993.

Id.

Mahlendorf appealed to the district court, alleging that the director erred when he revoked Mahlendorf's license because the Department had failed to establish a prima facie case. The district court found that because the Department had offered and received the sworn report of Officer Penick solely for the purpose of establishing jurisdiction and to show that the sworn report was filed,

> "[t]here was no other competent evidence received at the contest hearing that would support a finding that [Officer Penick] had probable cause; that [Mahlendorf] was lawfully arrested; that [Mahlendorf] was advised of the consequences or that [Mahlendorf] was operating or in the actual physical control of a motor vehicle.
>
> . . . .
>
> "The consideration by the Director of [the sworn report] to establish the prima facie case for revocation was error because it was not offered or received for that purpose. . . ."

Id. The district court held that the Department had failed to establish a prima facie case for revocation, and it therefore vacated the director's order, virtually the same decision as was reached by the district court in the present case.

The Department then appealed to this court, and we reversed the decision of the district court, relying upon *McPherrin v.*

Conrad, 248 Neb. 561, 537 N.W.2d 498 (1995). *McPherrin* was also a rules of evidence case in which the hearing officer received the sworn report of the arresting officer into evidence for the limited purpose of establishing jurisdiction and not as " 'proof of any of the statements made,' " 248 Neb. at 563, 537 N.W.2d at 500. The *McPherrin* court stated:

> [W]e must conclude that [the Department and its director] made a prima facie case once they established the officer provided his sworn report containing the required recitations. The director was not required to prove the recitations were true. Rather, it became [the alleged driver's] burden to prove that one or more of the recitations were false.

248 Neb. at 565, 537 N.W.2d at 501. In summary, if it is a proper sworn report, meaning that it contains the required recitations, then no other evidence need be introduced to sustain the case for revocation. Instead, the driver must then disprove the recitations of the sworn report. The testimony of Officer Salerno about what Officer Scott told him was obviously hearsay, but such testimony was not needed to make out the Department's prima facie case because that was done by the sworn report, making Officer Salerno's testimony essentially superfluous beyond providing foundation for the receipt of the report into evidence.

Therefore, the crucial inquiry is whether Steven carried his burden to disprove the recitations that he was driving a motor vehicle and that he was doing so with an illegal blood alcohol concentration. The answer is in the negative, as he introduced no evidence. See *Dale v. Thomas Funeral Home*, 237 Neb. 528, 466 N.W.2d 805 (1991) (prima facie case means that evidence sufficiently establishes elements of cause of action). Thus, under § 60-498.01(7), once the sworn report was received, the case for revocation had "prima facie validity" and the burden was Steven's to establish that the revocation should not take effect. Steven could have undertaken this burden by, for example, testifying that he had not been the driver of the vehicle because he was in Rome on the night in question and offering proof such as "Here's my airline ticket to prove it." The cross-examination testimony of Officer Salerno that establishes the fact he relied on what his fellow officer observed and told him does not disprove the recitations in the Department's prima

facie case, and no other evidence even remotely calls into question the accuracy of the sworn report. Accordingly, we reverse the decision of the district court and remand the cause with directions to reinstate the decision of the director.

REVERSED AND REMANDED WITH DIRECTIONS.

ROBERT A. VANDE GUCHTE, M.D., APPELLANT, V. GARY KORT AND HERITAGE BUILDERS, INC., APPELLEES.

703 N.W.2d 611

Filed September 6, 2005. No. A-04-777.

1. **Summary Judgment.** Summary judgment is proper when the pleadings and the evidence admitted at the hearing disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.
2. **Summary Judgment: Appeal and Error.** In reviewing a summary judgment, an appellate court views the evidence in the light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence.
3. **Specific Performance: Equity: Appeal and Error.** An action for specific performance sounds in equity, and on appeal, an appellate court tries factual questions de novo on the record and, as to questions of both fact and law, is obligated to reach a conclusion independent from the conclusion reached by the trial court.
4. **Summary Judgment: Proof.** A party moving for summary judgment must make a prima facie case by producing enough evidence to demonstrate that the movant is entitled to judgment if the evidence were uncontroverted at trial. Once the moving party makes a prima facie case, the burden to produce evidence showing the existence of a material issue of fact that prevents judgment as a matter of law shifts to the party opposing the motion.
5. **Summary Judgment.** The primary purpose of the summary judgment procedure is to pierce the allegations made in the pleadings and show conclusively that the controlling facts are other than as pled.
6. **Pleadings.** A complaint should be liberally construed in the plaintiff's favor and should not be dismissed merely because it does not precisely state all elements that give rise to a legal basis for recovery.
7. **Pleadings: Notice.** A party need not plead specific legal theories in the complaint, so long as the other side receives notice as to what is at issue in the case.
8. **Appeal and Error.** A trial court cannot err in failing to decide an issue not raised, and an appellate court will not consider an issue for the first time on appeal that was not presented to or passed upon by the trial court.
9. **Restrictive Covenants: Property.** Not every impediment to the sale of property is a restraint on alienation.

10. **Restrictive Covenants: Words and Phrases.** A restraint on alienation is an attempt by an otherwise effective conveyance or contract to cause a later conveyance to be void, to impose contractual liability on the one who makes the later conveyance when such liability results from a breach of an agreement not to convey, or to terminate or subject to termination all or a part of the property interest conveyed.
11. **Restrictive Covenants.** An indirect restraint on alienation arises when an attempt is made to accomplish some purpose other than the restraint of alienability, but with the incidental result that the instrument, if valid, would restrain practical alienability.
12. **Vendor and Vendee: Words and Phrases.** A tying arrangement is an agreement by a party to sell one product, but only on the condition that the buyer also purchase a different, or tied, product, or at least agree that it will not purchase that product from another supplier.
13. **Vendor and Vendee: Evidence.** A plaintiff alleging an unlawful tying arrangement must produce some evidence of the following elements: (1) the existence of two distinct products or services; (2) sufficient economic power on the part of the defendant in the tying market to appreciably restrain competition in the tied product market, combined with the exercise of such power to coerce the purchaser to buy both items; and (3) that the amount of commerce affected is not insubstantial.
14. **Vendor and Vendee: Words and Phrases.** Appreciable economic power in the tying market concerns market power, which is the power to force a purchaser to do something that he would not do in a competitive market.
15. **Vendor and Vendee: Proof.** Market power can be established by showing that the tied product is unavailable elsewhere or is particularly unique and desirable, or that the seller occupies a dominant position in the relevant market.
16. **Vendor and Vendee: Words and Phrases.** The relevant market is defined in terms of product market and geographic market—the geographic area in which the defendant faces competition and to which consumers may turn for alternative sources of the product.
17. **Vendor and Vendee: Proof.** The burden is on the antitrust plaintiff to show that no competitor could have offered a comparable product.
18. **Vendor and Vendee.** A single forced sale of a tied product to a single customer is not sufficient to warrant a finding of market power.
19. **Appeal and Error.** Errors assigned but not argued will not be addressed on appeal.
20. **Torts: Contracts: Intent: Proof.** A claim for tortious interference with a contract requires (1) a valid contract, (2) knowledge by the defendant of the contract, (3) an unjustified intentional act of interference on the part of the defendant, (4) proof that the interference caused the harm sustained, and (5) damage to the plaintiff.
21. **Actions: Judgments: Judicial Notice.** When cases are interwoven and interdependent and a controversy has already been considered and determined in a prior proceeding involving one of the parties now before the court, the court has the right to examine its own records and take judicial notice of its own proceedings and judgment in the prior action.

Appeal from the District Court for Lancaster County: BERNARD J. MCGINN, Judge. Affirmed.

Terry R. Wittler and Kevin J. Schneider, of Cline, Williams, Wright, Johnson & Oldfather, L.L.P., for appellant.

Gregory D. Barton, of Harding, Shultz & Downs, for appellees.

IRWIN, SIEVERS, and CASSEL, Judges.

SIEVERS, Judge.

I. INTRODUCTION

This appeal addresses a covenant that requires a lot owner to contract with a particular homebuilder and grants the builder an option to purchase the land, at the price originally paid by the lot owner, if the lot owner does not contract with the homebuilder to construct a residence on the lot within a specified timeframe. Robert A. Vande Guchte, M.D., the lot owner, appeals the decision of the Lancaster County District Court dismissing his complaint against Heritage Builders, Inc. (Heritage), and Gary Kort (collectively the defendants), granting the defendants' motion for summary judgment, and ordering Vande Guchte to specifically perform according to the terms listed in the court's May 21, 2004, supplemental order.

II. FACTUAL BACKGROUND

On August 27, 1997, W.G.M., Inc., and Heritage entered into an agreement in which Heritage agreed to "provide advice, consultation, suggestions and recommendations to W[.]G[.]M[.] regarding the development of, and final plat for," a residential development at Firethorn Golf Course in Lincoln, Nebraska. In exchange for Heritage's services, W.G.M. appointed Heritage as the "exclusive builder" of all homes on lots sold by W.G.M. (except Lot 5) within 2 years of the issuance of the final plat and on all townhome lots sold by W.G.M. within 7 years of the issuance of the final plat. W.G.M. also granted Heritage a nonexclusive option to purchase any lot in the development for the initial price per lot as set forth on exhibit A to the agreement. We note that Lot 5 was exempt from both the exclusive builder and the option provisions. A notice of the August 27 agreement was recorded with the Lancaster County register of deeds in September 1997.

On June 29, 1998, Heritage and W.G.M. entered into an "Extension and Modification Agreement" which provided that the termination date of the August 1997 agreement was extended from April 1, 1998, to February 1, 1999, and that all terms of such agreement that were not modified were renewed. The June 1998 agreement also provided that exhibit D, a purchase agreement attached to the June agreement, was to be used for the sale of each of the lots during the period of Heritage's exclusivity. Exhibit D included paragraph 1.7, which stated:

> Buyer acknowledges that Heritage . . . is the exclusive builder of any residential home or townhome to be constructed on the Property. Effective immediately upon Closing, Buyer hereby grants Heritage the exclusive option to purchase the Property in the event Buyer fails for any reason within four (4) years from Closing to enter into an unconditional building contract with Heritage for the construction of a residential home or townhome on the Property. This option may be exercised by Heritage any time four (4) years after Closing but prior to five (5) years after Closing by delivering to Buyer two copies of a purchase agreement in the form attached hereto and marked as Exhibit 2 which are duly executed and completed by Heritage. Upon receipt thereof, Buyer shall execute the tendered copies and return one such copy to Heritage within five (5) business days after receipt. In the event Heritage does not exercise the option in accordance with this Section, this option shall be of no further force and effect. In the event Buyer fails or refuses to execute and deliver the purchase agreements following execution and delivery by Heritage, Buyer shall be deemed to be bound by the terms and conditions of the purchase agreement, notwithstanding such failure or refusal to execute and deliver so long as Heritage has fully complied with the terms of this section.

On September 18, 1998, Vande Guchte entered into a purchase agreement, identical to exhibit D, with W.G.M. to purchase for $145,000 the property described as "Lot 2, Block 1" (hereinafter the lot) in the aforementioned development. The purhase agreement contained paragraph 1.7 as recited above. Additionally, Vande Guchte signed a "Notice" that Heritage had

been appointed the exclusive builder and "ha[d] been granted an exclusive option to purchase [the lot] for a period of five (5) years from and after" the date of the Notice—September 18, 1998. The purchase agreement is clear, however, that the option can be exercised only between the fourth and fifth years after the closing, which occurred October 5, 1998. The Notice also provided that the restrictions and option "run with [the] real estate" and are "binding upon all grantees, lessees, lien holders and assignees and any subsequent interest in such property." Vande Guchte's Notice was filed with the register of deeds on October 7.

On April 1, 2002, Vande Guchte listed the lot for sale with a realty company. On April 24, with one Realtor acting as a dual agent for both parties, Gary Hoffman entered into a purchase agreement with Vande Guchte to purchase the lot for $195,000. At such time, Vande Guchte had not entered into any agreement with Heritage to build a home on the lot and the lot was still undeveloped. The closing for the lot, scheduled to occur on August 2, did not take place. Hoffman had attempted to secure financing for the lot through Pinnacle Bank. However, Pinnacle Bank denied the financing request because of an "UNRESOLVED TITLE ISSUE - RELEASE OF NOTICE FOR OPTION TO PURCHASE BY HERITAGE." Hoffman testified in his deposition that "the title company came back that there was not a clear title, and really the deal essentially went pretty south after that." Hoffman further testified, "[O]nce it came up that there was a defect in the title, that put the brakes on everything, really."

On January 7, 2003, Heritage delivered a purchase agreement dated January 6, 2003, to Vande Guchte in accordance with Heritage's option to buy the lot as stated in paragraph 1.7 of the September 1998 purchase agreement, because Vande Guchte had not entered into a contract with Heritage to build a home within 4 years of purchase of the lot. Heritage stated in a letter to Vande Guchte that it was ready, willing, and able to close under the terms and conditions of the purchase agreement. Vande Guchte refused to participate in the closing with Heritage, scheduled to occur February 5.

III. PROCEDURAL BACKGROUND

Vande Guchte filed a complaint in the Lancaster County District Court on January 23, 2003, alleging that Heritage's

option in paragraph 1.7 of the purchase agreement was "void and unenforceable" and that the defendants "intentionally and unjustifiably interfered with Vande Guchte's contractual arrangement with Hoffman." Also on January 23, Vande Guchte filed a complaint in the Lancaster County District Court against Hoffman, alleging that Hoffman breached the purchase agreement. The district court's decision in that lawsuit is on appeal to this court as *Vande Guchte v. Hoffman*, No. A-03-1345, 2005 WL 2129101 (Neb. App. Sept. 6, 2005) (not designated for permanent publication), which appeal we decide this same day, but by a separate opinion.

Heritage filed an answer and counterclaim, alleging that its option to purchase is valid and enforceable and requesting that the court order Vande Guchte to specifically perform the terms and conditions of the January 2003 purchase agreement. The defendants then filed a summary judgment motion alleging that there were no genuine issues of material fact. Vande Guchte filed a motion to consolidate the two lawsuits or to continue the summary judgment hearing until a ruling in the Hoffman case could be entered. However, such motion was overruled. On December 15, 2003, following a summary judgment hearing, the district court granted the summary judgment motion "in its entirety," dismissed Vande Guchte's complaint, and ordered Vande Guchte to specifically perform "according to the terms of the January 6, 2003 Purchase Agreement."

Vande Guchte timely appealed to this court the December 15, 2003, order. However, we dismissed the appeal for lack of jurisdiction, because the district court's order directing Vande Guchte to transfer the lot's title by specifically performing according to the January 6, 2003, purchase agreement did not comply with the requirements for a final, appealable order for specific performance. See *Vande Guchte v. Kort*, 12 Neb. App. lxxvi (No. A-04-100, Mar. 12, 2004). We remanded the cause to the district court for entry of a final, appealable order in accordance with *Fritsch v. Hilton Land & Cattle Co.*, 245 Neb. 469, 513 N.W.2d 534 (1994). On May 21, 2004, the district court entered a "Supplemental Order of Specific Performance," as we mandated, and Vande Guchte then perfected this appeal.

IV. ASSIGNMENTS OF ERROR

Vande Guchte asserts that the trial court erred in (1) not finding that the option contract was an unlawful penalty, an unlawful restraint on alienation, and an unlawful tying arrangement; (2) concluding that the defendants had not intentionally interfered with Vande Guchte's contract with Hoffman; and (3) ordering specific performance.

V. STANDARD OF REVIEW

[1] Summary judgment is proper when the pleadings and the evidence admitted at the hearing disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law. *Nebraska Hosp. Assn. Char. Found. v. C & J Part.*, 268 Neb. 252, 682 N.W.2d 248 (2004).

[2] In reviewing a summary judgment, an appellate court views the evidence in the light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence. *Nebraska Hosp. Assn. Char. Found. v. C & J Part., supra*; *Snowdon Farms v. Jones*, 8 Neb. App. 445, 595 N.W.2d 270 (1999).

[3] An action for specific performance sounds in equity, and on appeal, an appellate court tries factual questions de novo on the record and, as to questions of both fact and law, is obligated to reach a conclusion independent from the conclusion reached by the trial court. *Langemeier v. Urwiler Oil & Fertilizer*, 265 Neb. 827, 660 N.W.2d 487 (2003); *Snowdon Farms v. Jones, supra.*

VI. ANALYSIS

1. General Principle of Summary Judgment

[4] A party moving for summary judgment must make a prima facie case by producing enough evidence to demonstrate that the movant is entitled to judgment if the evidence were uncontroverted at trial. *Russell v. Bridgens*, 264 Neb. 217, 647 N.W.2d 56 (2002). Once the moving party makes a prima facie case, the burden to produce evidence showing the existence of a material issue of fact that prevents judgment as a matter of law shifts to the party opposing the motion. *Id.*

2. Specific Performance

Vande Guchte alleged in his complaint that the option contract was "invalid and unenforceable." He now contends that the court erred in granting specific performance on the option contract, particularly because the option is an unlawful penalty, an unreasonable restraint on alienation, and an unlawful tying arrangement in violation of the antitrust laws. We address each of these contentions in turn.

(a) Unlawful Penalty

[5] The defendants' brief asserts that Vande Guchte's claim that the option constituted an unenforceable or unlawful penalty was not raised in his pleadings, nor ruled upon by the district court. The defendants argue that therefore, Vande Guchte is precluded from raising such issue here. The primary purpose of the summary judgment procedure is to pierce the allegations made in the pleadings and show conclusively that the controlling facts are other than as pled. *Rush v. Wilder*, 263 Neb. 910, 644 N.W.2d 151 (2002).

[6] Because this action was filed on January 23, 2003, it is governed by the new rules for notice pleading, which apply to all "civil actions filed on or after January 1, 2003." See Neb. Ct. R. of Pldg. in Civ. Actions 1 (rev. 2004). In *Christianson v. Educational Serv. Unit No. 16*, 243 Neb. 553, 559, 501 N.W.2d 281, 287 (1993), the Nebraska Supreme Court stated, prior to adopting notice pleading, that

> [n]otice pleading requires only that a party set forth 'a short and plain statement of the claim showing that the pleader is entitled to relief.' Fed. R. Civ. P. 8(a)(2). A litigant is not required to state a cause of action, but must simply give the opposing party sufficient notice of the claim so as to be able to prepare to meet it. [Jack H.] Friedenthal [et al., Civil Procedure] § 5.7 [(1985)]. Although a pleader in notice pleading is required to refer to circumstances and events upon which the claim is based, the pleader is not required to allege a specific fact to cover every substantive element of the claim. *Id.*

The federal rules were designed to liberalize pleading requirements, see *Weeder v. Central Comm. College*, 269 Neb. 114, 691

N.W.2d 508 (2005), and it follows that Nebraska's pleading practices have now also been liberalized. See *Anderson v. Wells Fargo Fin. Accept.*, 269 Neb. 595, 694 N.W.2d 625 (2005) (complaint should be liberally construed in plaintiff's favor and should not be dismissed merely because it does not precisely state all elements that give rise to legal basis for recovery).

[7,8] Vande Guchte's complaint states that the option is "void and unenforceable . . . for, but not limited to, the following reasons": the option lacks independent consideration and it is an unreasonable restraint on alienation. A party need not plead specific legal theories in the complaint, so long as the other side receives notice as to what is at issue in the case. *Greenwood v. Ross*, 778 F.2d 448 (8th Cir. 1985). The broad allegation that the option is void and unenforceable is sufficient to put the defendants on notice that the option may be void and unenforceable for reasons other than those specifically stated in the petition, including that it is an unlawful penalty. However, we note that Vande Guchte did not raise or argue in the district court the theory that the option was an unlawful penalty, nor did the district court address this issue. The district court cannot err in failing to decide an issue not raised, and we will not consider the issue for the first time on appeal. See *Scurlocke v. Hansen*, 268 Neb. 548, 684 N.W.2d 565 (2004) (appellate court will not consider issue on appeal that was not presented to or passed upon by trial court). In passing, we suggest that this long-established rule of appellate practice take on greater significance now that we have notice pleading, which makes the specifics of a complaint or answer less important. But, to gain appellate review of an issue or theory, it must be presented to the trial court. In this way, litigants have some assurance that appellate review will be essentially limited to the case which was tried and presented in the lower court.

(b) Unlawful Restraint on Alienation

[9] Vande Guchte asserts that the trial court erred in not concluding that the option contract was an unlawful restraint on alienation because the contract "severely restrict[ed] his ability to sell the lot and thus constitute[d] an unreasonable restraint on alienation." Brief for appellant at 19. The district court, relying

on *Occidental Sav. & Loan Assn. v. Venco Partnership*, 206 Neb. 469, 293 N.W.2d 843 (1980), found that "no Nebraska court has 'seriously suggest[ed] that such restrictions [exclusive builder with repurchase option rights] are invalid simply because they may affect the ease with which one may dispose of one's property.' " *Occidental Sav. & Loan Assn. v. Venco Partnership*, 206 Neb. at 473, 293 N.W.2d at 845, noted that not every impediment to the sale of property is a restraint on alienation:

> It is a fact that zoning restrictions, building restrictions, or public improvements may impede the sale and substantially affect the ability of an owner to realize a maximum price. Yet no one suggests that such restrictions or covenants, as a class, are invalid simply because they affect the ease with which one may dispose of one's property.

[10] The court in *Occidental Sav. & Loan Assn. v. Venco Partnership*, 206 Neb. at 472, 293 N.W.2d at 845 (quoting Restatement of Property § 404 (1944)), defined restraint on alienation as follows:

> "(1) A restraint on alienation, as that phrase is used in this Restatement, is an attempt by an otherwise effective conveyance or contract to cause a later conveyance
>
> "(a) to be void; or
>
> "(b) to impose contractual liability on the one who makes the later conveyance when such liability results from a breach of an agreement not to convey; or
>
> "(c) to terminate or subject to termination all or a part of the property interest conveyed.
>
> "(2) If a restraint on alienation is of the type described in Subsection (1), Clause (a), it is a disabling restraint.
>
> "(3) If a restraint on alienation is of the type described in Subsection (1), Clause (b), it is a promissory restraint.
>
> "(4) If a restraint on alienation is of the type described in Subsection (1), Clause (c), it is a forfeiture restraint."

Here, Vande Guchte argues that the exclusive builder contract "substantially impaired" his ability to sell the lot and that Heritage's option became an impediment to closing the sale with Hoffman. Brief for appellant at 21. However, the exclusive builder and purchase option rights granted to Heritage do not bring about any of the effects noted in the various subparts of the

aforementioned definition of restraint on alienation. The option did not preclude Vande Guchte from conveying the lot, he was free to convey it without legal restraint, and a conveyance would not cause a forfeiture of title. Therefore, the option was not a direct restraint on alienation.

[11] Nor was it an indirect practical restraint on alienation. An indirect restraint on alienation arises when an attempt is made to accomplish some purpose other than the restraint of alienability, but with the incidental result that the instrument, if valid, would restrain practical alienability. *Spanish Oaks v. Hy-Vee*, 265 Neb. 133, 655 N.W.2d 390 (2003). The court in *Occidental Sav. & Loan Assn. v. Venco Partnership*, 206 Neb. 469, 474, 293 N.W.2d 843, 846 (1980), explained that some covenants may impair marketability but are neither direct nor indirect restraints, stating, "As an example, a covenant in a deed that requires the dedication of property solely to residential purposes is not a restraint on alienation even if the owner could sell the property at a higher price for commercial purposes." Clearly, a restriction that a specific builder be used falls in the same category.

Here, because the option could only be exercised "by Heritage any time four (4) years after Closing but prior to five (5) years after Closing" if there was no contract to build, as stated in the purchase agreement, Vande Guchte could have sold the lot anytime before the 4 years expired. There was no positive restriction in the purchase agreement against Vande Guchte's selling the lot. In fact, the purchase agreement contemplated the possibility of a sale because it provided that the exclusive option would run with the real estate. As a practical matter, an attempted sale too close in time to Heritage's 1-year option could affect the sale price or the ability to complete a sale, but Vande Guchte still had both the legal and practical ability to alienate his interest in the property. As stated in *Spanish Oaks v. Hy-Vee*, 265 Neb. at 142, 655 N.W.2d at 399, "[t]his situation does not resemble a restraint on alienation of the kind that courts have generally refused to uphold and enforce." The *Spanish Oaks* court determined that a use restriction in a sublease that permitted the sublet premises to be used for retail purposes so long as such purposes did not include a mass-merchandise or discount store operation similar to Wal-Mart, Kmart, Target, grocery stores, or stores engaged

primarily in the consumer sale of pharmaceuticals was not a restraint on alienation, because "[d]espite a possible reduction in market price, [the seller] still ha[d] both the legal and practical ability to alienate its interest in the property." *Id.* In conclusion, in the instant case, Vande Guchte's argument that the option was a restraint on alienation is without merit.

(c) Unlawful Tying Arrangement

Vande Guchte asserts that using Heritage as an exclusive builder was a prohibited tying arrangement under Neb. Rev. Stat. § 59-801 et seq. (Reissue 2004)—"Unlawful Restraint of Trade." Section 59-801 is essentially identical to § 1 of the Sherman Act, 15 U.S.C. § 1 et seq. (2000), which also involves a tying arrangement. See *Heath Consultants v. Precision Instruments*, 247 Neb. 267, 527 N.W.2d 596 (1995).

[12,13] In *Heath Consultants v. Precision Instruments*, 247 Neb. at 272, 527 N.W.2d at 602, the Nebraska Supreme Court found that a tying arrangement is "an agreement by a party to sell one product, but only on the condition that the buyer also purchase a different, or tied, product, or at least agree that it will not purchase that product from another supplier." A plaintiff alleging an unlawful tying arrangement must produce some evidence of the following elements: (1) the existence of two distinct products or services; (2) sufficient economic power on the part of the defendant in the tying market to appreciably restrain competition in the tied product market, combined with the exercise of such power to coerce the purchaser to buy both items; and (3) that the amount of commerce affected is not insubstantial. *Heath Consultants v. Precision Instruments, supra.*

[14-16] Neither party contends that the first element for an unlawful tying arrangement—that there must be some evidence of two distinct products or services—is not satisfied here. Therefore, we turn to the second element, that the seller possess appreciable economic power in the relevant market. " 'Appreciable economic power' in the tying market concerns market power, which is the power 'to force a purchaser to do something that he would not do in a competitive market.' " *Heath Consultants v. Precision Instruments*, 247 Neb. at 275, 527 N.W.2d at 603, quoting *Jefferson Parish Hospital Dist. No. 2 v. Hyde*, 466 U.S. 2, 104 S.

Ct. 1551, 80 L. Ed. 2d 2 (1984). Market power can be established by showing that the tied product is unavailable elsewhere or is particularly unique and desirable, or that the seller occupies a dominant position in the relevant market. See, *Fortner Enterprises v. U. S. Steel*, 394 U.S. 495, 89 S. Ct. 1252, 22 L. Ed. 2d 495 (1969); *Baxley-DeLamar Monuments v. American Cemetery*, 938 F.2d 846 (8th Cir. 1991). The relevant market is defined in terms of product market and geographic market—the geographic area in which the defendant faces competition and to which consumers may turn for alternative sources of the product. *Baxley-DeLamar Monuments v. American Cemetery, supra.*

Here, Vande Guchte presented no evidence that W.G.M. (the seller of the lot) occupied a dominant position in the relevant market—of which there was also no evidence. See *McCormick v. Bradley*, 870 P.2d 599 (Colo. App. 1993) (analysis of market power necessarily requires plaintiff to define precisely market for residential lots when plaintiff claims that policy that buyer may not purchase residential lot without also purchasing goods and services provided by approved builder is illegal tying arrangement). Vande Guchte did not show that similarly situated lots, without Heritage as the builder, were unavailable elsewhere in the relevant market, whether that market be considered as all of Lincoln, only a certain area of Lincoln, or even Lancaster County.

[17] Additionally, we do not accept the notion that the "uniqueness" of land by itself establishes economic power. See *McCormick v. Bradley, supra.* "The burden is on the antitrust plaintiff to show that no competitor could have offered a comparable product." *Id.* at 604. Thus, there must be some showing that the lot possessed unique and desirable attributes that were attractive to other buyers in addition to Vande Guchte, which attributes prevented other sellers from offering a comparable product. See *id.* See, also, *Baxley-DeLamar Monuments v. American Cemetery, supra.*

[18] Because there is no such showing, Vande Guchte has failed to establish his burden of proof for an unlawful tying arrangement. Moreover, a single forced sale of a tied product to a single customer is not sufficient to warrant a finding of market power. *Jefferson Parish Hospital Dist. No. 2 v. Hyde, supra*; *McCormick v. Bradley, supra.* Consequently, due to the lack of

evidence showing a tying arrangement, there was no issue of material fact as to the defense that the exclusive builder provision was unlawful and voided the contract. Vande Guchte's argument is without merit.

(d) General Claim of Specific Performance

[19] Vande Guchte's third assignment of error is that the court erred in granting specific performance. However, his argument on such point is solely limited to the option's being an unlawful penalty, an unreasonable restraint on alienation, and an unlawful tying arrangement. There is no separate argument in his brief as to his third assignment of error—"The trial court erred in ordering specific performance." Because we do not find that Heritage's option under the purchase agreement was invalid or unenforceable for any of the reasons Vande Guchte relies upon—unlawful penalty, restraint on alienation, and tying arrangement—and because there is no argument in his brief as to this assignment of error other than as stated above, we do not further address this alleged error. See *Shipferling v. Cook*, 266 Neb. 430, 665 N.W.2d 648 (2003) (errors assigned but not argued will not be addressed on appeal).

3. Tortious Interference

[20] Vande Guchte claims that the district court erred in failing to find that the defendants tortiously interfered with Vande Guchte's contract with Hoffman. A claim for tortious interference with a contract requires (1) a valid contract, (2) knowledge by the defendant of the contract, (3) an unjustified intentional act of interference on the part of the defendant, (4) proof that the interference caused the harm sustained, and (5) damage to the plaintiff. See *Hroch v. Farmland Indus.*, 4 Neb. App. 709, 548 N.W.2d 367 (1996).

[21] Vande Guchte claims that the purchase agreement for the lot with Hoffman was breached due to the interference of the defendants. However, as we have decided in *Vande Guchte v. Hoffman*, No. A-03-1345, 2005 WL 2129101 (Neb. App. Sept. 6, 2005) (not designated for permanent publication), the sale of the lot to Hoffman failed because the purchase agreement between Vande Guchte and Hoffman, by its own terms, became null and void because the sale was contingent on Hoffman's

obtaining financing, which Hoffman could not. Pinnacle Bank would not finance Hoffman's purchase of the lot because of what the title company characterized as an unresolved "title issue." See *Goeke v. National Farms, Inc.*, 245 Neb. 262, 512 N.W.2d 626 (1994) (when cases are interwoven and interdependent and controversy has already been considered and determined in prior proceeding involving one of parties now before court, court has right to examine its own records and take judicial notice of its own proceedings and judgment in prior action). See, also, *Jessen v. Jessen*, 259 Neb. 644, 611 N.W.2d 834 (2000). We need not, and do not, address whether the title company was correct in its assessment of the title's condition or whether Pinnacle Bank was justified in refusing to extend financing. The fact is that Hoffman's performance under the purchase agreement was excused if he could not obtain financing, and he could not. The purchase agreement between Hoffman and Vande Guchte stated, "If the loan or assumption is not ultimately approved by the lending agency, this offer is null and void . . . ." Pinnacle Bank was "unable to approve" Hoffman's request because of an "UNRESOLVED TITLE ISSUE - RELEASE OF NOTICE FOR OPTION TO PURCHASE BY HERITAGE." Because Hoffman's inability to obtain financing, rather than any act of interference by the defendants, caused the failure of the Vande Guchte-Hoffman agreement, Vande Guchte failed to establish the fourth element of tortious interference. Therefore, the trial court did not err in granting summary judgment in favor of the defendants on this claim.

VII. CONCLUSION

Based on the foregoing, the trial court did not err in granting the defendants' motion for summary judgment, dismissing Vande Guchte's complaint, and ordering Vande Guchte to specifically perform the terms required by the option agreement.

AFFIRMED.

TARA SPENCE, APPELLEE, V.
CHARLIE BUSH, APPELLANT.
703 N.W.2d 606

Filed September 6, 2005. No. A-04-1487.

1. **Paternity: Appeal and Error.** In a filiation proceeding, questions concerning child custody determinations are reviewed on appeal de novo on the record to determine whether there has been an abuse of discretion by the trial court, whose judgment will be upheld in the absence of an abuse of discretion. In such de novo review, when the evidence is in conflict, the appellate court considers, and may give weight to, the fact that the trial court heard and observed the witnesses and accepted one version of the facts rather than another.
2. **Child Custody.** While an unwed mother is initially entitled to automatic custody of the child, the issue must ultimately be resolved on the basis of the fitness of the parents and the best interests of the child.
3. ____. In determining a child's best interests under Neb. Rev. Stat. § 42-364 (Reissue 2004), 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.
4. ____. A trial court may impose joint custody, even where the parties do not agree, if the court first conducts a hearing and specifically finds that joint custody is in the best interests of the minor child.
5. ____. Joint custody is not favored by the courts of this state and will be reserved for only the rarest of cases.
6. ____. Under Neb. Rev. Stat. § 42-364 (Reissue 2004), joint custody remains disfavored to the extent that if both parties do not agree, the court can award joint custody only if it holds a hearing and makes the required finding.
7. **Child Custody: Presumptions.** Under current Nebraska law, there is no presumption in favor of joint custody.
8. **Statutes: Legislature: Public Policy.** It is the function of the Legislature through the enactment of statutes to declare what is the law and public policy of this state.

Appeal from the District Court for Lancaster County: KAREN FLOWERS, Judge. Affirmed.

Peter Thew, of Thew Law Offices, for appellant.

Jeanelle S. Kleveland, of Kleveland Law Offices, for appellee.

IRWIN, SIEVERS, and CASSEL, Judges.

CASSEL, Judge.

INTRODUCTION

Charlie Bush appeals the order of the district court for Lancaster County which granted sole custody of his minor children to their mother, Tara Spence. On appeal, Bush argues that the trial court erred in declining to grant joint custody. Pursuant to our authority under Neb. Ct. R. of Prac. 11B(1) (rev. 2005), we ordered the matter submitted without oral argument. On our de novo review, we reject Bush's argument that the law affords a presumption in favor of joint custody and we conclude that the trial court did not abuse its discretion. We therefore affirm.

BACKGROUND

The parties, who never married, have three children together, ages 9, 5, and 4 at the time of trial. On May 6, 2004, Spence commenced an action against Bush in the district court to determine paternity of the children, to determine custody, and to obtain other collateral relief. At a trial on November 2, Bush admitted paternity, and the issues tried concerned only child custody, visitation, and support.

At trial, Spence requested sole custody, with visitation for Bush. She testified that the children had always lived with her. According to Spence, Bush had lived with her and the children from 1993 until 2002, when the parties separated. Since that time, the children had resided solely with Spence. Spence testified that while Bush lived with her, he helped with living expenses "[s]omewhat" or "a little." After separating from Spence, Bush had occasionally helped Spence with living expenses by buying groceries once and bringing clothing for the children. Shortly before trial, Bush purchased a coat and a pair of shoes for each of the three children. Spence admitted that Bush was a good father to the children, though "[h]e just seems to happen to tend to be on the wild side" and "[t]hings get wild" regardless of whether the children are present. Spence denied that Bush had ever harmed the children, and she believed that he loved them. Since the separation, Bush had watched the children overnight at his residence two or three times, and he had picked them up at daycare. Spence admitted that Bush had harmed her in front of the

children several times during the preceding 2 years. At the time of trial, Spence had a protection order against Bush. Spence admitted that Bush had had protection orders against her as well. Bush obtained one protection order after Spence broke Bush's car windows with a baseball bat. She claimed that she broke the windows in response to Bush's throwing a chair against a wall while the children were present. Spence admitted being extremely angry at the time and stated that as long as she is not in Bush's presence, she can remain calm. Spence was employed at the time of trial.

Bush requested that the parties have joint custody of the children. He testified that he began residing with Spence in 1992 or 1993 and moved out in February 2004. He stated that while he resided with Spence, he gave her money and she paid the expenses. Since February 2004, Bush had given Spence pocket money and had bought clothing and toys for the children as well as groceries for Spence's household. Bush stated that he had "filled the house with groceries three times." Bush admitted that the children love both parents. Bush testified that when the children visit him, they do not want to leave. Bush wanted the custody arrangement to be fair and did not want to deprive the children of time with either parent. Bush admitted violating a protection order Spence had against him. Bush testified that the children had seen him arguing with Spence and that the children had seen Spence act violently toward him, but he denied ever losing control in front of the children. Bush testified that Spence had broken his car windows in 2004 and threatened to kill him. In Bush's opinion, he tried to get along with Spence but Spence did not want to get along with him. He admitted having taken anger management classes in the past to learn "about carrying [him]self" but denied having anger control issues. At the time of trial, Bush was attending counseling and was employed.

The district court granted sole custody of the children to Spence, subject to reasonable visitation rights granted to Bush, and found that such arrangement was in the best interests of the children. The district court ordered Bush to pay child support, together with other collateral relief and other specifications of the order required by statute.

ASSIGNMENT OF ERROR

Bush assigns that the district court erred in granting sole custody of the children to Spence.

STANDARD OF REVIEW

[1] In a filiation proceeding, questions concerning child custody determinations are reviewed on appeal de novo on the record to determine whether there has been an abuse of discretion by the trial court, whose judgment will be upheld in the absence of an abuse of discretion. In such de novo review, when the evidence is in conflict, the appellate court considers, and may give weight to, the fact that the trial court heard and observed the witnesses and accepted one version of the facts rather than another. *State on behalf of Pathammavong v. Pathammavong*, 268 Neb. 1, 679 N.W.2d 749 (2004).

ANALYSIS

[2,3] Bush argues that the trial court failed to adequately consider the best interests of the children. While an unwed mother is initially entitled to automatic custody of the child, the issue must ultimately be resolved on the basis of the fitness of the parents and the best interests of the child. *Id.* In filiation proceedings, the Nebraska Supreme Court has disregarded the fact that a child was born out of wedlock and has applied the standards for determination of custody set forth in Neb. Rev. Stat. § 42-364(2) (Reissue 2004). See *State on behalf of Pathammavong v. Pathammavong, supra.* Section 42-364(2) provides:

> In determining custody arrangements and the time to be spent with each parent, the court shall consider the best interests of the minor child which shall include, but not be limited to:
>
> (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 regardless of chronological age, when such desires and wishes are based on sound reasoning;
>
> (c) The general health, welfare, and social behavior of the minor child; and

> (d) Credible evidence of abuse inflicted on any family or household member. For purposes of this subdivision, abuse and family or household member shall have the meanings prescribed in section 42-903.

In determining a child's best interests under § 42-364, 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. *Marcovitz v. Rogers*, 267 Neb. 456, 675 N.W.2d 132 (2004).

The ultimate focus of Bush's argument is his contention that a "presumption [of joint custody] should be carried forward in custody matters." Brief for appellant at 6. In essence, Bush seeks to have us declare joint custody as the default arrangement in custody disputes. The Nebraska appellate courts have not explicitly addressed this precise argument.

[4] Section 42-364(5) allows the trial court to order joint custody, stating:

> After a hearing in open court, the court may place the custody of a minor child with both parents on a shared or joint custody basis when both parents agree to such an arrangement. In that event, each parent shall have equal rights to make decisions in the best interests of the minor child in his or her custody. The court may place a minor child in joint custody after conducting a hearing in open court and specifically finding that joint custody is in the best interests of the minor child regardless of any parental agreement or consent.

In *Kay v. Ludwig*, 12 Neb. App. 868, 686 N.W.2d 619 (2004), we recognized that a trial court may impose joint custody, even where the parties do not agree, if the court first conducts a

hearing and specifically finds that joint custody is in the best interests of the minor child.

[5,6] Earlier, in *Dormann v. Dormann*, 8 Neb. App. 1049, 606 N.W.2d 837 (2000) (citing *Wilson v. Wilson*, 224 Neb. 589, 399 N.W.2d 802 (1987)), we noted the longstanding rule that joint custody is not favored by the courts of this state and will be reserved for only the rarest of cases. In *Dormann v. Dormann, supra*, we reversed an award of joint custody where the parties did not agree to such an arrangement and where the trial court failed to make a specific finding, as required by § 42-364(5), that joint custody was in the best interests of the child. In *Kay v. Ludwig, supra*, we stated that under the current version of § 42-364, joint custody remains disfavored to the extent that if both parties do not agree, the court can award joint custody only if it holds a hearing and makes the required finding. There, we affirmed the trial court's joint custody award, where the court made the required finding and that finding was supported by the evidence.

[7] Our conclusion in *Kay v. Ludwig, supra*, did not endorse a presumption in favor of joint custody. Although we recognized that the Parenting Act, Neb. Rev. Stat. §§ 43-2901 to 43-2919 (Reissue 2004), evidenced an attempt to foster participation of both parents of a separated family in raising their children, we did not discover in the preamble a legislative presumption in favor of joint custody. To the contrary, we reiterated that joint custody remains disfavored and emphasized that § 42-364 requires both a hearing and a finding concerning best interests before a trial court may award joint custody on its own motion.

[8] It is the function of the Legislature through the enactment of statutes to declare what is the law and public policy of this state. *Clemens v. Harvey*, 247 Neb. 77, 525 N.W.2d 185 (1994). Bush's argument—contending that a presumption of joint custody should be adopted—must be addressed to the Legislature rather than to this court.

In the instant case, the record shows that Spence has cared for and supported the children since Bush left her residence, with minimal financial support, in kind or otherwise, from Bush. Spence admitted that Bush was a good father who had never harmed his children, and Bush admitted that the children loved

both of their parents. It is undisputed that the parties have had conflicts in the recent past. Each party had obtained protection orders against the other, and there was evidence, most of it conflicting, that each party had exhibited violent behavior in the presence of the other. In any event, the evidence strongly suggests that the parties would have difficulty carrying out the interactions inherent in a joint custody arrangement. Considering the conflicting evidence and the factors set forth above and giving weight to the fact that the trial court heard and observed the parties and apparently accepted one version of the facts rather than the other, we conclude that the trial court did not abuse its discretion in granting sole custody to Spence.

CONCLUSION

For the foregoing reasons, we affirm the order of the district court.

AFFIRMED.

WANDA K. MACE, NOW KNOWN AS WANDA K. STRANATHAN, APPELLEE, V. JERRY D. MACE, APPELLANT.

703 N.W.2d 624

Filed September 13, 2005. Nos. A-03-375, A-03-376.

1. **Appeal and Error.** The construction of a mandate issued by an appellate court presents a question of law on which an appellate court is obligated to reach a conclusion independent of the determination reached by the court below.
2. **Modification of Decree: Appeal and Error.** Modification of a dissolution decree is a matter entrusted to the discretion of the trial court, and although, on appeal, the issue is reviewed de novo on the record, the decision of the trial court will be affirmed absent an abuse of discretion.
3. **Appeal and Error.** In a review de novo on the record, an appellate court reappraises the evidence as presented by the record and reaches its own independent conclusions with respect to the matters at issue. When evidence is in conflict, the 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 over another.
4. **Modification of Decree: Child Support: Proof.** A party seeking to modify a child support order must show a material change of circumstances which occurred subsequent to the entry of the original decree or a previous modification and which was not contemplated when the prior order was entered.

5. **Modification of Decree: Attorney Fees: Appeal and Error.** A district court's award or denial of attorney fees in a proceeding to modify a divorce decree will be upheld absent an abuse of discretion.
6. **Appeal and Error: Words and Phrases.** In appellate procedure, a "remand" is an appellate court's order returning a proceeding to the court from which the appeal originated for further action in accordance with the remanding order.
7. **Courts: Judgments: Appeal and Error.** As a result of an order for remand and mandate from an appellate court, a trial court is obligated to adhere to the mandate and render judgment within the mandate's purview.
8. **Courts: Appeal and Error.** When a cause is remanded with specific directions, the court to which the mandate is directed has no power to do anything but to obey the mandate.
9. **Appeal and Error.** Under the "law of the case" doctrine, holdings of an appellate court on questions presented to it in reviewing proceedings of the trial court conclusively settle, for the purpose of that litigation, all matters ruled upon, either expressly or by necessary implication.
10. **Modification of Decree: Child Support: Rules of the Supreme Court: Presumptions: Time.** Paragraph Q of the Nebraska Child Support Guidelines provides, in part, that a rebuttable presumption of a material change of circumstances is established when application of the child support guidelines results in a variation by 10 percent or more of the current child support obligation, due to financial circumstances which have lasted 3 months and can reasonably be expected to last for an additional 6 months.
11. **Modification of Decree: Child Support: Rules of the Supreme Court.** Paragraph T of the Nebraska Child Support Guidelines states that an obligor shall not be allowed a reduction in an existing support order solely because of the birth, adoption, or acknowledgment of subsequent children of the obligor; however, a duty to provide regular support for subsequent children may be raised as a defense to an action for an upward modification of such existing support order.
12. **Child Support.** In ordering child support, a trial court has discretion to choose whether and how to calculate a deduction for subsequent children, but it must do so in a manner that does not benefit one family at the expense of the other.
13. ____. In ordering child support, a district court may consider earning capacity in lieu of a parent's actual, present income.
14. **Child Support: Rules of the Supreme Court.** Earning capacity may be used as a basis for an initial determination of child support under the Nebraska Child Support Guidelines where evidence is presented that the parent is capable of realizing such capacity through reasonable effort.
15. **Divorce: Attorney Fees: Costs.** Customarily in dissolution cases, attorney fees and costs are awarded only to prevailing parties or assessed against those who file frivolous suits.
16. **Appeal and Error.** An appellate court will not consider an issue on appeal that was not passed upon by the trial court.

Appeal from the District Court for Sarpy County: GEORGE A. THOMPSON, Judge. Judgment in No. A-03-375 reversed, and cause

remanded with directions. Judgment in No. A-03-376 reversed in part and in part vacated, and caused remanded with directions.

Phillip G. Wright, of Wright & Associates, for appellant.

Mark S. Bertolini, of Bertolini, Schroeder & Blount, for appellee.

IRWIN, MOORE, and CASSEL, Judges.

CASSEL, Judge.

INTRODUCTION

Jerry D. Mace appeals from two separate orders of the Sarpy County District Court, both modifying a decree which dissolved his marriage to Wanda K. Mace, now known as Wanda K. Stranathan. Because both appeals arise out of the same factual background, we address them together in this opinion. In case No. A-03-375, Jerry contests the district court's implementation of our mandate in *Mace v. Mace*, No. A-01-500, 2002 WL 31002310 (Neb. App. Aug. 27, 2002) (not designated for permanent publication). In case No. A-03-376, Jerry contends that the district court erred in several respects in modifying his child support obligation upon Wanda's October 2002 application.

BACKGROUND

Portions of this opinion are taken verbatim from this court's unpublished opinion in *Mace v. Mace, supra.*

On July 28, 1992, the district court for Sarpy County entered a decree dissolving the marriage of Wanda and Jerry. The decree awarded Wanda custody of the three children who were born to the marriage: Christopher James Mace, born June 14, 1984; Michael Everett Mace, born June 7, 1988; and Anita Marie Mace, born March 25, 1992. The court found that Wanda had the ability to earn a net monthly income of approximately $450 and ordered Jerry to pay $825 per month for child support.

On March 30, 1998, Jerry filed an application to modify the dissolution decree. In the application, Jerry alleged that he had suffered a work-related injury which resulted in a reduction of his monthly net income. Wanda filed an answer and cross-application to modify the decree. She requested an increase in

child support because of increases in both parties' incomes and because of modifications to the Nebraska Child Support Guidelines. Wanda also asserted that Jerry should pay a portion of her daycare expenses.

On January 7, 1999, the district court conducted a modification hearing. Jerry contended that he was entitled to a deviation from the guidelines in calculating his support obligation, based on his obligation to a subsequent child. Kirsty Nicole Mace, the subsequent child, was born March 24, 1993, and on July 3, 1996, Jerry married Tracy J. Mace, Kirsty's mother.

The district court made factual findings on January 15, 1999, and entered its order of modification on January 29. The district court found that since the original decree, Wanda had remarried and was working 35 hours per week, earning $5.25 per hour, for a monthly net income of $725. The court determined that Jerry earned a monthly net income of $1,925 and that Jerry had a low-back condition that prevented him from earning any substantial overtime pay. In addressing Jerry's contention that the court should deviate from the guidelines based on Kirsty, his subsequent child, the district court noted that *Prochaska v. Prochaska*, 6 Neb. App. 302, 573 N.W.2d 777 (1998), and other cases "clearly established a legal duty of support to the child or children of a subsequent marriage." The district court determined that while Jerry's testimony may have established a moral duty of support, it failed to establish a legal duty, and the court therefore denied Jerry's request for a deviation from the guidelines. The court modified Jerry's support obligation for the parties' three children to $775 per month, ordered Jerry to pay 70 percent of Wanda's work-related daycare expenses, and ordered Jerry to pay $1,500 of Wanda's attorney fees.

Jerry appealed from the modification order. We affirmed the portion of the district court's order awarding daycare expenses and reversed the award of attorney fees because Wanda did not provide any evidence to establish the amount of the fees incurred. We concluded that Jerry's testimony established that he had a legal duty to support Kirsty, and we reversed, and remanded "for a consideration of whether a deviation [from the guidelines] is warranted as a result of Jerry's subsequent child." *Mace v. Mace*, 9 Neb. App. 270, 277, 610 N.W.2d 436, 441 (2000) (*Mace I*). On

June 26, 2000, a mandate was filed in the Sarpy County District Court ordering the court to enter judgment in conformity with our judgment and opinion.

On June 19, 2000, before the mandate was filed, the district court held its first trial on remand. On June 22, the court entered an order of modification. Jerry again appealed to this court. We dismissed the appeal and vacated the district court's June 22 order for lack of jurisdiction. *Mace v. Mace*, 9 Neb. App. lii (No. A-00-732, Jan. 3, 2001) (*Mace II*).

On April 5, 2001, after the mandate was filed, the district court conducted its second trial on remand concerning Jerry's application and Wanda's cross-application to modify regarding the deviation from the guidelines issue. At trial, Wanda's 1999 W-2 forms were received into evidence, along with her 1999 tax return, filed jointly with her husband. Jerry's W-2 for 1999 was received, as well as his and Tracy's 1999 joint tax return. Jerry's counsel noted on the record that the 1999 information was presented in response to the district court's request because the court wanted the most current information available regarding the parties' incomes.

On April 6, 2001, the district court entered an order of modification, determining that Jerry was entitled to a deviation from the guidelines based on his legal obligation to support Kirsty. Based on the deviation and the 1999 income figures, the district court ordered Jerry to pay $804 per month in child support for Christopher, Michael, and Anita. The court also ordered Jerry to pay Wanda $801.12 in attorney fees.

On April 26, 2001, Jerry appealed from the third modification order. In our consequent opinion, we noted, "When computing Jerry's support obligation to Christopher, Michael, and Anita, the trial court considered [Jerry's] obligation to Kirsty. In determining Jerry's obligation to Kirsty, the trial court considered his support obligation to Christopher, Michael, and Anita." This court concluded that although the district court did not abuse its discretion under *Prochaska v. Prochaska*, 6 Neb. App. 302, 573 N.W.2d 777 (1998) (respective support for multiple families is to be determined by interdependent arithmetic method), and *Brooks v. Brooks*, 261 Neb. 289, 622 N.W.2d 670 (2001) (no precise mathematical formula is required for deviation from guidelines

for subsequent children, and calculations are left to discretion of trial court), in considering Jerry's obligations to both families when it calculated the deviation, it abused its discretion in receiving evidence and making findings regarding the parties' most current incomes. We determined that "we must reverse, and remand so the trial court can calculate Jerry's support obligation using the same calculation method, but using the income figures from the January 1999 order." *Mace v. Mace*, No. A-01-500, 2002 WL 31002310 (Neb. App. Aug. 27, 2002) (not designated for permanent publication) (*Mace III*). We remanded "with directions to recalculate Jerry's child support obligation to Christopher, Michael, and Anita using the income figures from the January 1999 modification trial and the calculation method used by the trial court in its April 2001 order of modification that considered Jerry's subsequent child, Kirsty." *Id.* We further stated, "If the evidence from the January 1999 modification trial is insufficient to determine Tracy's monthly net income for 1995 through 1997, the trial court may receive evidence of her income for that time period. This is the only additional evidence that the trial court may consider on remand." *Id.*

On October 31, 2002, Wanda filed another application to modify child support, alleging that substantial changes in circumstances had occurred, essentially consisting of increases in both parties' incomes. Jerry filed an answer denying that a substantial and material change of circumstances had occurred.

On February 27, 2003, the district court conducted its third trial on remand and immediately thereafter conducted a trial on Wanda's October 2002 application for modification. During the portion of the trial pertaining to the remand, the court received Tracy's W-2 forms for 1996 and 1997. When Jerry also offered Tracy's W-2 forms for 1993, 1994, 1998, and 1999, the court sustained Wanda's relevancy objections to those exhibits. Jerry's counsel stated that he had provided Tracy's W-2 forms from 1993 and 1994, years outside of the 1995 to 1997 range allowed by this court, "to show the Court that we did make a good effort to try to find '95 and cannot." Subsequently, during the trial on Wanda's October 2002 application, Jerry offered Tracy's W-2 form for 2000, and Wanda objected on relevance grounds. The district court stated, "I'm going to receive it against my opinion

that those are not pertinent, but [the exhibit] is received so the Court can have a record of this."

During the trial upon the October 2002 application, Wanda testified that her gross monthly income had increased since the original dissolution action to $888.10. She stated that Jerry's gross income for 2002 was approximately $30,249. The district court received Wanda's calculation of child support, which showed Jerry's monthly net income to be $2,277.88.

Wanda's attorney, Mark S. Bertolini, questioned her regarding attorney fees she had incurred, and Jerry's counsel objected repeatedly. Wanda testified that Bertolini charged $150 per hour, but she was not allowed to testify as to the total of her legal expenses. In sustaining the objection to this evidence, the district court stated to Bertolini:

> I think you're going to get an objection, so you might take the stand. That's what happened in the first case, there was an objection, so your exhibit didn't get in in the first case. That's why you didn't get attorney fees. That's why the Court of Appeals feels you need attorney fees.

Bertolini testified that Wanda had incurred $1,023.94 for legal fees and $52.76 for costs. Bertolini had "reviewed various exhibits that were offered in other hearings since the original hearing of 1999 to determine that there was in fact an increase in [Jerry's] income since then." He testified that he recalled using Jerry's W-2 forms, tax returns, and paycheck stubs for "[a]ll the years," including 2001 but not 2002. Bertolini stated that Wanda's income had also increased. Bertolini did not know whether Jerry's income had increased 10 percent. After Bertolini's testimony, Jerry moved to dismiss, and the district court denied the motion. Jerry then testified in regard to the October 2002 application and presented additional evidence.

On March 4, 2003, the district court entered an order acknowledging this court's opinion which had directed the district court to recalculate Jerry's child support obligation " 'using the income figures from the January 1999 modification trial and the calculation method used by the trial court in its April 2001 order of modification,' " and, if necessary, using additional evidence of Tracy's monthly net income for 1995 through 1997. The district court nonetheless stated that although it did not receive Tracy's 1998

W-2 at trial, "upon reconsideration, the Court now receives . . . Tracy's 1998 W-2's." The district court determined that Tracy's 1998 income was "pertinent to a decision in January of 1999" and "question[ed] why Tracy's income for 1995 is necessary and why her income for 1996 and 1997 is relevant."

The district court stated that it had used the " 'interdependent arithmetic' formula under [*Prochaska v. Prochaska*, 6 Neb. App. 302, 573 N.W.2d 777 (1998)]" to calculate Jerry's support obligation for Kirsty in the April 2001 modification order. The district court continued:

> The Court has taken additional evidence, and Tracy's 1998 income which would be pertinent to a decision in January of 1999, has worked through the figures which are attached hereto as "Interdependent arithmetic under Prochaska v. Prochaska". What this would do would be to further reduce [Jerry's] obligation to $687.00 for the three children - a $138.00 reduction from the 1992 level - only because [Jerry] chose a second family.
>
> Having done the calculations and considering [Jerry's] child Kirsty, the Court notes the Supreme Court decision in Brooks v. Brooks, 261 Neb. 289, 622 N.W.2d 670 (2001), cited by the Court of Appeals in the last remand that does not require the [*Prochaska*] method.

The district court also went on to quote from a then new paragraph T of the guidelines, which became effective September 1, 2002. The district court concluded, "I find the deviation [from the guidelines] should be to $788.00 per month commencing February 1, 1999." The worksheets attached to the district court's order show that in arriving at $788, the district court used the income figures from the January 1999 order but did not deduct support for Kirsty from Jerry's income or consider Tracy's income in calculating Jerry's child support obligation for Christopher, Michael, and Anita. Jerry now appeals the order from which we have been quoting, as case No. A-03-375.

The district court entered an additional order on March 4, 2003, addressing Wanda's October 2002 application to modify. It increased Jerry's child support obligation for the parties' three children to $825 per month, ordered that he pay $1,024 in attorney fees to Wanda's counsel, and stated, "It appears to the Court

that [Jerry] has the ability to earn more if he cares to." The district court further found, "In accordance with guideline T. Limitation on Decrease, the Court finds that the amount of support should be no less than [the amount] ordered in 1992 for 3 children of $825.00." Jerry now appeals this order to this court, as case No. A-03-376.

ASSIGNMENTS OF ERROR

In case No. A-03-375, Jerry alleges (1) that the district court "abused its discretion and had no jurisdiction" to receive certain evidence and to use a method of calculating Jerry's child support obligation different from that specified by the Court of Appeals and (2) that the district court abused its discretion in failing to grant a deviation for Kirsty, Jerry's subsequent child.

In case No. A-03-376, Jerry alleges that the district court erred (1) in granting a modification of child support despite an absence of a substantial and material change of circumstances, (2) in failing to consider Jerry's obligation to Kirsty, (3) in finding that Jerry was capable of increasing his income, (4) in interpreting paragraph T of the guidelines as it did, and (5) in awarding attorney fees to Wanda.

STANDARD OF REVIEW

[1] The construction of a mandate issued by an appellate court presents a question of law on which an appellate court is obligated to reach a conclusion independent of the determination reached by the court below. *Pursley v. Pursley*, 261 Neb. 478, 623 N.W.2d 651 (2001).

[2-4] Modification of a dissolution decree is a matter entrusted to the discretion of the trial court, and although, on appeal, the issue is reviewed de novo on the record, the decision of the trial court will be affirmed absent an abuse of discretion. *Elsome v. Elsome*, 257 Neb. 889, 601 N.W.2d 537 (1999); *Dueling v. Dueling*, 257 Neb. 862, 601 N.W.2d 516 (1999); *Rauch v. Rauch*, 256 Neb. 257, 590 N.W.2d 170 (1999). In a review de novo on the record, an appellate court reappraises the evidence as presented by the record and reaches its own independent conclusions with respect to the matters at issue. *Elsome v. Elsome, supra*; *Rauch v. Rauch, supra*. When evidence is in conflict, the 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 over another. *Elsome v. Elsome, supra*; *Rauch v. Rauch, supra*. A party seeking to modify a child support order must show a material change of circumstances which occurred subsequent to the entry of the original decree or a previous modification and which was not contemplated when the prior order was entered. *Dueling v. Dueling, supra*.

[5] A district court's award or denial of attorney fees in a proceeding to modify a divorce decree will be upheld absent an abuse of discretion. *Hartman v. Hartman*, 261 Neb. 359, 622 N.W.2d 871 (2001).

ANALYSIS

Evidence Received and Method of Calculating Child Support.

We begin by addressing the March 4, 2003, order entered upon remand, the appeal of which is our case No. A-03-375. Jerry argues that the district court, in its order, was without authority to use evidence of Tracy's income for years other than 1995 through 1997 and to calculate Jerry's child support obligation using a method different from the method mandated by this court. He contends that the district court exceeded its authority on remand.

[6-8] In appellate procedure, a "remand" is an appellate court's order returning a proceeding to the court from which the appeal originated for further action in accordance with the remanding order. *In re Interest of J.L.M. et al.*, 234 Neb. 381, 451 N.W.2d 377 (1990). As a result of an order for remand and mandate from an appellate court, a trial court is obligated to adhere to the mandate and render judgment within the mandate's purview. *Id.* "[W]hen a cause is remanded with specific directions, the court to which the mandate is directed has no power to do anything but to obey the mandate." *Anderson/Couvillon v. Nebraska Dept. of Soc. Servs.*, 253 Neb. 813, 819, 572 N.W.2d 362, 367 (1998).

We first address the evidence received and considered by the district court. In *Mace III*, we stated that on remand, the district court could receive evidence of Tracy's monthly net income for 1995 through 1997, and specified, "*This is the only additional evidence that the trial court may consider on remand.*"

(Emphasis supplied.) On remand, the district court initially adhered to the mandate by receiving evidence of Tracy's income for 1996 and 1997 and refusing evidence of her income for 1993, 1994, 1998, and 1999. However, in rendering its decision, in which it was required to implement the mandate and follow this court's instructions, the district court, deeming evidence of Tracy's 1998 income "pertinent," reversed its earlier ruling and received such evidence. Clearly, the district court disobeyed this court's mandate.

In the April 2001 order, the district court considered Jerry's support obligation to Kirsty when computing his support obligation to Christopher, Michael, and Anita, and in turn considered the latter obligation in determining the former. Upon our consideration of that order in *Mace III*, we noted that under *Prochaska v. Prochaska*, 6 Neb. App. 302, 573 N.W.2d 777 (1998), and *Brooks v. Brooks*, 261 Neb. 289, 622 N.W.2d 670 (2001), the district court did not abuse its discretion in employing this calculation method, and we remanded "so the trial court can calculate Jerry's support obligation using the same calculation method."

[9] On remand, the district court expressly refused to employ the method mandated by this court for recalculating Jerry's support obligation. The court justified its refusal upon the decision in *Brooks*, noting that *Brooks* does not require a court to use the *Prochaska* method of interdependent arithmetic to calculate a party's support obligation in light of subsequent children. While we agree that *Brooks* limits the effect of our decision in *Prochaska*, see *Emery v. Moffett*, 269 Neb. 867, 697 N.W.2d 249 (2005), the correct application of *Prochaska* was not a proper subject for the district court's determination in implementing our remand. At the time when the district court was required to implement our remand, our determination had become the law of the case. See *Thomas v. State*, 268 Neb. 594, 685 N.W.2d 66 (2004) (under "law of the case" doctrine, holdings of appellate court on questions presented to it in reviewing proceedings of trial court conclusively settle, for purpose of that litigation, all matters ruled upon, either expressly or by necessary implication). The district court lacked authority to deviate from the instructions mandated by this court.

Deviation From Guidelines for Subsequent Child.

Jerry asserts that despite this court's mandate authorizing a deviation from the guidelines for Kirsty, the district court used current law and guidelines to deny Jerry the deviation. He argues that because this court did not authorize a new trial, the rules, case law, and statutes in effect at the time of the 1999 trial controlled the district court's March 4, 2003, order concerning the remand. We agree. The instructions of this court limited the authority of the district court upon remand.

Jerry alleges that although the district court reduced his monthly child support obligation for the parties' three children from $825 to $788, it erred in not granting a deviation for Kirsty. The district court attached two guidelines calculations to its order. The first calculation, which the district court implemented, simply considered the parties' 1999 net incomes and calculated the support amounts, using the 1999 guidelines, without any consideration for Kirsty. This calculation showed a support obligation for three children of $788.40, which, when rounded to an even dollar amount, is the figure ordered by the district court. Thus, it is clear that contrary to Jerry's argument, in the first calculation the district court used the 1999 version of the guidelines rather than the then-current version. But it is equally clear that the district court's first calculation omitted any consideration for Kirsty.

The second calculation attached to the district court's March 4, 2003, order on remand represented the district court's calculations using the interdependent arithmetic approach of *Prochaska v. Prochaska*, 6 Neb. App. 302, 573 N.W.2d 777 (1998). This calculation does give consideration to Kirsty and implements the method initially used in the district court in the second trial after remand, which is the method we approved and mandated in *Mace III*. Further, this calculation utilizes the 1999 net income figures for Jerry and Wanda, which is also in accordance with our mandate. (The second calculation results in support amounts to be paid by Jerry of $687 for three children, $573 for two children, and $399 for one child. Jerry makes no assignment of error regarding the accuracy of this calculation, and we accordingly do not address any issue regarding the correctness of the second calculation.) Nevertheless, despite the clear requirement of our

mandate, the district court's order used the first calculation and rejected the second calculation.

The district court erred in refusing to implement our mandate. Accordingly, we reverse the March 4, 2003, order on remand, and remand the cause with instructions to modify Jerry's support obligation, retroactively to February 1, 1999, to the amounts of $687 for three children, $573 for two children, and $399 for one child.

We next turn our attention to the March 4, 2003, order on Wanda's 2002 application for modification.

Material Change of Circumstances.

[10] Jerry contends that there was no material change of circumstances to support the district court's March 4, 2003, modification because there was no evidence that Jerry's child support obligation changed by 10 percent or more. Paragraph Q of the guidelines provides, in part, that a rebuttable presumption of a material change of circumstances is established when application of the guidelines results in a variation by 10 percent or more of the current child support obligation, due to financial circumstances which have lasted 3 months and can reasonably be expected to last for an additional 6 months.

Jerry's argument is premised on the "current" support obligation's being $788 per month, i.e., the support amount for three children determined in the March 4, 2002, order on remand. However, Jerry appealed that determination, and as discussed above, we have reversed that determination and remanded with directions to order support at the rate of $687 per month. Paragraph Q of the guidelines, as applied to the instant case, would require a threshold increase of $68.70, for the required duration, to establish a rebuttable presumption of a material change of circumstances. The district court ordered that support be increased to $825 per month, which is a monthly increase of $138 over the amount we have mandated above. Thus, under paragraph Q of the guidelines, the district court's calculations would support its determination that a material change of circumstances existed.

Obligation to Subsequent Child; Paragraph T.

Jerry asserts that although the district court stated in its modification order that it considered Jerry's obligation to Kirsty, the

district court did not show how it considered this obligation. Jerry contends, therefore, that despite the district court's assertion to the contrary, it did not consider his obligation to Kirsty. In a separate assignment, Jerry also contends that the district court erred in using his child support obligation from the original decree, rather than that from the most recent modification, as its baseline. Because these assignments are closely related, we consider them together.

Upon consideration of Wanda's October 2002 application, the district court calculated support under the guidelines to be $839 per month for the three children of Jerry and Wanda. The court attached a calculation to the order showing how that amount was computed. That calculation omits any consideration of Jerry's obligation to Kirsty. In the order, the court stated that it had "considered [Jerry's] obligation to a child born to him and [Tracy] subsequently to the [d]ecree." The court also stated that it had applied paragraph T of the guidelines and, in so doing, reduced Jerry's support obligation for the parties' three children from $839 to $825, the latter amount being the amount "ordered in 1992 for 3 children."

[11] Paragraph T was added to the guidelines and became effective on September 1, 2002, and it states:

> An obligor shall not be allowed a reduction in an existing support order solely because of the birth, adoption, or acknowledgment of subsequent children of the obligor; however, a duty to provide regular support for subsequent children may be raised as a defense to an action for an upward modification of such existing support order.

There are two problems with the district court's application of paragraph T. First, in the instant case, the amount of the "existing support order" would be the amount that we have mandated above in regard to case No. A-03-375. In the proceedings in case No. A-03-376, Jerry was not seeking a reduction in support; Wanda was seeking an increase. By utilizing a calculation that considered only the initial support obligation for the three subject children as of the date of the initial decree, the district court deprived Jerry of the defense of paragraph T concerning Jerry's obligation to support Kirsty.

[12] Secondly, and more importantly, the district court failed to justify its methodology by showing that it had "'"done the math."'" See *Gallner v. Hoffman*, 264 Neb. 995, 1002, 653 N.W.2d 838, 844 (2002) (quoting *Stewart v. Stewart*, 9 Neb. App. 431, 613 N.W.2d 486 (2000)). In case No. A-03-376, unlike in case No. A-03-375, there has been no previous appeal and there is no earlier mandate binding the trial court's determination of what methodology to use in recognizing Jerry's obligation to Kirsty. In *Emery v. Moffett*, 269 Neb. 867, 697 N.W.2d 249 (2005), the Nebraska Supreme Court reiterated its earlier holding in *Brooks v. Brooks*, 261 Neb. 289, 622 N.W.2d 670 (2001), that a trial court has discretion to choose whether and how to calculate a deduction for subsequent children, but that it must do so in a manner that does not benefit one family at the expense of the other. In the instant case, the "method" selected by the district court clearly benefits the three children of Jerry and Wanda at the expense of Kirsty. While the district court was not, in case No. A-03-376, restricted to the methodology of *Prochaska v. Prochaska*, 6 Neb. App. 302, 573 N.W.2d 777 (1998), it was required to use some principled basis that did not benefit one family at the expense of the other. In failing to do so, the district court abused its discretion.

Jerry's Ability to Increase His Income.

[13,14] Jerry argues that after the January 29, 1999, order stating that he had a medical condition which limited his earnings, there was no appeal or evidence on which to base the district court's March 4, 2003, finding in case No. A-03-376 that Jerry "has the ability to earn more if he cares to." We agree. A district court may consider earning capacity in lieu of a parent's actual, present income pursuant to paragraph D of the guidelines. However, paragraph D contemplates that the court consider "factors such as work history, education, occupational skills, and job opportunities." The evidence in the record before us focuses solely on present earnings. Neither party presented evidence to support a determination that Jerry's earning capacity differed from his actual, present income. Earning capacity may be used as a basis for an initial determination of child support

under the guidelines where evidence is presented that the parent is capable of realizing such capacity through reasonable effort. *Claborn v. Claborn*, 267 Neb. 201, 673 N.W.2d 533 (2004). Because neither party presented any such evidence, the district court abused its discretion in substituting its opinion concerning Jerry's earning capacity for Jerry's actual, present income.

The district court's order granting Wanda's October 2002 application and increasing Jerry's child support must be reversed, and the cause remanded with directions that the district court shall, based solely upon the existing evidentiary record, utilize a method for calculating the deduction to be allowed for Jerry's obligation to Kirsty that does not benefit one family at the expense of the other.

Attorney Fees.

[15] Jerry alleges that the district court erred in awarding attorney fees to Wanda. He argues that Wanda's application for modification was frivolous and that there was no rational basis for the award or the amount chosen. Customarily in dissolution cases, attorney fees and costs are awarded only to prevailing parties or assessed against those who file frivolous suits. *Noonan v. Noonan*, 261 Neb. 552, 624 N.W.2d 314 (2001).

[16] Although Jerry now argues that Wanda's application was frivolous, we find nothing in the record to suggest that any such contention was presented to the district court. An appellate court will not consider an issue on appeal that was not passed upon by the trial court. *Professional Bus. Servs. v. Rosno*, 268 Neb. 99, 680 N.W.2d 176 (2004). Moreover, the fees were awarded against Jerry, who did not initiate the modification proceeding, rather than Wanda, who commenced the attempt to modify.

Because we have determined that the district court abused its discretion in granting the support increase to Wanda upon her application, it is not clear that Wanda will be a prevailing party. Because it will be necessary upon remand for the district court to determine what relief, if any, to which Wanda should be entitled, we believe that the best resolution of this assignment is to vacate the order granting attorney fees, for further consideration by the district court upon remand based solely upon the existing evidentiary record.

CONCLUSION

In case No. A-03-375, because we have determined that the district court failed to comply with the mandate of this court in *Mace III*, we reverse the judgment and remand the cause with directions to modify Jerry's support obligation, retroactively to February 1, 1999, to the amounts of $687 for three children, $573 for two children, and $399 for one child.

In case No. A-03-376, the district court's order granting Wanda's October 2002 application and increasing Jerry's child support obligation must be reversed and the cause remanded with directions that the district court shall, based solely upon the existing evidentiary record, utilize a method for calculating the deduction to be allowed for Jerry's obligation to Kirsty that does not benefit one family at the expense of the other. Additionally, the award of attorney fees to Wanda is vacated, and upon remand, the district court shall, based solely upon the existing evidentiary record, determine whether Wanda should be awarded any attorney fees and, if so, the amount thereof.

JUDGMENT IN NO. A-03-375 REVERSED, AND CAUSE REMANDED WITH DIRECTIONS.
JUDGMENT IN NO. A-03-376 REVERSED IN PART AND IN PART VACATED, AND CAUSE REMANDED WITH DIRECTIONS.

RONNIE E. THORNTON, APPELLANT, V.
BARBARA J. THORNTON, APPELLEE.
704 N.W.2d 243

Filed September 13, 2005. No. A-03-1419.

1. **Contempt: Final Orders: Appeal and Error.** An appellate court, reviewing a final judgment or order in a contempt proceeding, reviews for errors appearing on the record.
2. **Judgments: Appeal and Error.** When reviewing a judgment for errors appearing on the record, the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable.
3. **Contempt: Appeal and Error.** A trial court's factual finding in a contempt proceeding will be upheld on appeal unless the finding is clearly erroneous.
4. **Service of Process: Notice.** Pursuant to Neb. Rev. Stat. § 25-517.02 (Reissue 1995), upon motion and showing by affidavit that service cannot be made with reasonable

diligence by any other method provided by statute, the court may permit service to be made (1) by leaving the process at the defendant's usual place of residence and mailing a copy by first-class mail to the defendant's last-known address, (2) by publication, or (3) by any manner reasonably calculated under the circumstances to provide the party with actual notice of the proceedings and an opportunity to be heard.

5. **Statutes: Service of Process.** Statutes prescribing the manner of service of summons are mandatory and must be strictly complied with.
6. **Statutes: Service of Process: Notice.** A statute which authorizes the use of postal service to notify a defendant that he has been sued in court is strictly construed and must be specifically observed.
7. **Jurisdiction.** One who invokes the power of the court on an issue other than the court's jurisdiction over one's person makes a general appearance so as to confer on the court personal jurisdiction over that person.
8. **Jurisdiction: Final Orders: Appeal and Error.** For an appellate court to acquire jurisdiction of an appeal, there must be a final order entered by the court from which the appeal is taken; conversely, an appellate court is without jurisdiction to entertain appeals from nonfinal orders.

Appeal from the District Court for Dakota County: PAUL R. ROBINSON and FRANK J. SKORUPA, County Judges. Orders vacated, and cause remanded for further proceedings.

Alice S. Horneber, of Horneber Law Firm, for appellant.

Bradford Kollars for appellee.

INBODY, Chief Judge, and SIEVERS and CASSEL, Judges.

INBODY, Chief Judge.

INTRODUCTION

Ronnie E. Thornton appeals from orders of the district court for Dakota County, Nebraska, finding him in contempt and awarding Barbara J. Thornton a judgment against him for attorney fees. For the reasons set forth herein, we vacate the orders of the district court and remand the cause for further proceedings.

STATEMENT OF FACTS

On August 26, 2000, the court entered a decree dissolving the parties' marriage. In the decree, the trial court divided the marital estate, specifically finding:

> [I]n this case, [Ronnie] testified that because of his disability he is no longer an active participant in Thornton Plumbing & Heating Partnership or Thornton Plumbing & Heating, Inc. and it can be assumed that his interest is now

> passive. [Ronnie] has also testified that his interest in these businesses has a negative value. Since [Ronnie] has a one-half interest in both it would not be unfair to award that interest to the non-family member nor would it interfere with the management of that business. The only evidence of the value of the partnership and corporation before the court is that given by [Ronnie] of ($1,200.00) subject to a debt of $9,908.00 which the court accepts for a total value of ($11,108.00).

Therefore, the trial court awarded, among other things, the following items to Barbara:

> All of [Ronnie's] interest, real or personal, in and to Thornton Plumbing & Heating, a partnership EI number 42-1310671 including, but not limited to, [Ronnie's] interest in and to The East 75 feet of Lot 12 in Block 40, of Sioux City, in the county of Woodbury and State of Iowa as well as any interest in any other real estate held by [Ronnie] in Dakota County constituting an asset in this partnership and all shares (assumed to be 500 common shares) or other interests held by [Ronnie] in and to Thornton Plumbing & Heating, Incorporated EI number 42-1483118 subject to debt of $9,908.00.

The decree also stated that "within 30 days [Ronnie] and [Barbara] shall execute and deliver to the other party any deed or other documents that may be reasonably required to accomplish the intent of this Decree of Dissolution of Marriage." Further, the decree provided:

> In the event either party shall fail to comply with the provisions of this Decree of Dissolution of Marriage with respect to the Court's decision concerning the division of marital assets within thirty (30) days of the day the Decree is entered, then this Decree shall constitute an actual grant, assignment and conveyance of the title to the property and rights in such manner and with such force and effect as shall be necessary to effectuate the terms of the Decree.

On December 29, 2000, Barbara filed a "Verified Motion for Contempt Citation." In Barbara's motion, she claimed that Ronnie had failed to transfer to Barbara his stock in Thornton Plumbing & Heating, Inc., as ordered in the decree. Barbara also alleged that

her "attempts to seek necessary information concerning Thornton Plumbing, Inc. and Thornton Plumbing & Heating Partnership have been prevented by [Ronnie], in conjunction with" Ronnie's attorney, Alice Horneber, and "by the business entities themselves, through their attorney . . . Horneber, such that the intent of the Court's Decree and its full force and effect is frustrated." Barbara further contended that the "[a]ctions of [Ronnie] constitute knowing and willful violations of the Decree of this Court, which has not been modified, reversed, or set aside, and remains in full force and effect," and that "[t]his action in conjunction with the business entities has prevented [Barbara] from having and exercising her rights as one-half owner of these business entities and depreciate the value of that interest as equitably awarded by this Court." Thus, Barbara asked that Ronnie be held in contempt until he complied with the decree.

On December 29, 2000, the trial court entered an order requiring Ronnie to appear on January 23, 2001, and show cause why he should not be charged with contempt. On February 15, Barbara's attorney appeared before the trial court and informed the court that the Woodbury County, Iowa, sheriff had been unable to serve Ronnie with the summons. On April 16, Barbara filed a "Verified Motion for Substitute Service" alleging that the Woodbury County sheriff's office had been unable to serve Ronnie with a summons on two different occasions. Barbara requested

> leave of Court to allow service to be made by leaving the process at [Ronnie's] usual place of residence and mailing a copy by First Class Mail to [Ronnie's] last known address, and in addition by leaving the process at [Ronnie's] usual place of employment, and mailing a copy by First Class Mail to [Ronnie's] usual place of employment, which shall constitute a manner reasonably calculated under the circumstances [to] provide [Ronnie] with actual notice of the proceeding and an opportunity to be heard.

Barbara's motion for substitute service was sustained by the trial court on April 25, 2001. In its order, the trial court found that "reasonable diligence by any other method provided by statute to obtain service on [Ronnie] has been unsuccessful." The court then

> permit[ed] service to be made by the Woodbury County, Iowa, Sheriff's office by leaving the Summons and Show Cause Order with a person of suitable age or securely affixing the same at a prominent point on said property at both [Ronnie's] usual place of residence and usual place of employment and by [Barbara's] mailing a copy of the Summons and Show Cause Order by First Class Mail to [Ronnie's] last known address of his residence and his place of employment.

The court ordered that after substitute service was complete, "it shall be determined that under the circumstances [Ronnie] has been provided actual notice of the proceedings and an opportunity to be heard."

The record indicates that the Woodbury County sheriff's office successfully posted the summons and show cause order at both Ronnie's last known address and usual place of employment. On May 17, 2001, Barbara filed a "Certificate of Service" indicating that on May 3, the required documents were mailed to Ronnie's last known address, his usual place of employment, and to his attorney's office; however, they were sent via certified mail rather than first-class mail. The record does not include any signed receipts and does include a returned letter sent to Ronnie; therefore, the record contains no evidence that Ronnie ever signed for or received any of the certified letters. On June 8, the trial court made a journal entry finding that "there has been personal service upon [Ronnie] concerning [Barbara's] Application for an Order and Citation for Contempt, and that [Ronnie] is granted 14 days in which to enter his appearance in this matter." Ronnie was ordered to appear before the court on June 13, and the court stated that "his failure to do so shall result in [the trial court's] issuing an Order that an Arrest Warrant for [Ronnie] shall issue."

On May 16, 2002, the trial court made a journal entry regarding Barbara's December 29, 2000, motion for contempt citation. In the journal entry, the trial court found as follows:

> One aspect of these motions was that the Court examine a letter dated March 5, 2002, from Attorney Alice Horneber. Attorney Horneber states, "until such time as [Ronnie] is served with documents in a quasi-criminal proceeding, and retains the services of this office to represent him and

prepare for court proceedings, I am not in a position to appear on his behalf". Notice from the Court and subsequent letter from the undersigned made it clear that the subject matter of the March 11, 2002, hearing was the afore cited motion for contempt. There was never any indication to [Ronnie] or his attorney that he might be 'served with documents in a quasi-criminal proceeding'. The attorney for [Ronnie] apparently continued to represent him in the underlying dissolution. The motion for contempt was a result of [Ronnie's] failure to comply with the Order of Dissolution. The Court finds no basis for [Ronnie] to refer to a possible quasi-criminal proceeding nor his attorney to question her retention for such a proceeding. If Attorney Horneber is no longer retained in this dissolution proceeding the motion to withdraw should have been filed long ago. In this regard, this same motion for contempt was set for hearing in October of 2001. At that time, the attorney for [Ronnie] stated she would not be present for the hearing. There was no mention of a quasi-criminal proceeding only a statement that attorney Horneber would be in Court elsewhere, the foregoing was imparted to the Court via a copy of a letter sent to [Barbara's] attorney . . . . The Court was not informed that Attorney Horneber had withdrawn and quite obviously had failed to move for a continuance. The Court further notes that the motion for contempt was set for hearing in May of 2001 and [Barbara] and her attorney appeared but [Ronnie] and his attorney failed to appear. Finally, the Court finds that [Ronnie] has had more than ample opportunity and time to respond to the verified motion for contempt and has failed to do so. The Court finds that [Ronnie] is in Contempt of the Order and Judgment of the Court entered on August 26, 2000.

The Court ORDERS that [Ronnie] comply with the Order and Judgment by June 3, 2002, and provide the Court with evidence of compliance by said date. Should [Ronnie] fail to comply, he should appear for sentencing on June 10, 2002, at 1:00 p.m. [Ronnie] is admonished that should he desire representation that he insures that he obtains counsel in light of some of the foregoing.

> Relative to the question of sanctions against Attorney Horneber, the Court continues to take that under advisement.

Ronnie did not comply with the court's order by June 3, 2002, nor did he appear for sentencing on June 10. On November 5, Barbara filed an affidavit alleging that Ronnie had not complied with the parties' dissolution decree and had not appeared on June 10. In the affidavit, Barbara gave Ronnie's last known address and alleged that "[e]xtradition of [Ronnie] may be necessary." Finally, Barbara claimed that "[t]he Court should issue an order for the arrest of [Ronnie], wherever he may be found, for contempt of Court and failure to appear before the Court as ordered." On November 19, the trial court entered an "Order and Bench Warrant for Contempt and Failure to Appear." In the order, the trial court found that Ronnie had willfully violated existing orders of the court, that he continued to be in contempt of the court's orders, and that he had failed to appear before the court as ordered.

On August 19, 2003, Ronnie filed a "Verified Motion for Contempt Citation" alleging that Barbara had "intentionally, willfully, and without just cause prevented [Ronnie] from having any meaningful contact" with the parties' minor son, Seth. The motion contended that Barbara had "intentionally, willfully, and without just cause refused to release" items awarded to Ronnie in the parties' divorce decree and that Barbara had "destroyed the items and/or caused them to be destroyed such that they are now without value." On August 21, a citation to show cause was issued to Barbara ordering her to "show cause, if any [she] may have, why [she] should not be accused, and placed upon trial and punished for contempt of Court."

On September 8, 2003, Ronnie filed a special appearance "objecting to the jurisdiction of the Court over the person of [Ronnie]." He alleged that after Barbara filed her motion for contempt citation, he was never personally served with any of the documents filed by her. Ronnie claimed that Barbara "seeks to have the Court punish [Ronnie] by fine and by imprisonment. Such actions are deemed criminal in nature and governed by the same rules. . . . Such action requires actual personal service upon [Ronnie]." Ronnie asserted that Barbara "obviously recognizes [the] requirement [of personal service] in that [Barbara]

has attempted personal service upon [Ronnie], albeit in an improper method" and that Barbara "did attempt service simply by mailing some documents to [Ronnie's] counsel; however, those mailings . . . were sporadic and were not all inclusive." Ronnie further alleged that Barbara "has not met the requirements of service for the type of action she attempts to prosecute against [Ronnie]."

Ronnie filed a "Motion to Set Aside Journal Entry Filed May 16, 2002 and Order and Bench Warrant of November 19, 2002," on September 9, 2003. In this motion, Ronnie claimed the following:

> 1. [Barbara] has filed numerous documents in the above-referenced matter. She also caused various orders and journal entries to be entered. Some of those documents were sent to [Horneber], others were not.
>
> 2. A review of the Court file indicates that there were numerous communications between the Court and counsel for [Barbara] about which neither [Ronnie] nor [Horneber] were made aware. This is reflected by the fact that the Court file indicates orders being entered when no notices of hearing were set and hearings being set but never taking place.
>
> 3. On May 7, 2002, counsel for [Barbara] confirmed telephone calls between himself and the Court, subsequent to which counsel for [Barbara] appears to have prepared a proposed Journal Entry. It further appears that there was a telephone conversation between counsel for [Barbara] and the Court on May 9, 2002, concerning a draft the Court provided solely and only to counsel for [Barbara] on May 8, 2002.
>
> 4. A letter was directed by [Horneber] to the Court via mail and fax on May 15, 2002. It states: "I am unable to specifically address what [Barbara's counsel] told the Court so as to having orders entered subsequent to the Decree. [Barbara's attorney] obviously felt it appropriate to have ex parte communications with the Court while asserting, at the same time, that I am an attorney of record." . . .
>
> 5. Without hearing or addressing the above-referenced letter, a Journal Entry was filed on May 16, 2002.

> 6. The Journal Entry filed on May 16, 2002, and the decision announced and/or to be entered in conjunction with the proceedings held on June 10, 2002, were appealed.
>
> 7. The Nebraska Supreme Court dismissed the appeal stating, "Order appealed from is not a final, appealable order."
>
> 8. Thereafter, [Barbara] filed an Affidavit on November 5, 2002. Neither [Ronnie] nor [Horneber] were served with that Affidavit. Thus, without the knowledge of [Ronnie] or [Horneber], the Court entered an Order and Bench Warrant for Contempt and Failure to Appear on November 19, 2002.
>
> 9. Subsequent to the filing of her Verified Motion on December 29, 2000, [Barbara] has prosecuted her matter in such a way as to cause confusion and improper orders being entered with regard to [Ronnie]. [Barbara] appears to take the position that service is accomplished simply by serving [Horneber]; however, on numerous occasions, [Barbara] has failed to serve documents upon [Horneber], had ex parte communications with the Court, and had orders setting hearings entered without anything pending before the Court and without [Horneber's] knowledge.
>
> 10. [Barbara's] failure to follow a simple, direct and appropriate route has resulted in confusion and prejudice to [Ronnie]. The Journal Entry entered on May 16, 2002 (which is not a final order) and the Order and Bench Warrant for Contempt and Failure to Appear entered November 19, 2002, should be set aside in their entirety.

Also on September 9, 2003, a hearing was held on the parties' pending motions for contempt citations. The trial court first took up the matter of whether Ronnie had complied with the dissolution decree. Ronnie testified in his own behalf. He testified that he had not transferred stock in the Thornton plumbing corporation to Barbara "[b]ecause the business by-laws by the State of Iowa say they can't be transferred, the way I understand it." Ronnie testified that he had been informed by certified public accountants that the effect of the divorce decree was that he "forfeited" Thornton Plumbing & Heating to his brother, Lonnie Thornton, who was the sole stockholder "according to the Iowa

by-laws." Ronnie said that he "didn't have any interest [in the Thornton plumbing corporation], it was taken from me."

When asked if Ronnie had done everything that he could to comply with the court's decree, Ronnie replied, "[a]s far as my knowledge to what goes on with legal matters in corporations and business, I've done everything I can [to] comply, my hands are tied as far as giving what I can give, [and not giving] what [I] can't give, according to the Iowa law." Ronnie testified that he believed the court's decree had the effect of eliminating any interest he had in the Thornton plumbing businesses. He stated, "I knew that the business would be handed over to Lonnie automatically according to the law because the stocks could not be transferred and if — and if they were, then all the stock would automatically go to Lonnie, that was in the by-laws."

On cross-examination, Ronnie admitted that he had not transferred his interest in the Thornton plumbing partnership because "there was so much money owed with the bank against the partnership that that wasn't allowable, either." Ronnie testified that the sources of legal advice he and Lonnie had received came from certified public accountants and Horneber. Ronnie testified that he had not received any benefits from the ownership of the corporation or the partnership because "[t]here was — there's so much money owed against that business that there couldn't possibly be a dime taken out of it to give to anybody."

On redirect examination, Ronnie testified that loans had been made to the plumbing businesses and that the lending institutions had taken as security "all of the properties, all the equipment, everything that they could attach." Ronnie said that he was not "at will to transfer anything without satisfying the lending institutions." Ronnie also testified that "not only were the businesses required to pay these debts, but [Ronnie and Lonnie] personally [were] required to pay them too."

Following arguments from the parties, the trial court noted as follows:

> [I]t's clear that [Ronnie] has failed to comply with the decree [entered] on August 2[6], 2002 — or excuse me, 2000. He has failed to show to the court adequately why he has failed to comply with that decree, and therefore, [Ronnie], I'm inclined to remand you to custody until such

> time as you do comply or show why you have not complied. You haven't done so today. I have a feeling you're not going to. You're gonna drag this out for as long as you can. And it's not gonna happen anymore. You can drag it out for as long as you can, but you're gonna be sitting in jail while you drag it out.
>
> . . . .
>
> . . . The court finds that you are in contempt. That finding has already been made by Judge Robinson, that you are in contempt. The court today finds that you have failed to show cause why you should not be sentenced . . . and therefore you are to be held in custody until such time as you have shown to the court adequately that you have complied with the decree of August 2[6], 2000. I will give you further opportunity to show cause why you should be released from custody, but understand, it's going to be up to you to show why you should be released from custody. You understand that. And so after we complete the other hearing this morning, you are remanded to custody.

Next, the parties were heard on Ronnie's August 19, 2003, motion for contempt against Barbara, which motion claimed that she failed to turn over property decreed to Ronnie, destroyed some of that property, and interfered with his visitation with the parties' minor child. Barbara testified in her own behalf. She testified that she had never "intentionally, willfully, or without just cause prevented [Ronnie] from seeing his [minor] son . . . Seth." Barbara said that she had not come in between Ronnie and Seth and that she had tried to encourage visitation. She testified that visitation has occurred and that Seth and Ronnie "seem to have a good time." Barbara also testified that Ronnie had attempted only one time to retrieve the property awarded to him in the decree. The items were at the marital residence, and Ronnie came to the residence and was threatening to take things not awarded to him in the decree. Barbara said that she called the police and that the police handled the situation from there. Barbara said that since that date, Ronnie had never attempted to retrieve any of the property. Barbara testified that she had no problem with Ronnie retrieving the property, "as long as he does it in a proper and peaceful fashion."

Barbara testified that she was unfamiliar with $200 in cash that Ronnie, in his motion for contempt, had claimed he was owed. She also testified that she had not "intentionally, willfully, and without just cause refused to timely pay the outstanding mortgage" on the marital residence. She said: "The bills were late, simply because I didn't have the money to pay them. I paid them as soon as I possibly could. I don't believe they were ever past a month late. That was the roof over my children's head. I paid it first above all." She also testified that she was unaware of any effect the late payments had had on Ronnie's credit. She also asked the court to award attorney fees to her because she believed that "this whole matter concerning the contempt citation filed, not only by [Ronnie], but the one that [Barbara] had to file, is of a frivolous nature."

On cross-examination, Barbara said that she had not removed from the marital residence any of the items awarded to Ronnie in the decree and that she was unaware of any additional attempts by Ronnie to get the property. Regarding visitation, Barbara said that "Ron[nie] had threatened Seth, and told him if he didn't come for visitation he would take him or send Boys and Girls Home after him." She said that "Seth was 15 . . . and he has his own choices." Barbara said that she encouraged Seth to visit Ronnie but that she "did not force him. He was 15 years old." Barbara conceded that Ronnie wanted to exercise visitation with Seth. She also conceded that Ronnie had not received all of the property awarded to him in the decree.

Ronnie again testified in his own behalf. He said that he and Barbara had "been awarded joint custody of Seth." Ronnie said that he had tried to call Seth on numerous occasions, but that no one answered the telephone. He went to Barbara's residence on one occasion to visit, but when Barbara came home, she made him leave. He said that he believed his relationship with Seth was being blocked by Barbara and her attorney. Ronnie said that Barbara had Seth read the parties' divorce decree. He also testified that "Barb[ara] made the comment that when I divorced her, I divorced them kids and she told the kids that." Ronnie said that in 2001, he was allowed to see Seth "[n]ot at all, hardly," and that in 2002, he was allowed to see Seth "[a] couple times, I guess, three times, maybe." Regarding the property Ronnie

was awarded and did not receive, he said that Barbara had moved some items to a different location. He said that he had made efforts, personally and through Horneber, to get the items from Barbara but that he had not gotten them. He also testified that he was very concerned with the condition of the items. Finally, he testified that his name is still on the mortgage for the marital residence, that he has received late payment notices, and that his credit has been damaged.

On cross-examination, Ronnie conceded that he and Barbara did not have joint custody of Seth and that while Ronnie wanted visitation with Seth, Ronnie did not file anything with the trial court when the visitation did not occur. At the conclusion of the testimony, the trial court found that "the citation with regard to visitation should be and is hereby dismissed." The trial judge specifically noted:

> I'm hard pressed to find that at after three years [Ronnie] is complaining about the visitation and when you're talking about a 15 to an 18 year old boy, although reasonable rights of visitation are generally defined under Wilson v. Wilson, [224 Neb. 589, 399 N.W.2d 802 (1987),] that doesn't necessarily mean that in each case those are what reasonable visitation is. You have to take into account the — the children themselves. And — and if there were, in fact, problems with visitation, [Ronnie] could have been in here much sooner than three years after the events of which he complains.

The trial court also ordered Barbara to make available to Ronnie any property awarded to him in the decree that he had not yet received. The judge noted that "[w]ith regard to the [$200] cash, I'm not going to address that at this time." The court found that Barbara had not "intentionally, willfully, or without cause refused to make timely payments on the mortgage payments and that part of the citation is dismissed." The court took the matter of attorney fees under advisement and remanded Ronnie to custody. Horneber asked the court "for some specifics because in the documentation other than it states shares of stock, one doesn't know what else is expected or anticipated." The trial court notified Ronnie that he "need[s] to

transfer whatever interest is provided by — in the decree to [Barbara]. I'm not going to address that further."

Also on September 9, 2003, Ronnie filed a "Notice of Compliance" claiming the following:

> 3. In compliance with the Court's Decree, [Ronnie] has drafted, executed, and delivered the following:
>
> A. Stock certificate for Thornton Plumbing & Heating, Inc. reflecting 500 shares in the name of Ronnie E. Thornton dated January 29, 1999, and sold, assigned, and transferred unto Barbara J. Thornton . . . by date of September 9, 2003.
>
> B. Assignment of Ronnie E. Thornton, General Partner, in Thornton Plumbing & Heating, partnership EI Number 42-1310671, an Iowa partnership, assigned to Barbara J. Thornton dated September 9, 2003;
>
> C. Quit Claim Deed from Ronnie E. Thornton to Barbara J. Thornton for the East 75 feet of Lot 12 in Block 40 of Sioux City, County of Woodbury and State of Iowa dated September 9, 2003;
>
> D. Quit Claim Deed from Ronnie E. Thornton to Barbara J. Thornton for Lot 17 Island Homes Addition, Third Filing, Dakota County, Nebraska, dated September 9, 2003.
>
> 4. With the above, [Ronnie] has transferred all of his interest, real or personal, in and to Thornton Plumbing & Heating, an Iowa general partnership and to Thornton Plumbing & Heating, Inc., all to Barbara J. Thornton.

A further hearing was held on September 12, 2003, regarding the notice of compliance. Horneber said that Ronnie "has prepared, signed, and given to the court all documentation . . . that can effectuate a complete and total transfer of his interest" in the businesses. A quitclaim deed was entered into evidence indicating that on January 14, 2003, Ronnie had deeded to Lonnie the same real estate awarded to Barbara in the dissolution decree. A warranty deed was also entered into evidence showing that also on January 14, Lonnie conveyed the same real estate to a third party. Ronnie admitted that he had purported to convey this same real estate to Barbara on September 9 and that on that date, "he had no titled interest in the real estate," while he did have a titled interest in the real estate on the date of the decree.

When asked why Ronnie made the January 14, 2003, transfer, Horneber replied:

> Because we had a huge number of debts with the Dakota County Bank and he was a personal guarantor on those debts. [Barbara] did not come in and sign off at the Dakota County Bank to be a personal guarantor on those debts. At the end of 2000, Judge, this business was not making its payments and the bank was coming to [Ronnie] and telling him that this business is not making his payments, it's payments we want you, as the personal guarantor, to take care of these debts. So, the end effect is that the bank insisted that these debts get paid. The way the debts got paid, Your Honor, was that the bank insisted that somebody take care of the debts. Ron[nie] didn't have any ability to take care of these debts, Your Honor, so, Lon[nie] went and took over the obligation and made sure that the debts were paid with Dakota County Bank, and that's . . . in conjunction with the warranty deed then from Lon[nie] to the [third party], and that's how all of the debts got paid at the — or how some of the debts, or the debts got paid at the Dakota County Bank, because Dakota County Bank had a complete real estate mortgage and a complete security interest in all of this property with regard to the business, Your Honor.

The trial court found that Ronnie "has tried to pull the wool over the eyes of [Barbara] by . . . conveying something that he knew full well he didn't have the authority to convey. . . . [I]f it was to defraud the court or to defraud [Barbara], I don't know." The court further stated that "[b]y giving [Barbara] a sham deed, that's certainly not complying with — with the decree. . . . Conveying the real estate to his brother in order to get out of conveying it to [Barbara] is not a reason why he can't comply." Horneber then noted that she and Ronnie "know of nothing to do with regard to the assignment of the partnership interest with regard to the stock, there's nothing else that can be done." The trial court then found that Ronnie had "failed to comply with the decree," and the court "remanded [him] to custody until such time as [he has] shown full compliance." Again, Horneber asked the court for direction on how to comply. The judge replied that

Ronnie "better find out a way to get that real estate back from the [third party] and convey it to whom it belongs. . . . [H]e needs to comply with the decree. That's all I'm saying."

On September 16, 2003, the trial court entered an order overruling Ronnie's special appearance and overruling Ronnie's motions to set aside the May 16, 2002, journal entry and the November 19, 2002, order and bench warrant. The court further dismissed Ronnie's contempt motion against Barbara, but it did order that Barbara make available to Ronnie certain items of personal property in her possession. The court also found that "the question of cash in the amount of $200.00 is reserved to be ruled on at a later date."

Also on September 16, 2003, the trial court filed another order finding that Ronnie had "failed to show that he has complied with the Decree entered in this matter on August 26, 2000." Further, since Ronnie was previously found to be in contempt of the judgment of the court entered on August 26, 2000, the court found that Ronnie "should be and is hereby sentenced to incarceration in the Dakota County Jail until such time as he is able to show to the Court that he has complied with said Decree."

On November 19, 2003, a hearing was held on Barbara's request for attorney fees. At the hearing, the parties stipulated that a rate of $100 per hour was a fair and reasonable hourly rate. The court took judicial notice of pertinent exhibits, and Barbara entered an additional affidavit regarding attorney fees she had incurred. At the conclusion of the hearing, the trial court took the matter under advisement. On November 20, the court entered its award. The court stated:

> Reviewing the Court's involvement in this matter, it is clear that since the entry of the decree in this matter [Ronnie] has acted in bad faith, requiring [Barbara] to file the necessary pleadings in an attempt to enforce the decree that was entered in this matter some three years ago. Even to this date, [Ronnie] has failed to comply with the requirements of the decree.

Accordingly, the trial court found that Barbara "should be and is hereby allowed an attorney fee in the amount of $2,927.70 and [that] judgment is awarded to [Barbara] and against [Ronnie] in that amount." Ronnie has appealed to this court.

ASSIGNMENTS OF ERROR

Ronnie alleges, restated, that the trial court erred in (1) finding that there had been effective service upon him, (2) finding him in contempt of the parties' decree of dissolution, (3) overruling his special appearance and his motion to set aside the May 16, 2002, journal entry and the November 19, 2002, order and bench warrant, (4) holding a hearing solely on whether he had complied with the decree, (5) failing to find Barbara in contempt of the parties' dissolution decree, (6) sentencing him to incarceration until he complied with the decree, (7) failing to award him $200 in cash that he was awarded in the decree, and (8) awarding Barbara attorney fees in the amount of $2,927.70.

STANDARD OF REVIEW

[1-3] An appellate court, reviewing a final judgment or order in a contempt proceeding, reviews for errors appearing on the record. *City of Beatrice v. Meints*, 12 Neb. App. 276, 671 N.W.2d 243 (2003). When reviewing a judgment for errors appearing on the record, the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable. *Id.* A trial court's factual finding in a contempt proceeding will be upheld on appeal unless the finding is clearly erroneous. *Id.*

ANALYSIS

Personal Service.

Ronnie first alleges that the trial court erred when it found that there had been "personal service" upon him. It is true that on June 8, 2001, the trial court made a journal entry finding that "there has been personal service upon [Ronnie] concerning [Barbara's] Application for an Order and Citation for Contempt." The record does not support a finding of "personal service," because it is clear that Ronnie was never personally served. However, the trial court had earlier granted Barbara's motion for substitute service, and we believe that the court's journal entry was intended to convey that substitute service had been effectively completed. Therefore, we must address whether the substitute service upon Ronnie was effective.

In its order granting Barbara's motion for substitute service, the court

> permit[ed] service to be made by the Woodbury County, Iowa, Sheriff's office by leaving the Summons and Show Cause Order with a person of suitable age or securely affixing the same at a prominent point on said property at both [Ronnie's] usual place of residence and usual place of employment and by [Barbara] mailing a copy of the Summons and Show Cause Order by First Class Mail to [Ronnie's] last known address of his residence and his place of employment.

However, although the record does show that the Woodbury County sheriff's office did affix the summons and show cause order as ordered by the trial court, Barbara did not strictly comply with the order. The documents she was ordered to send to Ronnie were sent via certified mail, rather than by first-class mail as ordered by the trial court.

[4] The acceptable methods of substitute service in Nebraska are found in Neb. Rev. Stat. § 25-517.02 (Reissue 1995), which provides:

> Upon motion and showing by affidavit that service cannot be made with reasonable diligence by any other method provided by statute, the court may permit service to be made (1) by leaving the process at the defendant's usual place of residence and mailing a copy by first-class mail to the defendant's last-known address, (2) by publication, or (3) by any manner reasonably calculated under the circumstances to provide the party with actual notice of the proceedings and an opportunity to be heard.

[5,6] Therefore, both the statute and the court's order required Barbara to mail a copy of the process by first-class mail rather than by certified mail. Statutes prescribing the manner of service of summons are mandatory and must be strictly complied with. *Anderson v. Autocrat Corp.*, 194 Neb. 278, 231 N.W.2d 560 (1975). A statute which authorizes the use of postal service to notify a defendant that he has been sued in court is strictly construed and must be specifically observed. *Id.* Further, the record establishes that the certified letters sent to Ronnie were not accepted by Ronnie, and there is no showing that these certified letters were ever received by him. As a result, we find that there was no effective substitute service upon Ronnie and that the district

court erred when it found that Ronnie had been effectively served. Because there was no effective service upon Ronnie at the time he was found in contempt and because he had not yet voluntarily submitted to the court's jurisdiction, the trial court lacked jurisdiction over Ronnie at that time. The trial court erred when it overruled Ronnie's special appearance on the basis that service had already been perfected upon him. Further, the court's May 16, 2002, journal entry finding Ronnie in contempt of the August 26, 2000, decree, its November 19, 2002, order and bench warrant, and its November 20, 2003, award of attorney fees to Barbara are all vacated.

Ronnie's Motion for Contempt Citation.

[7] Ronnie next alleges that the trial court erred when it failed to grant his motion for contempt against Barbara. Ronnie filed a "Verified Motion for Contempt Citation" against Barbara on August 19, 2003. When Ronnie filed the motion, he voluntarily submitted to the court's jurisdiction over him. See *Galaxy Telecom v. SRS, Inc., ante* p. 178, 689 N.W.2d 866 (2004) (one who invokes power of court on issue other than court's jurisdiction over one's person makes general appearance so as to confer on court personal jurisdiction over that person). In the motion, Ronnie asked the court to find Barbara in contempt for "intentionally, willfully, and without just cause" preventing Ronnie from (1) having any meaningful contact with Seth, (2) refusing to release certain property and $200 cash awarded to Ronnie in the decree, (3) destroying those items or causing them to be destroyed such that they are now without value, and (4) refusing to timely pay the outstanding mortgage on the marital residence, resulting in the mortgage holder continuously contacting Ronnie for payment and threatening foreclosure proceedings.

[8] Although the trial court, in its September 16, 2003, order, found that "[t]he claims contained in [Ronnie's] Verified Motion for Contempt are without merit and said Motion is dismissed," the court also held that "the question of cash in the amount of $200.00 is reserved to be ruled on at a later date." Therefore, regarding Ronnie's motion, the trial court failed to dispose of all the issues raised. As such, the trial court's ruling on Ronnie's motion is not final. For an appellate court to acquire jurisdiction

of an appeal, there must be a final order entered by the court from which the appeal is taken; conversely, an appellate court is without jurisdiction to entertain appeals from nonfinal orders. *Mumin v. Dees*, 266 Neb. 201, 663 N.W.2d 125 (2003). Therefore, we lack jurisdiction to decide this issue.

Additional Assignments of Error.

We need not address Ronnie's additional assignments of error, because they have been either addressed earlier or deemed moot by our earlier holdings.

CONCLUSION

We find that the trial court did not have jurisdiction over Ronnie when it found him in contempt; it did not have jurisdiction over him until he voluntarily submitted to the court's jurisdiction by filing his motion for contempt. We vacate the trial court's May 16, 2002, journal entry finding Ronnie in contempt, its November 19, 2002, order and bench warrant, the portion of its September 16, 2003, order sentencing Ronnie for contempt, and its November 20, 2003, award of $2,927.70 in attorney fees to Barbara. The matter is remanded to the trial court for further proceedings consistent with this opinion.

ORDERS VACATED, AND CAUSE REMANDED FOR FURTHER PROCEEDINGS.

STATE OF NEBRASKA, APPELLEE, V.
CHRISTOPHER M. ELLINGSON, APPELLANT.
703 N.W.2d 273

Filed September 13, 2005. No. A-04-837.

1. **Courts: Appeal and Error.** In reviewing decisions of the district court which affirmed, reversed, or modified decisions of the county court, a higher appellate court will consider only those errors specifically assigned in the appeal to the district court and again assigned as error in the appeal to the higher appellate court.
2. **Criminal Law: Appeal and Error.** When an assignment of error is generalized and vague, an appellate court will review the appeal if the specific contention made by the criminal defendant is set forth in his or her brief and the State, through its brief, has argued in response to that contention.
3. **Convictions: Appeal and Error.** In reviewing a criminal conviction, an appellate court does not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence. Such matters are for the finder of fact, and a conviction

will be affirmed, in the absence of prejudicial error, if the properly admitted evidence, viewed and construed most favorably to the State, is sufficient to support the conviction.

4. **Criminal Law: Convictions: Evidence: Appeal and Error.** When reviewing a criminal conviction for sufficiency of the evidence to sustain the conviction, the relevant question for an appellate court is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.
5. **Arrests: Motor Vehicles: Proof.** An attempt to arrest is an essential element of the offense of fleeing in a motor vehicle to avoid arrest, but proof that the defendant actually committed the law violation for which the arrest was attempted is not required.
6. **Arrests: Words and Phrases.** An arrest is taking custody of another person for the purpose of holding or detaining him or her to answer a criminal charge. It is defined as the taking, seizing, or detaining of the person of another.
7. **Arrests.** To effect an arrest, there must be actual or constructive seizure or detention of the person arrested, or his or her voluntary submission to custody, and the restraint must be under real or pretended legal authority.
8. **Arrests: Search and Seizure: Police Officers and Sheriffs: Probable Cause.** The validity of a warrantless arrest and the permissibility of a search incident thereto are premised upon the existence of probable cause, not on a police officer's knowledge that probable cause exists.
9. **Arrests: Probable Cause.** The test of probable cause for a warrantless arrest is whether, at the moment of the arrest, the facts and circumstances within the officers' knowledge and of which they had reasonably trustworthy information were sufficient to warrant a prudent person in believing that the defendant had committed or was committing an offense.
10. **Police Officers and Sheriffs: Arrests: Probable Cause.** Probable cause for a warrantless arrest is to be evaluated by the collective information of the police engaged in a common investigation.
11. **Criminal Law: Police Officers and Sheriffs.** There must be some sort of affirmative physical act, or threat thereof, for the offense of obstructing a peace officer to occur.
12. ____: ____. Running away from officers has been held to be a violation of Neb. Rev. Stat. § 28-906(1) (Reissue 1995) when the physical obstacle interposed by the act obstructs, impairs, or hinders the officers' efforts to preserve the peace.
13. **Criminal Law: Words and Phrases.** "Preservation of the peace," as used in Neb. Rev. Stat. § 28-906(1) (Reissue 1995), means maintaining the tranquility enjoyed by members of a community where good order reigns.
14. **Investigative Stops: Probable Cause.** Limited investigatory stops are permissible only upon a reasonable suspicion, supported by specific and articulable facts, that the person is, was, or is about to be engaged in criminal activity.
15. **Probable Cause: Words and Phrases.** Reasonable suspicion entails some minimal level of objective justification for detention, something more than an inchoate and unparticularized suspicion or "hunch," but less than the level of suspicion required for probable cause.
16. **Police Officers and Sheriffs.** Whether a police officer has a reasonable suspicion based on sufficient articulable facts requires taking into account the totality of the circumstances.

17. **Police Officers and Sheriffs: Investigative Stops: Probable Cause.** An officer making a traffic stop need not be aware of the factual foundation for the basis of the stop, so long as the factual foundation is sufficient to support a reasonable suspicion.

Appeal from the District Court for Sarpy County, GEORGE A. THOMPSON, Judge, on appeal thereto from the County Court for Sarpy County, TODD HUTTON, Judge. Judgment of District Court affirmed.

James Martin Davis, of Davis & Finley Law Offices, for appellant.

Jon Bruning, Attorney General, and James D. Smith for appellee.

IRWIN, SIEVERS, and CASSEL, Judges.

CASSEL, Judge.

INTRODUCTION

Christopher M. Ellingson appeals the order of the district court for Sarpy County which affirmed his county court convictions for misdemeanor operation of a motor vehicle to avoid arrest and for obstruction of a peace officer. Because we conclude that the evidence was sufficient to support Ellingson's conviction on each count, we affirm.

BACKGROUND

On September 13, 2002, the State filed its operative complaint charging Ellingson with misdemeanor operation of a motor vehicle to avoid arrest, a Class I misdemeanor in violation of Neb. Rev. Stat. § 28-905(1) (Cum. Supp. 2004), and with obstructing a peace officer, a Class I misdemeanor in violation of Neb. Rev. Stat. § 28-906(1) (Reissue 1995). The complaint contained two other charges, but they were dismissed at trial and are not the subject of this appeal.

Prior to trial, Ellingson filed motions to suppress his statements and all evidence seized during the stop, questioning, and arrest. At trial, Ellingson withdrew his motions to suppress.

On December 11 and 12, 2003, the county court conducted a bench trial on the charges. Considering our standard of review, we summarize the evidence in the light most favorable to the State. See *State v. Muro*, 269 Neb. 703, 695 N.W.2d 425 (2005).

On September 7, 2002, at approximately 3 a.m., Officer Kurt Stroeher of the Bellevue Police Department was on duty and in uniform, operating stationary radar. Stroeher initially testified that at rollcall at the beginning of Stroeher's shift, Stroeher was advised that Ellingson had been involved in a domestic assault against his wife earlier in the evening and that he might be driving a white BMW. Stroeher was instructed that if he encountered Ellingson, Stroeher was to stop Ellingson, take him into custody, and make contact with an "Officer Lowery." Stroeher later testified that he recalled hearing the vehicle's description at rollcall but that if he heard Ellingson's name prior to stopping him, Stroeher did not remember it. During Stroeher's shift on September 7, he saw a white BMW and followed the vehicle until he received confirmation that it was the vehicle mentioned at rollcall. Stroeher activated his patrol car's red lights and siren, and Ellingson, who was driving the BMW, immediately pulled over and stopped. Stroeher's patrol car was situated behind Ellingson's vehicle, with a video camera focused on Ellingson's vehicle. The trial court received the resulting videotape into evidence.

Stroeher approached the driver's side of the BMW and asked Ellingson to produce his driver's license, registration, and proof of insurance. Ellingson responded, "What did I do?" Stroeher requested the documents two more times. Ellingson said, "I was doing the speed limit." Ellingson produced at least some of the documents. Stroeher informed Ellingson that he had been stopped because of an incident the previous afternoon involving Ellingson's wife. Ellingson denied knowing anything about an incident involving his wife. Stroeher told Ellingson that he would do some more checking to determine whether Stroeher needed to discuss the matter further with Ellingson or whether the case had been resolved. Stroeher informed Ellingson that another police officer had talked to Ellingson's wife the preceding afternoon about a "problem" that Ellingson and his wife had had. Ellingson again denied knowledge of the incident. As Stroeher was about to walk away from Ellingson's vehicle, Ellingson said that he had been at work from 8 a.m. until 4 p.m. on the preceding day. Stroeher asked Ellingson whether an argument had occurred the preceding afternoon, and Ellingson replied that nothing had happened. Ellingson remained in his vehicle while Stroeher walked

toward his patrol car to consult with Sgt. Timothy Hrbek, the backup police officer and shift supervisor who had arrived at the scene after the stop and who was also in uniform. The emergency lights on Stroeher's patrol car were still engaged.

Stroeher called the police dispatcher and received confirmation that police had been at Ellingson's residence at 3:05 p.m. the preceding afternoon in response to a domestic violence complaint. Hrbek advised Stroeher that Lowery wanted Ellingson "booked" for third degree assault and false imprisonment. Stroeher deduced aloud that it was because of these possible charges that Ellingson "was intent on telling me" that he had been at work until 4 p.m. Hrbek then recalled that Lowery had gone to Ellingson's workplace the preceding day but that Ellingson was not present and had departed from work 20 or 30 minutes early. Stroeher expressed uncertainty as to whether certain events occurred the preceding afternoon or the day before that, but he considered Ellingson's claims of being at work to be inconsistent with the time of the domestic violence complaint. Stroeher and Hrbek decided to arrest Ellingson. At trial, Stroeher testified that he had intended to arrest Ellingson "on the domestic violence charge."

In order to effectuate the arrest, Stroeher approached Ellingson's vehicle from the rear on the driver's side. Ellingson sat in the vehicle with the driver's-side door closed and the window open, using a cellular telephone. Stroeher told Ellingson to exit the vehicle. Ellingson responded, "Why?" Stroeher told Ellingson two more times to exit the vehicle, but Ellingson refused. Hrbek approached Ellingson's vehicle from the rear on the passenger's side. Hrbek opened the passenger door of Ellingson's vehicle. Stroeher ordered Ellingson to "[h]ang up the phone [and g]et out of the car." Ellingson started the vehicle, revved the engine, and drove away from the scene.

After Ellingson started the vehicle, Stroeher reached inside the vehicle in an attempt to turn off the ignition. He withdrew his hand when Ellingson began to drive away. Hrbek believed Stroeher was being dragged by Ellingson's vehicle. Hrbek drew his gun and fired one shot at Ellingson's vehicle, shattering the rear window. Stroeher and Hrbek entered their patrol cars and pursued Ellingson through a residential area with their cars' lights and sirens engaged, traveling at approximately 50 miles per hour.

After about a 90-second chase during which Ellingson ran a stop sign, Ellingson stopped in a cul-de-sac.

Stroeher, who was pointing his weapon at Ellingson, repeatedly ordered Ellingson to exit his vehicle and show his hands. Ellingson exited the vehicle. Initially, Ellingson had his left arm in the air with his palm facing forward and his right hand appeared to be behind his back, dropping an object into the car. Ellingson briefly placed both arms in the air with his palms facing forward, but he immediately moved his arms to his sides with his palms facing the rear. Stroeher and Hrbek repeatedly ordered Ellingson to get on the ground. Ellingson asked, "Why?" He folded his arms and remained standing. Ellingson then extended his arms slightly to the sides with his palms forward and continued to ask "Why?" in response to repeated commands to get on the ground. Hrbek shot Ellingson in the chest with a stun gun, and Ellingson fell to the ground. Stroeher handcuffed Ellingson, informed Ellingson that he was under arrest, and began reciting —but failed to totally pronounce—the *Miranda* rights.

Stroeher informed Ellingson that Stroeher had initially stopped Ellingson to arrest him for third degree assault, that Stroeher's hand was inside Ellingson's vehicle when Ellingson drove away, and that Stroeher could have been dragged by Ellingson's vehicle. Ellingson said, "I'm sorry. You just scared me because every time [indiscernible] hop out or whatever, you arrest me." Stroeher told Ellingson that Stroeher had indeed intended to arrest him. Ellingson conversed with Stroeher until paramedics arrived. Ellingson had suffered a superficial gunshot wound to his shoulder, where the bullet from Hrbek's gun had entered and exited.

At trial, Ellingson testified that when Hrbek opened the passenger door of Ellingson's vehicle, Ellingson was not aware that any officer other than Stroeher was in the area. Ellingson claimed that he drove away from Stroeher and Hrbek because he was "spooked" when an unknown person opened the passenger door. Ellingson testified that he did not know he was under arrest and that he believed he was free to leave. Ellingson admitted that he had left work early the preceding afternoon.

The trial court made specific findings regarding the lawfulness of the stop and the initial attempt to arrest Ellingson. The

court then found Ellingson guilty of misdemeanor operation of a motor vehicle to avoid arrest and guilty of obstructing a peace officer. The trial court fined Ellingson $100 for each conviction and sentenced him to 365 days in county jail for each conviction, with the sentences to be served concurrently. The trial court also revoked Ellingson's driver's license for 1 year for his conviction for misdemeanor operation of a motor vehicle to avoid arrest. Ellingson appealed to the district court, asserting that the evidence was insufficient to convict him of each charge. Rejecting Ellingson's assertions, the district court affirmed. Ellingson now appeals to this court.

ASSIGNMENTS OF ERROR

Ellingson assigns (1) that the district court erred in affirming the conviction for misdemeanor operation of a motor vehicle to avoid arrest, (2) that the district court erred in affirming the conviction for obstruction of a peace officer, and (3) that the trial court's findings were clearly erroneous and contrary to law.

[1,2] These assigned errors are much broader than the errors Ellingson assigned on appeal to the district court. In reviewing decisions of the district court which affirmed, reversed, or modified decisions of the county court, a higher appellate court will consider only those errors specifically assigned in the appeal to the district court and again assigned as error in the appeal to the higher appellate court. *State v. Kubin*, 263 Neb. 58, 638 N.W.2d 236 (2002). We also note that when an assignment of error is generalized and vague, as in this case, an appellate court will review the appeal if the specific contention made by the criminal defendant is set forth in his or her brief and the State, through its brief, has argued in response to that contention. See *State v. Egger*, 8 Neb. App. 740, 601 N.W.2d 785 (1999). Therefore, in this appeal, we consider only whether the evidence was sufficient to support Ellingson's convictions for misdemeanor operation of a motor vehicle to avoid arrest and for obstructing a peace officer.

STANDARD OF REVIEW

[3] In reviewing a criminal conviction, an appellate court does not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence. Such matters are for

the finder of fact, and a conviction will be affirmed, in the absence of prejudicial error, if the properly admitted evidence, viewed and construed most favorably to the State, is sufficient to support the conviction. *State v. Jonusas*, 269 Neb. 644, 694 N.W.2d 651 (2005).

[4] When reviewing a criminal conviction for sufficiency of the evidence to sustain the conviction, the relevant question for an appellate court is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *State v. Muro*, 269 Neb. 703, 695 N.W.2d 425 (2005).

ANALYSIS

Misdemeanor Operation of Motor Vehicle to Avoid Arrest.

[5] Ellingson argues that the evidence was insufficient to support his conviction for misdemeanor operation of a motor vehicle to avoid arrest. Section 28-905(1), which sets forth the elements of the offense, provides:

> Any person who operates any motor vehicle to flee in such vehicle in an effort to avoid arrest or citation for the violation of any law of the State of Nebraska constituting a misdemeanor, infraction, traffic infraction, or any city or village ordinance, except nonmoving traffic violations, commits the offense of misdemeanor operation of a motor vehicle to avoid arrest.

An attempt to arrest is an essential element of the offense of fleeing in a motor vehicle to avoid arrest, but proof that the defendant actually committed the law violation for which the arrest was attempted is not required. *State v. Taylor*, 12 Neb. App. 58, 666 N.W.2d 753 (2003).

[6,7] On the day of Ellingson's arrest, Stroeher and Hrbek had knowledge that another police officer wanted Ellingson charged with third degree assault and false imprisonment, related to a domestic violence incident. Third degree assault is a misdemeanor offense. Neb. Rev. Stat. § 28-310 (Reissue 1995). Stroeher testified that he had intended to arrest Ellingson on the "domestic violence charge." An arrest is taking custody of another person for the purpose of holding or detaining him or her to answer a

criminal charge. It is defined as the taking, seizing, or detaining of the person of another. *State v. White*, 209 Neb. 218, 306 N.W.2d 906 (1981). To effect an arrest, there must be actual or constructive seizure or detention of the person arrested, or his or her voluntary submission to custody, and the restraint must be under real or pretended legal authority. *Id.* Stroeher did not verbally announce an arrest, but by ordering Ellingson to exit the vehicle, Stroeher had begun to take actions to effectuate physical control over Ellingson, which actions constituted an attempt to arrest. Viewed in the light most favorable to the State, the evidence shows that Stroeher and Hrbek attempted to arrest Ellingson for a misdemeanor offense.

We next determine whether Ellingson operated his vehicle in an effort to avoid arrest. Construed in the light most favorable to the State, the evidence shows that Ellingson fled when a police officer, who had questioned Ellingson about an incident, argument, or problem with Ellingson's wife, ordered him to exit his vehicle. At all times during the encounter, the officer's patrol car's emergency lights were engaged. After the ensuing chase, Ellingson apologized to Stroeher for driving away while Stroeher's hand was inside the vehicle and Ellingson admitted that he had feared being arrested. We conclude that Ellingson drove away in his vehicle in an attempt to avoid arrest and that there was sufficient evidence to support his conviction for misdemeanor operation of a motor vehicle to avoid arrest.

[8-10] Ellingson argues that any arrest prior to the chase would have been unlawful and that he therefore did not flee to avoid an arrest. Even assuming, without deciding, that § 28-905(1) requires a lawful arrest, Ellingson's argument fails. Neb. Rev. Stat. § 29-404.02(3) (Reissue 1995), the version of the statute in effect at the time of Ellingson's arrest, authorizes warrantless arrests when the arresting officer has reasonable cause to believe that the suspect has intentionally, knowingly, or recklessly caused bodily injury to his or her spouse or has threatened his or her spouse in a menacing manner. The validity of a warrantless arrest and the permissibility of a search incident thereto are premised upon the existence of probable cause, not on a police officer's knowledge that probable cause exists. *State v. Ranson*, 245 Neb. 71, 511 N.W.2d 97 (1994). The test of probable cause for a

warrantless arrest is whether, at the moment of the arrest, the facts and circumstances within the officers' knowledge and of which they had reasonably trustworthy information were sufficient to warrant a prudent person in believing that the defendant had committed or was committing an offense. See *State v. Jones*, 208 Neb. 641, 305 N.W.2d 355 (1981). Probable cause for a warrantless arrest is to be evaluated by the collective information of the police engaged in a common investigation. *State v. Nissen*, 252 Neb. 51, 560 N.W.2d 157 (1997).

At the police rollcall, Stroeher had received information that Ellingson had been involved in a domestic assault with his wife and that he might be driving a white BMW. Stroeher was instructed to take Ellingson into custody if Stroeher encountered Ellingson. Stroeher and Hrbek knew through information received from the police dispatcher and through their own recollections that police had responded to a domestic violence complaint at Ellingson's residence the previous afternoon and that Lowery intended to charge Ellingson with third degree assault and false imprisonment. A person commits third degree assault if he or she intentionally, knowingly, or recklessly causes bodily harm to another or threatens another in a menacing manner. § 28-310(1). Stroeher and Hrbek also had information that Lowery had gone to Ellingson's workplace in connection with Lowery's investigation but that Ellingson had left work early, giving the appearance that Ellingson was attempting to avoid Lowery. Ellingson told Stroeher that he had been at work on the day of the alleged assault, but the fact that the domestic violence complaint was made at a time when Ellingson claimed to have been at work raised questions as to Ellingson's truthfulness. Considering the reasonably trustworthy information available to Stroeher and Hrbek, we conclude that the officers were authorized to make a warrantless arrest of Ellingson on the domestic violence-related offenses and that had the officers effectuated such arrest before Ellingson fled, it would have been lawful. Therefore, viewing the evidence in the light most favorable to the State, the trial court did not commit clear error in determining that the officers had probable cause to execute a warrantless arrest. See, *State v. Muro*, 269 Neb. 703, 695 N.W.2d 425 (2005); *State v. Anderson*, 258 Neb. 627, 605 N.W.2d 124 (2000).

Obstructing Peace Officer.

[11,12] Ellingson contends that the evidence was insufficient to convict him of obstructing a peace officer. Section 28-906(1) provides:

> A person commits the offense of obstructing a peace officer, when, by using or threatening to use violence, force, physical interference, or obstacle, he or she intentionally obstructs, impairs, or hinders . . . the enforcement of the penal law or the preservation of the peace by a peace officer or judge acting under color of his or her official authority . . . .

There must be some sort of affirmative physical act, or threat thereof, for a violation of the statute to occur. *State v. Owen*, 7 Neb. App. 153, 580 N.W.2d 566 (1998). See *State v. Yeutter*, 252 Neb. 857, 566 N.W.2d 387 (1997). Running away from officers has been held to be a violation of § 28-906(1) when the physical obstacle interposed by the act obstructs, impairs, or hinders the officers' efforts to preserve the peace. See *In re Interest of Richter*, 226 Neb. 874, 415 N.W.2d 476 (1987).

In the instant case, Stroeher questioned Ellingson about an incident, problem, or argument involving Ellingson's wife. When Stroeher told Ellingson to exit his vehicle and Hrbek, another uniformed officer, opened the passenger door of Ellingson's vehicle, Ellingson drove away from the officers. After a chase, Ellingson disobeyed the officers' orders to get on the ground. He later explained to Stroeher that he had feared being arrested. Viewing the evidence in the light most favorable to the State, we conclude that in fleeing from the officers, Ellingson intentionally hindered their efforts to preserve the peace and enforce penal law, and that the trial court did not err in finding the evidence sufficient to support a conviction for obstruction of a peace officer.

[13] Ellingson attempts to distinguish *In re Interest of Richter, supra*, from the present case. He argues that *In re Interest of Richter* involved a young man breaching the peace by yelling and cursing, while the instant case involved no such disturbance. "Preservation of the peace," as used in § 28-906(1), means maintaining the tranquility enjoyed by members of a community where good order reigns. *In re Interest of Richter, supra*. Stroeher initially stopped Ellingson in connection with domestic violence offenses. Ellingson subsequently sped away from the

scene of the stop and led officers, with their patrol cars' emergency lights and sirens engaged, on a chase through a residential neighborhood in the middle of the night at a speed of approximately 50 miles per hour. Even if the holding in *In re Interest of Richter, supra*, applied exclusively to cases involving an obstruction, impairment, or hindrance of the preservation of the peace, the instant case would fall within that classification.

Ellingson further argues that his conviction for obstructing a peace officer cannot stand because the police officers were not legitimately enforcing penal law when Ellingson left the scene of the initial stop. He asserts that Stroeher did not initially stop Ellingson to arrest him and that a limited investigatory stop was not justified. By withdrawing his motion to suppress, Ellingson waived any arguments that the initial stop was illegal, insofar as those arguments relate to the suppression of evidence. We examine the investigatory stop only in the context of the sufficiency of the evidence, and thus, we construe the evidence in the light most favorable to the State in determining whether the trial court committed clear error. See, *State v. Muro*, 269 Neb. 703, 695 N.W.2d 425 (2005); *State v. Anderson*, 258 Neb. 627, 605 N.W.2d 124 (2000).

[14-17] Limited investigatory stops are permissible only upon a reasonable suspicion, supported by specific and articulable facts, that the person is, was, or is about to be engaged in criminal activity. *State v. Puls, ante* p. 230, 690 N.W.2d 423 (2004). See *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968). Reasonable suspicion entails some minimal level of objective justification for detention, something more than an inchoate and unparticularized suspicion or "hunch," but less than the level of suspicion required for probable cause. *State v. Puls, supra.* Whether a police officer has a reasonable suspicion based on sufficient articulable facts requires taking into account the totality of the circumstances. *Id.* An officer making a traffic stop need not be aware of the factual foun dation for the basis of the stop, so long as the factual foundation is sufficient to support a reasonable suspicion. See *State v. Soukharith*, 253 Neb. 310, 570 N.W.2d 344 (1997) (stop supported by reasonable suspicion where National Crime Information Center check by officer before any stop revealed that vehicle was associated with missing

white adult female and that there was caution message concerning vehicle and where officer observed no female in vehicle). See, also, *United States v. Hensley*, 469 U.S. 221, 105 S. Ct. 675, 83 L. Ed. 2d 604 (1985) (officer may rely on flyer or bulletin in making investigatory stop if bulletin is based on articulable facts supporting reasonable suspicion); *State v. Benson*, 198 Neb. 14, 251 N.W.2d 659 (1977) (where no evidence was provided at suppression hearing regarding information or facts relied on as factual foundation for broadcast message, radio message alone did not establish existence of reasonable suspicion); *State v. Micek*, 193 Neb. 379, 227 N.W.2d 409 (1975) (upholding traffic stop made solely on basis of radio bulletin that was based on facts creating reasonable suspicion or probable cause); *State v. Mays*, 6 Neb. App. 855, 578 N.W.2d 453 (1998) (reasonable suspicion not present where State offered no factual foundation for fellow officer's warning to arresting officer that driver of red pickup was drug dealer and had drugs on his person), *overruled on other grounds, State v. Anderson, supra.*

In the instant case, Ellingson's vehicle was identified at a police rollcall and Stroeher was instructed to stop Ellingson because he had been involved in a domestic assault against his wife. Lowery intended to charge Ellingson with third degree assault and false imprisonment. Lowery had attempted to speak with Ellingson at his workplace, but Ellingson had departed early. Therefore, assuming without deciding that § 28-906(1) allows a defendant to raise the legitimacy of an investigatory stop in defending a charge of obstructing a peace officer, we find that the stop in the instant case was supported by reasonable suspicion based on specific and articulable facts.

CONCLUSION

We conclude that the district court did not err in affirming Ellingson's convictions for misdemeanor operation of a motor vehicle to avoid arrest and for obstruction of a peace officer, and we affirm.

AFFIRMED.

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