THIS BOOK CONTAINS THE OFFICIAL
REPORTS OF CASES

DECIDED BETWEEN

SEPTEMBER 15, 2009 and MAY 9, 2011

IN THE

Nebraska Court of Appeals

NEBRASKA APPELLATE REPORTS

VOLUME XVIII

PEGGY POLACEK
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By Peggy Polacek, Reporter of the Supreme Court
and the Court of Appeals

For the benefit of the State of Nebraska

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†No. A-09-113: **County of Sarpy v. Courtney, LLC**. Affirmed. Irwin, Judge, and Inbody, Chief Judge, and Moore, Judge.

†No. A-09-117: **State v. Aguirre**. Affirmed. Irwin, Judge, and Inbody, Chief Judge, and Carlson, Judge.

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†No. A-09-236: **Moffett v. Key Associates**. Affirmed. Moore, Judge, and Inbody, Chief Judge, and Irwin, Judge.

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No. A-09-741: **Harrington v. Harrington**. Affirmed. Inbody, Chief Judge, and Sievers and Cassel, Judges.

No. A-09-742: **State v. Ellis**. Affirmed. Inbody, Chief Judge, and Moore and Cassel, Judges.

No. A-09-760: **Lawler Farm & Ranch Co. v. Bank of Paxton**. Affirmed. Inbody, Chief Judge, and Irwin and Cassel, Judges.

†No. A-09-767: **In re Interest of Manuel C**. Reversed and remanded with directions. Carlson, Judge, and Inbody, Chief Judge, and Irwin, Judge.

No. A-09-769: **State v. Poole**. Affirmed. Sievers, Irwin, and Carlson, Judges.

No. A-09-778: **In re Interest of Sherri L. et al**. Affirmed. Sievers, Judge, and Inbody, Chief Judge, and Cassel, Judge.

No. A-09-780: **State ex rel. Motsinger v. City of North Platte**. Affirmed. Sievers, Judge, and Inbody, Chief Judge. Carlson, Judge, participating on briefs.

†No. A-09-781: **Menkens v. Morse**. Reversed and remanded with directions. Cassel, Judge, and Inbody, Chief Judge, and Irwin, Judge.

†No. A-09-788: **Whittington v. Legent Clearing**. Affirmed. Irwin, Carlson, and Moore, Judges.

No. A-09-790: **In re Interest of A.H**. Affirmed. Carlson, Sievers, and Moore, Judges.

No. A-09-797: **In re Interest of Laini T**. Affirmed. Inbody, Chief Judge, and Irwin and Carlson, Judges.

†No. A-09-800: **Watkins Concrete Block Co. v. Pacha**. Affirmed. Irwin and Sievers, Judges. Moore, Judge, participating on briefs.

†No. A-09-801: **In re Interest of Rayna G**. Affirmed. Moore and Carlson, Judges. Sievers, Judge, participating on briefs.

No. A-09-803: **Rodriguez v. Rodriguez**. Affirmed. Inbody, Chief Judge, and Sievers and Cassel, Judges.

No. A-09-813: **State on behalf of Newill v. Hosch**. Affirmed. Sievers, Judge, and Inbody, Chief Judge, and Cassel, Judge.

†No. A-09-814: **Norby v. Farnam Bank**. Affirmed. Sievers, Judge, and Inbody, Chief Judge, and Cassel, Judge.

†No. A-09-815: **State v. Bacon**. Affirmed. Irwin, Sievers, and Carlson, Judges.

†No. A-09-816: **Sullivan v. Farmers Ins. Exch**. Affirmed in part, and in part vacated. Cassel, Sievers, and Moore, Judges.

No. A-09-817: **Villas of Southwind v. Southwind Homeowners Assn**. Affirmed. Carlson, Irwin, and Moore, Judges.

†No. A-09-819: **Smith v. Smith**. Affirmed. Irwin, Sievers, and Carlson, Judges.

Nos. A-09-821, A-09-822: **In re Interest of Tauteyana J. et al**. Affirmed. Moore, Sievers, and Carlson, Judges.

No. A-09-828: **Arent v. Kelley**. Affirmed. Cassel, Judge, and Inbody, Chief Judge, and Sievers, Judge.

†No. A-09-831: **State v. Galaway**. Affirmed. Cassel, Judge, and Inbody, Chief Judge, and Moore, Judge.

No. A-09-833: **In re Interest of Cedric T. et al**. Affirmed. Cassel, Judge, and Inbody, Chief Judge, and Irwin, Judge.

†No. A-09-838: **Glass Lake v. Hofer**. Reversed and remanded for further proceedings. Irwin, Carlson, and Moore, Judges.

No. A-09-841: **State v. Short**. Affirmed. Inbody, Chief Judge, and Moore and Cassel, Judges.

No. A-09-848: **In re Interest of Yiech Y. et al**. Affirmed. Cassel, Judge, and Inbody, Chief Judge, and Sievers, Judge.

No. A-09-853: **Jones v. Belgum**. Affirmed. Cassel, Judge, and Inbody, Chief Judge, and Sievers, Judge.

†No. A-09-854: **State v. Farias-Barragan**. Affirmed. Moore, Sievers, and Cassel, Judges.

†No. A-09-855: **State v. Allen**. Affirmed. Carlson, Sievers, and Moore, Judges.

†No. A-09-858: **Baker v. Baker**. Reversed and remanded with directions. Irwin, Sievers, and Carlson, Judges.

†No. A-09-859: **Jones v. Jones**. Reversed and remanded for further proceedings. Sievers, Judge, and Inbody, Chief Judge, and Cassel, Judge.

No. A-09-867: **Morehouse v. Nast**. Affirmed. Moore and Cassel, Judges. Inbody, Chief Judge, participating on briefs.

†No. A-09-869: **Houser v. Houser**. Affirmed in part, and in part reversed and remanded with directions. Cassel, Judge, and Inbody, Chief Judge, and Sievers, Judge.

†No. A-09-871: **Contreras v. Contreras**. Affirmed. Cassel, Judge, and Inbody, Chief Judge, and Sievers, Judge.

†No. A-09-875: **State ex rel. Baker v. Baker**. Reversed and remanded with directions. Irwin, Sievers, and Carlson, Judges.

†No. A-09-876: **Perkins Delaware v. AWG Acquisition**. Affirmed. Cassel, Judge, and Inbody, Chief Judge. Irwin, Judge, participating on briefs.

†No. A-09-882: **State ex rel. Linder v. Remmen**. Affirmed. Irwin, Carlson, and Moore, Judges.

†No. A-09-889: **Wulf v. Wulf**. Affirmed as modified. Sievers and Carlson, Judges. Irwin, Judge, participating on briefs.

No. A-09-891: **In re Interest of Nadia S. et al**. Affirmed. Sievers, Carlson, and Moore, Judges.

†No. A-09-896: **Countryside Co-op v. The Harry A. Koch Co**. Motion overruled. Cassel, Sievers, and Carlson, Judges.

†No. A-09-896: **Countryside Co-op v. The Harry A. Koch Co**. Former opinion vacated. Appeal reinstated. Cassel, Judge, and Inbody, Chief Judge, and Sievers, Judge.

†No. A-09-917: **State v. Meskimen**. Affirmed. Sievers, Carlson, and Moore, Judges.

No. A-09-928: **Phillips v. Phillips**. Affirmed as modified. Cassel, Judge, and Inbody, Chief Judge, and Sievers, Judge.

†No. A-09-944: **Maycock v. Hoody**. Affirmed in part, and in part reversed and remanded. Sievers and Carlson, Judges. Inbody, Chief Judge, participating on briefs.

No. A-09-949: **State v. Hillard**. Reversed and remanded for further proceedings. Cassel, Judge, and Inbody, Chief Judge, and Moore, Judge.

No. A-09-950: **State v. Pitzer**. Affirmed. Moore, Judge, and Inbody, Chief Judge, and Cassel, Judge.

†No. A-09-951: **In re Guardianship & Conservatorship of Shannon**. Affirmed. Moore, Irwin, and Carlson, Judges.

No. A-09-957: **Ladd v. Lancaster County**. Affirmed. Inbody, Chief Judge, and Irwin and Cassel, Judges.

No. A-09-973: **State v. Armstrong**. Affirmed. Inbody, Chief Judge, and Moore and Cassel, Judges.

No. A-09-976: **Nitsch v. Nitsch**. Affirmed. Moore and Cassel, Judges. Inbody, Chief Judge, participating on briefs.

No. A-09-978: **Bailey v. Bachman**. Affirmed. Carlson, Irwin, and Sievers, Judges.

No. A-09-979: **Blair v. Blair**. Affirmed. Carlson, Irwin, and Sievers, Judges.

†No. A-09-982: **Duin v. Duin**. Affirmed in part, and in part reversed and remanded with directions. Per Curiam.

No. A-09-987: **In re Interest of Jaydah G. & Anthony J**. Affirmed. Inbody, Chief Judge, and Sievers and Cassel, Judges.

No. A-09-993: **In re Interest of Ray'Cine L**. Affirmed in part, and in part reversed. Sievers, Irwin, and Carlson, Judges.

No. A-09-994: **In re Interest of Dejan L**. Affirmed in part, and in part reversed. Sievers, Irwin, and Carlson, Judges.

†Nos. A-09-996 through A-09-998: **Jeffrey Lake Dev. v. Central Neb. Pub. Power**. Affirmed as modified. Cassel and Moore, Judges. Inbody, Chief Judge, participating on briefs.

No. A-09-999: **State v. Smith**. Affirmed as modified. Inbody, Chief Judge, and Moore and Cassel, Judges.

†No. A-09-1003: **Maxson v. Maxson**. Affirmed as modified. Per Curiam. Cassel, Judge, concurring.

†No. A-09-1004: **In re Trust of Lorello**. Affirmed. Irwin, Sievers, and Carlson, Judges.

†No. A-09-1005: **State v. Hoeft**. Affirmed in part, sentence of restitution vacated, and cause remanded with directions. Carlson, Sievers, and Moore, Judges.

†No. A-09-1013: **In re Interest of Desiree F. & Briana F**. Appeal dismissed. Irwin, Carlson, and Moore, Judges.

No. A-09-1017: **Estate of LeBron v. LeBron**. Affirmed. Inbody, Chief Judge, and Moore and Cassel, Judges.

†No. A-09-1023: **In re Interest of Ipolita B**. Affirmed. Cassel, Judge, and Inbody, Chief Judge, and Moore, Judge.

†No. A-09-1024: **In re Interest of Patience I**. Affirmed. Irwin, Sievers, and Carlson, Judges.

†No. A-09-1025: **Norwood v. Nordhue**. Affirmed. Moore and Cassel, Judges. Inbody, Chief Judge, participating on briefs.

No. A-09-1026: **Polson v. Polson**. Affirmed as modified. Moore, Judge, and Inbody, Chief Judge, and Cassel, Judge.

No. A-09-1028: **Alberts v. Scheels All Sports**. Affirmed. Carlson, Irwin, and Sievers, Judges.

No. A-09-1029: **Hood v. Hood**. Affirmed. Inbody, Chief Judge, and Sievers and Cassel, Judges.

†No. A-09-1036: **State v. Aldana**. Affirmed. Irwin, Sievers, and Carlson, Judges.

†No. A-09-1037: **Synowski v. Goettsche**. Reversed and remanded with directions. Cassel, Judge, and Inbody, Chief Judge, and Moore, Judge.

No. A-09-1040: **In re Interest of Natasia C. & Shania C**. Affirmed. Moore, Irwin, and Carlson, Judges.

No. A-09-1045: **Harden v. Hormel Foods Corp**. Affirmed. Cassel, Judge, and Inbody, Chief Judge, and Sievers, Judge.

No. A-09-1046: **In re Interest of Brianna L. et al**. Affirmed. Moore, Judge, and Inbody, Chief Judge, and Cassel, Judge.

†No. A-09-1047: **State v. Sanders**. Affirmed. Moore, Judge, and Inbody, Chief Judge, and Cassel, Judge.

No. A-09-1050: **Hough v. Richardson**. Affirmed. Cassel, Judge, and Inbody, Chief Judge, and Sievers, Judge.

†No. A-09-1055: **In re Interest of Antonio A., Jr**. Affirmed. Carlson and Irwin, Judges. Sievers, Judge, participating on briefs.

†No. A-09-1056: **In re Interest of Bianca H. & Eternity H**. Affirmed. Carlson and Irwin, Judges. Sievers, Judge, participating on briefs.

†No. A-09-1057: **In re Interest of Bianca H. & Eternity H**. Affirmed. Carlson, Irwin, and Moore, Judges.

No. A-09-1058: **In re Interest of Baylee C. & Katelyn M**. Affirmed. Moore, Irwin, and Carlson, Judges.

No. A-09-1059: **In re Interest of Hassan A. & Zade A**. Affirmed. Inbody, Chief Judge, and Moore and Cassel, Judges.

†No. A-09-1060: **In re Interest of Justice H**. Affirmed. Carlson and Irwin, Judges. Sievers, Judge, participating on briefs.

†No. A-09-1065: **Americo Fin. Life v. Reed Enters**. Affirmed. Moore and Cassel, Judges. Inbody, Chief Judge, participating on briefs.

No. A-09-1072: **Elder-Keep v. Aksamit**. Affirmed. Carlson, Irwin, and Sievers, Judges.

No. A-09-1073: **Botz v. Henderson**. Affirmed. Sievers, Irwin, and Carlson, Judges.

No. A-09-1077: **Kleewein v. Kleewein**. Affirmed in part, and in part reversed. Carlson, Irwin, and Sievers, Judges.

†No. A-09-1080: **In re Interest of Americal T. et al**. Affirmed. Irwin, Sievers, and Carlson, Judges.

No. A-09-1084: **State v. Borst**. Affirmed. Inbody, Chief Judge, and Moore and Cassel, Judges.

†No. A-09-1087: **Larkins v. Department of Motor Vehicles**. Motion for rehearing sustained. Original memorandum opinion withdrawn. Reversed and remanded with direction. Per Curiam.

†No. A-09-1091: **State v. Garner**. Affirmed. Irwin, Carlson, and Moore, Judges.

No. A-09-1097: **Longbine v. Lenco Inc**. Affirmed as modified. Inbody, Chief Judge, and Sievers and Cassel, Judges.

No. A-09-1098: **Edwards v. Edwards**. Affirmed. Cassel, Judge, and Inbody, Chief Judge, and Carlson, Judge.

No. A-09-1102: **State v. Wiley**. Affirmed. Sievers, Irwin, and Carlson, Judges.

†No. A-09-1103: **Levi v. Werner Enters**. Affirmed. Cassel, Judge, and Inbody, Chief Judge, and Sievers, Judge.

†No. A-09-1113: **State v. Kelly**. Affirmed. Irwin, Sievers, and Carlson, Judges.

†No. A-09-1114: **Canham v. Canham**. Affirmed. Irwin, Carlson, and Moore, Judges.

No. A-09-1115: **Smith v. Jackson**. Affirmed. Moore, Judge, and Inbody, Chief Judge, and Cassel, Judge.

No. A-09-1116: **Parker v. Parker**. Affirmed. Carlson, Irwin, and Sievers, Judges.

†No. A-09-1123: **In re Change of Name of Crawford**. Affirmed. Moore, Judge, and Inbody, Chief Judge, and Cassel, Judge.

No. A-09-1137: **State v. Benish**. Affirmed. Moore, Judge, and Inbody, Chief Judge, and Cassel, Judge.

†No. A-09-1140: **State v. Peterson**. Affirmed. Cassel, Carlson, and Moore, Judges.

†No. A-09-1142: **In re Interest of Shayla H. et al**. Affirmed. Moore, Judge, and Inbody, Chief Judge, and Cassel, Judge.

No. A-09-1143: **State v. Killingsworth**. Affirmed. Carlson, Judge, and Inbody, Chief Judge, and Cassel, Judge.

No. A-09-1156: **In re Interest of Shireen S**. Affirmed. Inbody, Chief Judge, and Irwin and Moore, Judges.

No. A-09-1157: **State v. Coufal**. Affirmed. Sievers, Irwin, and Carlson, Judges.

No. A-09-1161: **State v. Fisher**. Affirmed. Per Curiam.

†No. A-09-1165: **Channell Constr. Co. v. Rubin**. Affirmed in part, and in part reversed and remanded for further proceedings. Sievers, Irwin, and Carlson, Judges.

No. A-09-1167: **Ackerman v. Ackerman**. Affirmed. Carlson, Irwin, and Sievers, Judges.

No. A-09-1177: **In re Interest of Rachel A**. Affirmed. Carlson, Irwin, and Sievers, Judges.

†No. A-09-1182: **Guthrie v. Runge**. Affirmed. Carlson, Irwin, and Sievers, Judges.

†No. A-09-1185: **In re Guardianship of Kechter**. Affirmed as modified. Per Curiam.

†No. A-09-1186: **In re Conservatorship of Kechter**. Affirmed as modified. Per Curiam.

†No. A-09-1198: **Thies v. Wild West**. Affirmed. Cassel and Moore, Judges. Inbody, Chief Judge, participating on briefs.

†No. A-09-1209: **Bordeaux v. Regional West Med. Ctr**. Affirmed. Irwin, Sievers, and Carlson, Judges.

†No. A-09-1210: **In re Interest of P.A**. Affirmed in part, and in part reversed and remanded with directions. Moore, Judge, and Inbody, Chief Judge, and Irwin, Judge.

†No. A-09-1211: **Lewis v. Vacanti**. Affirmed. Sievers, Irwin, and Carlson, Judges.

No. A-09-1214: **In re Guardianship of Nevaeh G. & Rose G**. Reversed and remanded with directions. Cassel, Judge, and Inbody, Chief Judge, and Moore, Judge.

†No. A-09-1227: **Beckwith v. Beckwith**. Affirmed. Per Curiam.

†No. A-09-1229: **In re Interest of Marquesha C. et al**. Affirmed. Irwin, Sievers, and Carlson, Judges.

No. A-09-1234: **State v. Kuta**. Affirmed. Cassel, Irwin, and Moore, Judges.

No. A-09-1235: **Discover Bank v. Lukes**. Affirmed. Carlson, Irwin, and Sievers, Judges.

No. A-09-1237: **State v. Gonzales**. Affirmed. Irwin, Sievers, and Carlson, Judges.

†No. A-09-1241: **Kandel v. Nebraska Med. Ctr**. Affirmed. Moore, Judge, and Inbody, Chief Judge, and Cassel, Judge.

†No. A-09-1256: **Smokey Ridge Feeders v. Magill**. Affirmed. Inbody, Chief Judge, and Moore and Cassel, Judges.

†No. A-09-1259: **McFall v. Mary's Place**. Affirmed. Irwin, Sievers, and Carlson, Judges.

No. A-09-1264: **State v. Zimbelman**. Affirmed. Inbody, Chief Judge, and Moore and Cassel, Judges.

†No. A-09-1265: **Natural Gas Pipeline Co. v. E Energy Adams**. Affirmed. Carlson, Judge, and Inbody, Chief Judge, and Irwin, Judge. Irwin, Judge, concurring.

†No. A-09-1269: **In re Interest of Seherzada M**. Affirmed. Carlson and Sievers, Judges. Irwin, Judge, participating on briefs.

†No. A-09-1274: **In re Interest of Fatima S**. Affirmed. Cassel and Moore, Judges. Inbody, Chief Judge, participating on briefs.

No. A-09-1277: **Rule v. Rule**. Affirmed. Cassel, Judge, and Inbody, Chief Judge, and Moore, Judge.

†No. A-09-1279: **JONWL, L.L.C. v. Starostka**. Affirmed in part, and in part reversed and remanded with directions. Sievers, Moore, and Cassel, Judges.

†No. A-09-1280: **Wedgewood v. U.S. Filter/Whittier**. Affirmed. Carlson, Irwin, and Sievers, Judges.

†No. A-09-1292: **Bietz v. Bietz**. Affirmed. Irwin, Sievers, and Carlson, Judges.

No. A-09-1296: **Mehner Family Trust v. US Bank**. Reversed and remanded for further proceedings. Cassel, Judge, and Inbody, Chief Judge, and Moore, Judge.

No. A-09-1304: **Hergenrader v. Hergenrader**. Affirmed. Moore, Judge, and Inbody, Chief Judge, and Cassel, Judge.

†No. A-09-1305: **State v. Haynes**. Affirmed. Moore, Judge, and Inbody, Chief Judge, and Irwin, Judge.

No. A-09-1313: **State v. Landis**. Reversed and remanded for a new trial. Sievers and Carlson, Judges. Irwin, Judge, participating on briefs.

†No. A-09-1314: **Metter v. Master Trading**. Affirmed. Sievers, Irwin, and Carlson, Judges.

No. A-10-006: **Koziol v. Koziol**. Affirmed. Sievers, Irwin, and Carlson, Judges.

†No. A-10-011: **Monica S. v. Nguyen**. Affirmed. Cassel, Judge, and Inbody, Chief Judge, and Sievers, Judge.

†No. A-10-013: **State v. Eggert**. Affirmed. Irwin, Sievers, and Carlson, Judges.

†No. A-10-014: **Bohbot v. Allstate Ins. Co**. Affirmed. Moore, Judge, and Inbody, Chief Judge, and Cassel, Judge.

†No. A-10-015: **State v. Aguiles-Garay**. Affirmed. Moore, Judge, and Inbody, Chief Judge, and Cassel, Judge.

†No. A-10-017: **Larsen v. Union Pacific RR. Co**. Affirmed in part, and in part reversed and remanded for further proceedings. Inbody, Chief Judge, and Irwin and Carlson, Judges.

†No. A-10-021: **In re Interest of Wendi L**. Affirmed. Sievers and Carlson, Judges. Irwin, Judge, participating on briefs.

†No. A-10-022: **State v. Dyer**. Affirmed. Carlson, Irwin, and Sievers, Judges.

Nos. A-10-026, A-10-116: **In re Interest of Alex N**. Affirmed. Moore, Judge, and Inbody, Chief Judge, and Cassel, Judge.

†No. A-10-030: **Handke v. Handke**. Affirmed. Irwin, Sievers, and Carlson, Judges.

No. A-10-031: **In re Interest of Josiah J**. Affirmed. Moore, Sievers, and Cassel, Judges.

No. A-10-033: **Garcia v. Garcia**. Affirmed. Moore, Judge, and Inbody, Chief Judge, and Cassel, Judge.

†No. A-10-046: **E & A Consulting Group v. RSV**. Affirmed. Carlson, Judge, and Inbody, Chief Judge, and Irwin, Judge.

†No. A-10-049: **McNew v. Hunt**. Reversed and remanded for further proceedings. Moore, Judge, and Inbody, Chief Judge, and Cassel, Judge.

No. A-10-053: **State v. Castonguay**. Affirmed. Cassel, Judge, and Inbody, Chief Judge, and Moore, Judge.

No. A-10-057: **Vance v. Gertsch**. Reversed and remanded with directions. Moore, Judge, and Inbody, Chief Judge, and Cassel, Judge.

No. A-10-058: **Adams v. Don Hagan & Son's**. Affirmed. Sievers, Irwin, and Carlson, Judges.

†No. A-10-059: **State v. Marsh**. Affirmed as modified. Moore, Sievers, and Cassel, Judges.

†No. A-10-103: **Tierney v. Four H Land Co**. Affirmed. Inbody, Chief Judge, and Irwin and Carlson, Judges.

†No. A-10-117: **In re Interest of Arica S. et al**. Affirmed. Irwin, Sievers, and Carlson, Judges.

No. A-10-123: **Jensen v. Jensen**. Affirmed. Inbody, Chief Judge, and Moore and Cassel, Judges.

No. A-10-131: **State v. Voter**. Affirmed. Sievers, Moore, and Cassel, Judges.

†No. A-10-136: **Great West Cas. Co. v. Michigan Millers Mut. Ins. Co**. Reversed and remanded with directions. Sievers, Irwin, and Carlson, Judges.

No. A-10-141: **In re Interest of Nyreeco H. et al**. Affirmed. Cassel, Judge, and Inbody, Chief Judge, and Moore, Judge.

No. A-10-147: **State v. Gray**. Affirmed. Cassel, Judge, and Inbody, Chief Judge, and Moore, Judge.

†No. A-10-148: **State v. Schultz**. Affirmed. Irwin, Judge, and Inbody, Chief Judge, and Carlson, Judge.

No. A-10-150: **State v. Hubbard**. Affirmed. Carlson, Irwin, and Moore, Judges.

No. A-10-151: **McGeorge v. Mutual of Omaha Ins. Co**. Affirmed. Inbody, Chief Judge, and Irwin and Carlson, Judges. Cassel, Judge, participating on briefs. Carlson, Judge, not participating in the decision.

†No. A-10-160: **Salumbides v. Salumbides**. Affirmed as modified. Moore, Sievers, and Cassel, Judges.

No. A-10-161: **In re Interest of Sarah G. & David G**. Affirmed. Cassel, Judge, and Inbody, Chief Judge, and Moore, Judge.

No. A-10-162: **State v. Poindexter**. Affirmed. Inbody, Chief Judge, and Moore and Cassel, Judges.

No. A-10-177: **Sprague v. Plymale**. Affirmed. Cassel, Judge, and Inbody, Chief Judge, and Moore, Judge.

†No. A-10-179: **State v. Gonzalez**. Affirmed. Irwin, Judge, and Inbody, Chief Judge, and Carlson, Judge.

†No. A-10-180: **State v. Wylie**. Affirmed. Irwin, Sievers, and Carlson, Judges.

†No. A-10-183: **State v. Beins**. Affirmed. Moore, Sievers, and Cassel, Judges.

No. A-10-197: **In re Interest of Vincent L**. Affirmed. Sievers, Irwin, and Carlson, Judges.

No. A-10-198: **State v. Baker**. Affirmed. Sievers, Irwin, and Carlson, Judges.

No. A-10-200: **Krivohlavek v. Dorchester Farmers Co-op**. Affirmed. Inbody, Chief Judge, and Moore and Cassel, Judges.

No. A-10-202: **State v. Mikuchonis**. Affirmed. Sievers, Irwin, and Carlson, Judges.

No. A-10-206: **State v. Erovick**. Affirmed. Cassel, Judge, and Inbody, Chief Judge, and Moore, Judge.

No. A-10-209: **In re Interest of Ayla R. & Marciana R**. Affirmed in part, and in part reversed and remanded for further proceedings. Moore, Judge, and Inbody, Chief Judge, and Cassel, Judge.

No. A-10-212: **In re Estate of Runge**. Affirmed. Sievers, Irwin, and Carlson, Judges.

†No. A-10-219: **State v. Abram**. Affirmed. Irwin, Judge, and Inbody, Chief Judge, and Carlson, Judge.

No. A-10-234: **In re Interest of Amber P. & Khristian P**. Affirmed. Sievers, Irwin, and Carlson, Judges.

†No. A-10-235: **Armstrong v. County of Dixon**. Affirmed. Irwin, Judge, and Inbody, Chief Judge, and Moore, Judge.

†No. A-10-236: **In re Loyal W. Sheen Family Trust**. Reversed and remanded for further proceedings. Moore, Sievers, and Cassel, Judges.

†No. A-10-239: **In re Change of Name of Schnack**. Reversed and remanded for further proceedings. Cassel, Sievers, and Moore, Judges.

No. A-10-245: **State v. Marking**. Affirmed. Sievers, Irwin, and Carlson, Judges.

†No. A-10-246: **Davenport Ltd. Partnership v. 75th & Dodge II, L.P**. Affirmed. Cassel, Sievers, and Moore, Judges.

†No. A-10-251: **Green v. Beatty**. Affirmed. Cassel, Judge, and Inbody, Chief Judge, and Sievers, Judge.

Nos. A-10-253, A-10-305: **State v. Gandara**. Affirmed. Moore, Judge, and Inbody, Chief Judge, and Cassel, Judge.

No. A-10-273: **In re Interest of Elizabeth L**. Affirmed. Inbody, Chief Judge, and Moore and Cassel, Judges.

†No. A-10-274: **In re Interest of Kennedy B. & MacKenzie B**. Reversed and remanded for further proceedings. Cassel, Judge, and Inbody, Chief Judge, and Moore, Judge.

No. A-10-277: **State v. King**. Affirmed. Sievers, Moore, and Cassel, Judges.

†No. A-10-279: **Masek v. Estate of Masek**. Affirmed. Cassel, Sievers, and Carlson, Judges.

†No. A-10-294: **State v. Helmstadter**. Affirmed. Cassel, Judge, and Inbody, Chief Judge, and Moore, Judge.

†No. A-10-295: **State v. Alfredson**. Affirmed. Inbody, Chief Judge, and Irwin and Moore, Judges.

No. A-10-303: **Sims v. Sims**. Affirmed as modified. Carlson, Irwin, and Moore, Judges.

No. A-10-311: **State v. Alameen**. Affirmed. Moore, Irwin, and Carlson, Judges.

No. A-10-312: **In re Estate of Opocensky**. Affirmed. Inbody, Chief Judge, and Irwin and Carlson, Judges.

†No. A-10-322: **DeBord v. Miller**. Affirmed. Moore, Irwin, and Carlson, Judges.

†No. A-10-330: **Brown v. Drivers Mgmt**. Affirmed. Inbody, Chief Judge, and Irwin and Carlson, Judges.

No. A-10-335: **State v. Workman**. Affirmed as modified. Sievers, Irwin, and Carlson, Judges.

†No. A-10-336: **Killinger v. Grand Island Radiology Assocs**. Affirmed. Per Curiam.

No. A-10-340: **Vital Signs Unlimited v. CTKA Corp**. Affirmed in part, and in part reversed. Inbody, Chief Judge, and Sievers and Cassel, Judges.

†No. A-10-352: **State v. Sanchez Viltres**. Affirmed. Inbody, Chief Judge, and Moore and Cassel, Judges.

†No. A-10-353: **State v. White**. Affirmed. Moore, Judge, and Inbody, Chief Judge, and Cassel, Judge.

No. A-10-365: **Intermountain Coach Leasing v. Wolf Automotive Ctr**. Affirmed. Sievers, Moore, and Cassel, Judges.

No. A-10-369: **Mackins v. State**. Affirmed. Sievers, Moore, and Cassel, Judges.

†No. A-10-370: **Hopper v. Rainforth**. Affirmed. Cassel, Judge, and Inbody, Chief Judge, and Sievers, Judge.

No. A-10-375: **In re Interest of J.M**. Affirmed. Inbody, Chief Judge, and Moore and Cassel, Judges.

†No. A-10-379: **Krebs v. Sanders**. Affirmed. Irwin, Sievers, and Carlson, Judges.

No. A-10-388: **Petska v. Petska**. Affirmed. Moore, Irwin, and Carlson, Judges.

†No. A-10-394: **InterCall, Inc. v. HRJ Capital**. Affirmed in part, and in part reversed and remanded for further proceedings. Cassel, Sievers, and Moore, Judges.

†No. A-10-398: **Jenkinson v. Faith Regional Health Servs**. Affirmed. Irwin, Carlson, and Moore, Judges.

No. A-10-399: **In re Interest of Charles H**. Affirmed. Inbody, Chief Judge, and Irwin and Carlson, Judges.

No. A-10-400: **Farruggia v. Done**. Affirmed. Inbody, Chief Judge, and Irwin and Carlson, Judges.

No. A-10-404: **Carpenter v. Carpenter**. Affirmed. Cassel, Sievers, and Moore, Judges.

No. A-10-410: **Sobotka v. Woockman**. Affirmed. Irwin, Sievers, and Carlson, Judges.

No. A-10-412: **Gdowski v. Lant**. Affirmed. Sievers, Irwin, and Carlson, Judges.

Nos. A-10-414, A-10-415: **State v. Deckard**. Affirmed. Sievers, Moore, and Cassel, Judges.

†No. A-10-423: **In re Interest of Maddison T**. Affirmed. Irwin, Judge, and Inbody, Chief Judge, and Carlson, Judge.

†No. A-10-427: **State v. Lopez**. Affirmed. Moore, Irwin, and Cassel, Judges.

No. A-10-429: **Wellnitz v. Wellnitz**. Affirmed. Moore, Irwin, and Sievers, Judges.

†No. A-10-430: **Wegener v. Wegener**. Affirmed as modified. Cassel, Sievers, and Moore, Judges.

†No. A-10-436: **Producers Livestock Mktg. Assn. v. Peterson**. Affirmed. Per Curiam.

†No. A-10-451: **J.S. v. State**. Affirmed. Cassel, Irwin, and Sievers, Judges.

No. A-10-452: **In re Interest of Jalen D**. Affirmed. Sievers and Cassel, Judges, and Hannon, Judge, Retired.

No. A-10-461: **Schmitt v. Schmitt**. Affirmed. Irwin, Carlson, and Moore, Judges.

†No. A-10-467: **Susan K.-W. v. Larry W**. Reversed and remanded with directions. Carlson, Moore, and Cassel, Judges.

†No. A-10-470: **State v. Goodlander**. Reversed and remanded for a new trial. Cassel, Sievers, and Moore, Judges.

†No. A-10-478: **State v. Strasburg**. Affirmed. Irwin, Carlson, and Moore, Judges.

No. A-10-483: **In re Interest of Elizabeth F. et al**. Affirmed. Sievers, Moore, and Cassel, Judges.

No. A-10-487: **In re Interest of Rae'Shaun W**. Affirmed. Sievers, Irwin, and Carlson, Judges.

†No. A-10-491: **M.K. Double R v. Hays**. Reversed and remanded for further proceedings. Irwin, Judge, and Inbody, Chief Judge, and Moore, Judge.

†No. A-10-493: **Blish Partners v. McKinnis Roofing & Sheet Metal**. Affirmed. Cassel, Sievers, and Moore, Judges.

†No. A-10-495: **Evans v. Millard Drywall Servs**. Affirmed. Irwin, Carlson, and Moore, Judges.

No. A-10-496: **Smith v. Union Pacific RR. Co**. Affirmed. Sievers, Judge, and Inbody, Chief Judge, and Cassel, Judge.

No. A-10-499: **State v. Banuelos-Luna**. Affirmed. Moore, Sievers, and Cassel, Judges.

†No. A-10-500: **In re Interest of Kailynn I**. Affirmed. Cassel, Judge, and Inbody, Chief Judge, and Sievers, Judge.

No. A-10-511: **Marvel Precision v. Marvel**. Affirmed. Moore, Judge, and Inbody, Chief Judge, and Irwin, Judge.

†No. A-10-521: **State v. Corona**. Affirmed. Irwin, Carlson, and Moore, Judges.

No. A-10-522: **In re Interest of Jada L. et al**. Affirmed. Sievers, Judge, and Inbody, Chief Judge, and Cassel, Judge.

No. A-10-525: **Johnson v. Trident Builders**. Affirmed. Sievers and Cassel, Judges, and Hannon, Judge, Retired.

No. A-10-526: **Haman v. Aherin**. Affirmed. Inbody, Chief Judge, and Sievers and Cassel, Judges.

†No. A-10-535: **Shannon v. Omaha Pub. Power Dist**. Reversed and remanded with direction. Sievers, Judge, and Inbody, Chief Judge, and Cassel, Judge.

No. A-10-541: **King v. Rolin K. Farms & Trucking**. Reversed and remanded with directions. Inbody, Chief Judge, and Sievers and Cassel, Judges.

No. A-10-547: **State v. Dileo**. Affirmed. Sievers, Moore, and Cassel, Judges.

No. A-10-550: **In re Interest of Tatiana S**. Affirmed. Carlson, Judge, and Inbody, Chief Judge, and Irwin, Judge.

†No. A-10-557: **State v. Rubio**. Affirmed. Moore, Irwin, and Carlson, Judges.

No. A-10-560: **Mora v. Mora**. Affirmed. Irwin, Judge, and Inbody, Chief Judge, and Moore, Judge.

No. A-10-589: **State v. Cullum**. Affirmed. Moore, Sievers, and Cassel, Judges.

No. A-10-590: **State v. On**. Affirmed. Sievers, Moore, and Cassel, Judges.

No. A-10-609: **In re Interest of Alyssa B. et al**. Affirmed in part, and in part reversed and remanded for further proceedings. Inbody, Chief Judge, and Irwin and Carlson, Judges.

†No. A-10-612: **Dawson v. Zachry Constr. Corp**. Affirmed. Irwin, Carlson, and Moore, Judges.

†No. A-10-623: **Bonifas v. City of Lexington**. Affirmed. Moore, Judge, and Inbody, Chief Judge, and Irwin, Judge.

No. A-10-625: **Kroeker v. Kroeker**. Affirmed as modified. Inbody, Chief Judge, and Irwin and Moore, Judges.

No. A-10-628: **State v. Woodward**. Affirmed. Inbody, Chief Judge, and Irwin and Carlson, Judges.

No. A-10-644: **Katzberg v. Katzberg**. Affirmed. Sievers, Judge, and Inbody, Chief Judge, and Cassel, Judge.

†No. A-10-651: **Jones Ins. Agency v. Kuhnel**. Affirmed. Cassel, Judge, and Inbody, Chief Judge, and Sievers, Judge.

†No. A-10-655: **State v. Francis**. Affirmed. Irwin, Judge (1-judge).

No. A-10-666: **In re Interest of Michelle B**. Affirmed. Sievers, Judge, and Inbody, Chief Judge, and Cassel, Judge.

No. A-10-667: **In re Interest of Breanna B**. Affirmed. Sievers, Judge, and Inbody, Chief Judge, and Cassel, Judge.

No. A-10-668: **In re Interest of McKayla R**. Affirmed. Sievers, Judge, and Inbody, Chief Judge, and Cassel, Judge.

No. A-10-669: **In re Interest of Katelynn R**. Affirmed. Sievers, Judge, and Inbody, Chief Judge, and Cassel, Judge.

No. A-10-677: **Mittelstedt v. Mittelstedt**. Affirmed. Sievers, Judge, and Inbody, Chief Judge, and Cassel, Judge.

No. A-10-696: **Sjogren v. Sjogren**. Affirmed as modified. Moore, Judge, and Inbody, Chief Judge, and Irwin, Judge.

No. A-10-701: **In re Interest of Benjamin K. & Anthony K**. Affirmed. Sievers, Irwin, and Cassel, Judges.

†No. A-10-705: **Harkin v. Blatter**. Affirmed in part, and in part reversed and remanded for a new trial. Cassel and Sievers, Judges, and Hannon, Judge, Retired.

†No. A-10-706: **State v. Bass**. Affirmed. Irwin, Judge, and Inbody, Chief Judge, and Moore, Judge.

No. A-10-713: **Doolittle v. Lakewood Villages Lake Lot Owners Assn**. Affirmed. Sievers, Judge, and Inbody, Chief Judge, and Cassel, Judge.

No. A-10-715: **Salmon v. Fisher**. Affirmed. Cassel and Sievers, Judges, and Hannon, Judge, Retired.

No. A-10-723: **State on behalf of Nguyen v. Nguyen**. Affirmed. Cassel, Judge, and Inbody, Chief Judge, and Sievers, Judge.

No. A-10-732: **Bowers v. Vybiral**. Affirmed. Cassel and Sievers, Judges, and Hannon, Judge, Retired.

†No. A-10-738: **State v. Zarate**. Affirmed. Cassel and Sievers, Judges, and Hannon, Judge, Retired.

No. A-10-740: **In re Interest of Amanda C. et al**. Affirmed. Moore, Irwin, and Sievers, Judges.

No. A-10-770: **Purdie v. Purdie**. Affirmed. Sievers, Moore, and Cassel, Judges.

†Nos. A-10-772 through A-10-774: **In re Interest of Frank S. et al**. Affirmed. Cassel, Judge, and Inbody, Chief Judge, and Sievers, Judge.

†No. A-10-778: **Thompson v. Thompson**. Affirmed. Moore, Judge, and Inbody, Chief Judge, and Irwin, Judge.

†No. A-10-790: **Hasemann v. Hasemann**. Affirmed. Irwin, Judge, and Inbody, Chief Judge, and Moore, Judge.

No. A-10-875: **In re Interest of Jaiden D**. Affirmed. Inbody, Chief Judge, and Irwin and Moore, Judges.

No. A-10-876: **In re Interest of Ashton D**. Affirmed. Inbody, Chief Judge, and Irwin and Moore, Judges.

No. A-10-877: **In re Interest of Sean D**. Affirmed. Inbody, Chief Judge, and Irwin and Moore, Judges.

†No. A-10-892: **Brooks v. Pinnacle Bank**. Reversed and remanded for further proceedings. Irwin, Carlson, and Moore, Judges.

†No. A-10-893: **In re Interest of Corey W. et al**. Affirmed as modified. Sievers, Judge, and Inbody, Chief Judge, and Cassel, Judge.

†No. A-10-906: **In re Interest of Javontae T**. Affirmed. Irwin, Judge, and Inbody, Chief Judge, and Moore, Judge.

†No. A-10-910: **State v. Buckley**. Remanded with directions. Sievers, Irwin, and Cassel, Judges.

No. A-10-914: **Commercial Flooring Systems v. Denenberg**. Affirmed in part, and in part reversed and remanded with directions. Inbody, Chief Judge, and Irwin and Moore, Judges.

No. A-10-915: **K & L Decks & Remodeling & Custom Painting v. Denenberg**. Affirmed in part, and in part reversed and remanded with directions. Inbody, Chief Judge, and Irwin and Moore, Judges.

†No. A-10-931: **Phelps v. Phelps**. Affirmed. Cassel and Sievers, Judges, and Hannon, Judge, Retired.

No. A-10-948: **In re Interest of Piper B**. Affirmed. Cassel, Sievers, and Moore, Judges.

†No. A-10-963: **In re Interest of Justin K**. Reversed and vacated. Sievers, Judge, and Inbody, Chief Judge, and Cassel, Judge.

No. A-10-964: **State v. Flores-Guerrero**. Affirmed. Inbody, Chief Judge, and Irwin and Moore, Judges.

No. A-10-976: **In re Interest of Renan P. et al**. Affirmed. Inbody, Chief Judge, and Irwin and Moore, Judges.

No. A-10-1002: **In re Interest of Kimberlee K**. Affirmed. Sievers, Moore, and Cassel, Judges.

No. A-10-1008: **In re Interest of Skyler H**. Affirmed. Cassel, Judge, and Inbody, Chief Judge, and Sievers, Judge.

No. A-10-1016: **In re Interest of Cole G. et al**. Affirmed. Moore, Judge, and Inbody, Chief Judge, and Irwin, Judge.

No. A-10-1056: **In re Interest of Brooklynn D**. Affirmed. Sievers and Cassel, Judges, and Hannon, Judge, Retired.

†No. A-10-1112: **In re Interest of Lokani M**. Affirmed. Cassel, Irwin, and Sievers, Judges.

No. A-10-1186: **State v. Lloyd**. Affirmed. Sievers, Judge (1-judge).

No. A-10-1190: **In re Interest of Jermaine S**. Affirmed. Sievers, Judge, and Inbody, Chief Judge, and Moore, Judge.

LIST OF CASES DISPOSED OF WITHOUT OPINION

No. A-08-526: **Thompson v. Thompson**. Appeal dismissed. See, § 2-107(A)(2); *Dunning v. Tallman*, 244 Neb. 1, 504 N.W.2d 85 (1993); *Maddux v. Maddux*, 239 Neb. 239, 475 N.W.2d 524 (1991).

Nos. A-08-846, A-08-847: **In re Estate of Covey**. Pursuant to order of U.S. Bankruptcy Court for District of Colorado approving agreement, appeals dismissed.

No. A-08-892: **State v. Albenesius**. Motion of appellee for summary affirmance sustained; judgment affirmed. See *State v. Macek*, 278 Neb. 967, 774 N.W.2d 749 (2009).

No. A-08-1293: **State v. Holladay**. Affirmed. See, § 2-107(A)(1); *State v. Lotter*, 278 Neb. 466, 771 N.W.2d 551 (2009); *Obad v. State*, 277 Neb. 866, 766 N.W.2d 89 (2009); *State v. Sims*, 277 Neb. 192, 761 N.W.2d 527 (2009).

No. A-08-1328: **School Dist. 12, York Cty. v. Corporate Benefit Servs**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-09-077: **In re Interest of Kevin B**. Stipulation allowed; appeal dismissed.

No. A-09-118: **Sawaged v. Sawaged**. Affirmed. See § 2-107(A)(1).

No. A-09-163: **Polen v. Polen**. Affirmed. See, § 2-107(A)(1); *Millatmal v. Millatmal*, 272 Neb. 452, 723 N.W.2d 79 (2006); *Shearer v. Shearer*, 270 Neb. 178, 700 N.W.2d 580 (2005); *Emery v. Moffett*, 269 Neb. 867, 697 N.W.2d 249 (2005); *Claborn v. Claborn*, 267 Neb. 201, 673 N.W.2d 533 (2004).

No. A-09-180: **State v. Sinner**. Affirmed. See § 2-107(A)(1).

No. A-09-186: **Forbes v. Asche**. Appeal dismissed. See § 2-107(A)(2).

No. A-09-223: **State v. Tamayo**. Motion of appellant for rehearing sustained. Appeal reinstated.

No. A-09-265: **In re Estate of Covey**. Pursuant to order of U.S. Bankruptcy Court for District of Colorado approving agreement, appeal dismissed.

No. A-09-295: **State v. Montin**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); Neb. Rev. Stat. § 29-3703 (Reissue 2008).

No. A-09-303: **State v. Alford**. Motion of appellee for summary affirmance sustained; judgment affirmed. See *State v. Segura*, 265 Neb. 903, 660 N.W.2d 512 (2003).

No. A-09-322: **Ottaco Acceptance v. Larkin**. Motion of appellee for summary dismissal sustained; appeal dismissed. See Neb. Rev. Stat. § 25-1902 (Reissue 2008). See, also, *Sydow v. City of Grand Island*, 263 Neb. 389, 639 N.W.2d 913 (2002).

No. A-09-334: **State v. Jones**. Motion of appellee for summary dismissal sustained; appeal dismissed. See, § 2-107(B)(1); Neb. Rev. Stat. § 25-2301.02(1) (Reissue 2008); *Martin v. McGinn*, 267 Neb. 931, 678 N.W.2d 737 (2004).

No. A-09-335: **Dekock v. Dekock**. Affirmed. See, § 2-107(A)(1); *Millatmal v. Millatmal*, 272 Neb. 452, 723 N.W.2d 79 (2006); *Bauerle v. Bauerle*, 263 Neb. 881, 644 N.W.2d 128 (2002).

No. A-09-338: **State v. Sobey**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. McKinney*, 279 Neb. 297, 777 N.W.2d 555 (2010); *State v. Gunther*, 278 Neb. 173, 768 N.W.2d 453 (2009); *State v. Sims*, 277 Neb. 192, 761 N.W.2d 527 (2009); *State v. Nelson*, 274 Neb. 304, 739 N.W.2d 199 (2007); *State v. Mata*, 273 Neb. 474, 730 N.W.2d 396 (2007); *State v. Hubbard*, 267 Neb. 316, 673 N.W.2d 567 (2004); *Gibilisco v. Gibilisco*, 263 Neb. 27, 637 N.W.2d 898 (2002).

No. A-09-341: **Tyma v. Department of Motor Vehicles**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-09-365: **State v. Pauly**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

Nos. A-09-376, A-09-377: **State v. Stahla**. Motions of appellee for summary affirmance sustained; judgments affirmed. See *State v. Segura*, 265 Neb. 903, 660 N.W.2d 512 (2003).

No. A-09-380: **Meat Commodities v. Greater Omaha Packing Co**. Appeal dismissed.

No. A-09-381: **State v. McCloud**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Davis*, 277 Neb. 161, 762 N.W.2d 287 (2009); *State v. Pillard*, 16 Neb. App. 99, 741 N.W.2d 441 (2007).

No. A-09-392: **Hartnett v. TSL Company Holdings Ltd**. Stipulation allowed; appeal and cross-appeal dismissed with prejudice.

No. A-09-393: **In re Guardianship & Conservatorship of Karen F**. Matter reversed and remanded to trial court for new hearing. See *Coates v. First Mid-American Fin. Co.*, 263 Neb. 619, 641 N.W.2d 398 (2002).

No. A-09-403: **State v. Rodriguez**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-09-413: **Russell v. Department of Corr. Servs**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-09-417: **State v. Alfredson**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-09-418: **State v. Serda**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-09-419: **State v. O'Neal**. Affirmed. See § 2-107(A)(1).

No. A-09-428: **Wilkinson Development v. Pamida, Inc**. Stipulation allowed; appeal and cross-appeal dismissed.

No. A-09-434: **State v. Talley**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-09-435: **Johnson v. Pacesetter Homes**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-09-440: **Redler v. Department of Corr. Servs**. Affirmed. See, § 2-107(A)(1); Neb. Rev. Stat. § 25-2301.02 (Reissue 2008); *Glass v. Kenney*, 268 Neb. 704, 687 N.W.2d 907 (2004).

Nos. A-09-444 through A-09-446: **State v. Wolfe**. Motions of appellee for summary affirmance sustained; judgments affirmed. See § 2-107(B)(2).

No. A-09-455: **State v. Vergil**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Babbitt*, 277 Neb. 327, 762 N.W.2d 58 (2009).

No. A-09-456: **Gaunt v. Gaunt**. Affirmed. See, § 2-107(A)(1); *Millatmal v. Millatmal*, 272 Neb. 452, 723 N.W.2d 79 (2006); *Bauerle v. Bauerle*, 263 Neb. 881, 644 N.W.2d 128 (2002).

No. A-09-460: **In re Estate of Schademan**. Affirmed. See, § 2-107(A)(1); *In re Estate of Baer*, 273 Neb. 969, 735 N.W.2d 394 (2007).

No. A-09-461: **State ex rel. Bonner v. McSwine**. Motion of appellant for rehearing sustained. Appeal reinstated.

No. A-09-461: **State ex rel. Bonner v. McSwine**. Motion of appellee for summary affirmance sustained. See *State ex rel. Bonner v. McSwine*, 14 Neb. App. 486, 709 N.W.2d 691 (2006).

No. A-09-469: **Davis v. Davis**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-09-474: **State v. Nation**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Branch*, 277 Neb. 738, 764 N.W.2d 867 (2009); *State v. Decker*, 261 Neb. 382, 622 N.W.2d 903 (2001); *State v. Harrison*, 255 Neb. 990, 588 N.W.2d 556 (1999).

No. A-09-475: **State v. Cantu**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-09-482: **State ex rel. Jacob v. Pirsch**. Motion of appellee for summary affirmance sustained; judgment affirmed. See §§ 2-107(B)(2), 6-1112(b)(1) and (6), and 3-301 et seq.

No. A-09-486: **Havorka v. Neth**. Stipulation allowed; appeal dismissed.

No. A-09-488: **U.S. Bank v. Donovan**. By order of the court, appeal dismissed for failure to file briefs.

No. A-09-490: **State v. Larsen**. Motion of appellee for summary affirmance sustained; judgment affirmed. See *State v. Segura*, 265 Neb. 903, 660 N.W.2d 512 (2003).

No. A-09-492: **State v. Forbes**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-09-493: **State v. Pargo**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-09-497: **Hettinger v. Department of Motor Vehicles**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *In re Interest of Fedalina G.*, 272 Neb. 314, 721 N.W.2d 638 (2006); *Hass v. Neth*, 265 Neb. 321, 657 N.W.2d 11 (2003); *State v. Pappas*, 228 Neb. 861, 424 N.W.2d 604 (1988); *State v. Howard*, 184 Neb. 274, 167 N.W.2d 80 (1969).

No. A-09-499: **State v. Woods**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Williams*, 276 Neb. 716, 757 N.W.2d 187 (2008); *State v. Losinger*, 268 Neb. 660, 686 N.W.2d 582 (2004).

No. A-09-500: **State v. Millspaugh**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-09-506: **State v. McBride**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Reid*, 274 Neb. 780, 743 N.W.2d 370 (2008); *State v. Thurman*, 273 Neb. 518, 730 N.W.2d 805 (2007); *State v. Decker*, 261 Neb. 382, 622 N.W.2d 903 (2001); *State v. Harrison*, 255 Neb. 990, 588 N.W.2d 556 (1999).

No. A-09-507: **Hansen v. Wells Fargo**. Affirmed. See, § 2-107(A)(1); Neb. Rev. Stat. § 25-1330 et seq. (Reissue 2008); *Parker v. State ex rel. Bruning*, 276 Neb. 359, 753 N.W.2d 843 (2008).

No. A-09-509: **Bush v. Sheriff of Lancaster Cty**. Affirmed. See, § 2-107(A)(1); Neb. Rev. Stat. § 29-2801 (Reissue 2008); *Gallion v. Zinn*, 236 Neb. 98, 459 N.W.2d 214 (1990).

No. A-09-513: **Cameron v. Washington Cty. File CI07-249 & CI07-250**. Affirmed. See, § 2-107(A)(1); *Stetson v. Silverman*, 278 Neb. 389, 770 N.W.2d 632 (2009).

No. A-09-518: **State v. Harris**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-09-520: **Young v. Nebraska Insurance Commissioner**. Affirmed. See § 2-107(A)(1).

No. A-09-523: **Bush v. Sheriff of Lancaster Cty**. Affirmed. See, § 2-107(A)(1); *Skyline Woods Homeowners Assn. v. Broekemeier*, 276 Neb. 792, 758 N.W.2d 376 (2008).

Nos. A-09-524, A-09-525: **State v. Argo**. Motions of appellee for summary affirmance sustained; judgments affirmed. See § 2-107(B)(2).

Nos. A-09-541, A-09-557: **State v. Craven**. Motions of appellee for summary affirmance sustained; judgments affirmed. See § 2-107(B)(2).

No. A-09-544: **State v. Mithlo**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-09-547: **In re Trust of Darby**. Motion of appellant to dismiss appeal sustained; appeal dismissed with prejudice.

No. A-09-548: **State v. Vandyke**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-09-549: **In re Name Change of Hilding**. Motion of appellant to dismiss appeal considered; appeal dismissed.

No. A-09-552: **State v. Leonard**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-09-554: **Miller v. Lehman**. Affirmed. See § 2-107(A)(1).

Nos. A-09-556, A-09-559: **State v. Jones**. Motions of appellee for summary affirmance sustained; judgments affirmed. See § 2-107(B)(2).

No. A-09-558: **State v. Williams**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Sims*, 277 Neb. 192, 761 N.W.2d 527 (2009); *Malchow v. Doyle*, 275 Neb. 530, 748 N.W.2d 28 (2008).

No. A-09-562: **Neiswanger v. Neiswanger**. Stipulation allowed; appeal dismissed.

No. A-09-563: **Nilson v. Nilson**. Affirmed. See, § 2-107(A)(1); *State on behalf of A.E. v. Buckhalter*, 273 Neb. 443, 730 N.W.2d 340 (1977); *Tejral v. Tejral*, 220 Neb. 264, 369 N.W.2d 359 (1985).

No. A-09-566: **State v. Daringer**. By order of the court, appeal dismissed for failure to file briefs.

No. A-09-568: **State v. Kohrell**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Branch*, 277 Neb. 738, 764 N.W.2d 867 (2009); *State v. Reid*, 274 Neb. 780, 743 N.W.2d 370 (2008); *State v. Decker*, 261 Neb. 382, 622 N.W.2d 903 (2001); *State v. Harrison*, 255 Neb. 990, 588 N.W.2d 556 (1999).

No. A-09-569: **Tyler v. Natvig**. Affirmed. See, § 2-107(A)(1); *In re Estate of Baer*, 273 Neb. 969, 735 N.W.2d 394 (2007); *Peterson v. Ohio Casualty Group*, 272 Neb. 700, 724 N.W.2d 765 (2006).

No. A-09-570: **Imolati v. Yeager**. Affirmed. See § 2-107(A)(1).

No. A-09-576: **State v. Harmon**. Affirmed. See, § 2-107(A)(1); *State v. Segura*, 265 Neb. 903, 660 N.W.2d 512 (2003); *State v. Badami*, 235 Neb. 118, 453 N.W.2d 746 (1990).

No. A-09-577: **State v. Harmon**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Branch*, 277 Neb. 738, 764 N.W.2d 867 (2009); *State v. Decker*, 261 Neb. 382, 622 N.W.2d 903 (2001).

No. A-09-579: **State v. Tompkins**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, §§ 2-107(B)(2) and 2-109(D)(1)(e); *State v. Rodriguez*, 272 Neb. 930, 726 N.W.2d 157 (2007).

No. A-09-580: **Brockman v. Brockman**. Affirmed. See § 2-107(A)(1).

No. A-09-583: **State v. Borden**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-09-584: **State v. Stafford**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Branch*, 277 Neb. 738, 764 N.W.2d 867 (2009); *State v. Reid*, 274 Neb. 780, 743 N.W.2d 370 (2008); *State v. Decker*, 261 Neb. 382, 622 N.W.2d 903 (2001); *State v. Harrison*, 255 Neb. 990, 588 N.W.2d 556 (1999).

No. A-09-590: **In re Estate of Wolf**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-09-595: **State v. Marsh**. Appellee's suggestion of remand sustained. Cause remanded with directions. See, Neb. Rev. Stat. § 29-1207(4) (Reissue 2008); *State v. Williams*, 277 Neb. 133, 761 N.W.2d 514 (2009).

Nos. A-09-598, A-09-601: **State v. Bohlke**. Motions of appellee for summary affirmance sustained; judgments affirmed. See *State v. Segura*, 265 Neb. 903, 660 N.W.2d 512 (2003).

No. A-09-603: **State v. Stoltenberg**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-09-604: **State v. Svoboda**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. §§ 29-824(2) and 29-825 (Reissue 2008); *State v. Ruiz-Medina*, 8 Neb. App. 529, 597 N.W.2d 403 (1999).

No. A-09-605: **State v. Favinger**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-09-608: **Kennedy v. Neth**. Motion of appellant to dismiss appeal considered; appeal dismissed.

No. A-09-614: **In re Estate of Barnes**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *In re Estate of Dueck*, 274 Neb. 89, 736 N.W.2d 720 (2007); *In re Estate of Nemetz*, 273 Neb. 918, 735 N.W.2d 363 (2007); *In re Conservatorship of Estate of Marsh*, 5 Neb. App. 899, 566 N.W.2d 783 (1997).

No. A-09-615: **State v. Millard**. Motion of appellee for summary affirmance sustained; judgment affirmed. See *State v. Segura*, 265 Neb. 903, 660 N.W.2d 512 (2003).

No. A-09-617: **Simic v. Simic**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *Murphy v. Murphy*, 237 Neb. 406, 466 N.W.2d 87 (1991).

No. A-09-620: **Quist v. Eggers**. By order of the court, appeal dismissed for failure to file briefs.

No. A-09-621: **State v. Wallace**. Affirmed. See, § 2-107(A)(1); *State v. Thompson*, 278 Neb. 320, 770 N.W.2d 598 (2009); *State v. Moyer*, 271 Neb. 776, 715 N.W.2d 565 (2006).

No. A-09-637: **Tyler v. Parks**. Affirmed. See § 2-107(A)(1).

No. A-09-640: **State v. Pacha**. Affirmed. See, § 2-107(A)(1); *State v. Burnett*, 254 Neb. 771, 579 N.W.2d 513 (1998).

No. A-09-641: **State v. Shiffermiller**. Motion of appellee for summary affirmance sustained; judgment affirmed. See *State v. Falcon*, 260 Neb. 119, 615 N.W.2d 436 (2000).

No. A-09-659: **State v. Murillo**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-09-661: **Bush v. Thurber**. By order of the court, appeal dismissed for failure to file briefs.

No. A-09-662: **Salisbury v. Salisbury**. Motion of appellant to dismiss appeal sustained; appeal dismissed at cost of appellant.

No. A-09-669: **State v. Merheb**. Appeal dismissed as moot. See, § 2-107(D)(1); *State v. York*, 278 Neb. 306, 770 N.W.2d 614 (2009); *State v. Whitmore*, 238 Neb. 125, 469 N.W.2d 527 (1991).

No. A-09-675: **Tran-Villarreal v. Villarreal**. Appeal dismissed. See § 2-107(A)(2).

No. A-09-676: **Village of Wilsonville v. Chambers**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1315(1) (Reissue 2008).

No. A-09-678: **In re Estate of Stuthman**. Affirmed. See § 2-107(A)(1).

No. A-09-679: **State v. Bush**. By order of the court, appeal dismissed for failure to file briefs.

No. A-09-680: **In re Interest of Ty Onna J. & Keylen E**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-09-681: **State v. Barleen**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Segura*, 265 Neb. 903, 660 N.W.2d 512 (2003); *State v. Beach*, 211 Neb. 660, 319 N.W.2d 754 (1982).

No. A-09-682: **State v. Flowers**. Motion of appellee for summary affirmance sustained; judgment affirmed. See *State v. Segura*, 265 Neb. 903, 660 N.W.2d 512 (2003).

No. A-09-683: **State v. Rainey**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Macek*, 278 Neb. 967, 774 N.W.2d 749 (2009); *State v. Keen*, 272 Neb. 123, 718 N.W.2d 494 (2006); *State v. Louthan*, 257 Neb. 174, 595 N.W.2d 917 (1999).

No. A-09-684: **State v. Giles**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-09-686: **Freeman v. Andy's Town & Country Motor Sales**. Stipulation allowed; appeal dismissed with prejudice; each party to pay own costs.

No. A-09-688: **Jackson v. Catholic Charities of Omaha**. By order of the court, appeal dismissed for failure to file briefs.

No. A-09-689: **Wilson v. Boys Town**. Stipulation allowed; appeal dismissed.

No. A-09-692: **Maloley v. Maloley**. Appeal dismissed for failure to file brief. See § 2-110(A).

No. A-09-695: **State v. Woodrum**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Branch*, 277 Neb. 738, 764 N.W.2d 867 (2009); *State v. Reid*, 274 Neb. 780, 743 N.W.2d 370 (2008); *State v. Decker*, 261 Neb. 382, 622 N.W.2d 903 (2001); *State v. Harrison*, 255 Neb. 990, 588 N.W.2d 556 (1999).

No. A-09-697: **In re Interest of Sierra S**. Appeal dismissed. See, § 2-107(A)(2); *State v. Stuart*, 12 Neb. App. 283, 671 N.W.2d 239 (2003).

No. A-09-703: **State v. Thirtle**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); Neb. Rev. Stat. § 29-2103 (Reissue 2008); *State v. Lotter*, 278 Neb. 466, 771 N.W.2d 551 (2009).

No. A-09-705: **Komatsu Financial v. Thille**. By order of the court, appeal dismissed for failure to file briefs.

No. A-09-705: **Komatsu Financial v. Thille**. Motion of appellant for rehearing sustained. Appeal reinstated.

No. A-09-708: **Donovan v. Donovan**. Appeal dismissed. See, § 2-107(A)(2); *Maddux v. Maddux*, 239 Neb. 239, 475 N.W.2d 524 (1991).

No. A-09-713: **Mousseau v. Mousseau**. Affirmed. See, § 2-107(A)(1); *Sitz v. Sitz*, 275 Neb. 832, 749 N.W.2d 470 (2008).

No. A-09-715: **Courtney, L.L.C. v. Reidmann**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

Nos. A-09-722, A-09-723: **State v. Freeman**. Motions of appellee for summary affirmance sustained; judgments affirmed. See § 2-107(B)(2).

No. A-09-724: **State v. Gonzalez**. Matter dismissed. See, § 2-101(B)(4); *In re Interest of Sean H.*, 271 Neb. 395, 711 N.W.2d 879 (2006); *State v. Parmar*, 255 Neb. 356, 586 N.W.2d 279 (1998); *In re Interest of T.W. et al.*, 234 Neb. 966, 453 N.W.2d 436 (1990).

No. A-09-728: **Landreth v. Landreth**. Stipulation allowed; appeal dismissed.

No. A-09-730: **Burnham v. Liberty Mutual Holding Co**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-09-732: **State ex rel. Wagner v. Amwest Surety Ins**. Motion of appellee for summary dismissal sustained; appeal dismissed. See *Dawes v. Wittrock Sandblasting & Painting*, 266 Neb. 526, 667 N.W.2d 167 (2003).

No. A-09-736: **Cornish v. Neth**. By order of the court, appeal dismissed for failure to file briefs.

No. A-09-740: **Higgins v. VanArsdall**. By order of the court, appeal dismissed for failure to file briefs.

No. A-09-743: **Santillan v. Tyson Fresh Meats**. Stipulation allowed; appeal dismissed.

No. A-09-744: **State v. Padilla**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

Nos. A-09-745 through A-09-747: **State v. Droescher**. Motions of appellee for summary affirmance sustained; judgments affirmed. See, § 2-107(B)(2); *State v. Branch*, 277 Neb. 738, 764 N.W.2d 867 (2009); *State v. Reid*, 274 Neb. 780, 743 N.W.2d 370 (2008); *State v. Decker*, 261 Neb. 382, 622 N.W.2d 903 (2001); *State v. Harrison*, 255 Neb. 990, 588 N.W.2d 556 (1999).

No. A-09-748: **Cabrera v. Williams**. By order of the court, appeal dismissed for failure to file briefs.

No. A-09-750: **State v. Lerma**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-09-751: **State v. Purdie**. Motion of appellee for summary affirmance sustained. See § 2-107(B)(2).

No. A-09-755: **Housing Authority of Omaha v. Whiters**. Appeal dismissed. See § 2-107(A)(2).

No. A-09-758: **Groesser v. Groesser**. Motion of appellant to dismiss appeal sustained; appeal dismissed with prejudice.

No. A-09-759: **Bhuller v. Bhuller**. Motion of appellee for summary dismissal sustained; appeal dismissed. See § 2-107(B)(1).

No. A-09-761: **Russell v. Sorenson**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-09-762: **State v. Gonzalez**. Motion of appellee for summary affirmance sustained; judgment affirmed. See *State v. Segura*, 265 Neb. 903, 660 N.W.2d 512 (2003).

Nos. A-09-763, A-09-764: **State v. Storz**. Motions of appellee for summary affirmance sustained; judgments affirmed. See, § 2-107(B)(2); Neb. Rev. Stat. § 60-6,197.02(1)(a)(i)(C) (Cum. Supp. 2008); *State v. Macek*, 278 Neb. 967, 774 N.W.2d 749 (2009); *State v. Louthan*, 257 Neb. 174, 595 N.W.2d 917 (1999); *State v. Wilson*, 17 Neb. App. 846, 771 N.W.2d 228 (2009).

No. A-09-771: **Yampolsky v. Kennedy Dental Assocs**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1902 (Reissue 2008); *In re Interest of Walter W.*, 274 Neb. 859, 744 N.W.2d 55 (2008).

No. A-09-772: **KAK, Inc. v. Schultz**. Affirmed. See, § 2-107(A)(1); *Ricks v. Vap*, 280 Neb. 130, 784 N.W.2d 432 (2010).

No. A-09-773: **State v. Wiley**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Branch*, 277 Neb. 738, 764 N.W.2d 867 (2009); *State v. Reid*, 274 Neb. 780, 743 N.W.2d 370 (2008); *State v. Decker*, 261 Neb. 382, 622 N.W.2d 903 (2001); *State v. Harrison*, 255 Neb. 990, 588 N.W.2d 556 (1999).

No. A-09-776: **Byrd v. State Patrol**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *Slansky v. Nebraska State Patrol*, 268 Neb. 360, 685 N.W.2d 335 (2004).

No. A-09-777: **Robbins v. Pfizer Inc**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. §§ 25-1329 and 25-1912(3)(b) (Reissue 2008).

No. A-09-782: **Hillard v. Department of Corr. Servs**. Affirmed. See, § 2-107(A)(1); *Ahmann v. Nebraska Dept. of Corr. Servs.*, 278 Neb. 29, 767 N.W.2d 104 (2009).

No. A-09-783: **Hillard v. Department of Corr. Servs**. Affirmed. See § 2-107(A)(1).

No. A-09-784: **Hillard v. Department of Corr. Servs**. Affirmed. See, § 2-107(A)(1); *Ahmann v. Nebraska Dept. of Corr. Servs.*, 278 Neb. 29, 767 N.W.2d 104 (2009).

No. A-09-785: **Hillard v. Houston**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1902 (Reissue 2008).

No. A-09-786: **State v. Zimmerman**. Motion of appellee for summary affirmance sustained; judgment affirmed. See *State v. Segura*, 265 Neb. 903, 660 N.W.2d 512 (2003).

No. A-09-787: **Chase Bank USA v. Lukes**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-09-789: **Chase Bank USA v. Lukes**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-09-791: **State v. Kolt**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-09-792: **Bailey v. Merrick County**. Stipulation allowed; appeal dismissed.

No. A-09-794: **State v. Loury**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-09-795: **State v. Manniales-Perez**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Nevels*, 235 Neb. 39, 453 N.W.2d 579 (1990).

No. A-09-798: **Bohling v. Schicker**. Affirmed. See § 2-107(A)(1).

No. A-09-799: **State v. Carlson**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Branch*, 277 Neb. 738, 764 N.W.2d 867 (2009); *State v. Reid*, 274 Neb. 780, 743 N.W.2d 370 (2008); *State v. Decker*, 261 Neb. 382, 622 N.W.2d 903 (2001); *State v. Harrison*, 255 Neb. 990, 588 N.W.2d 556 (1999).

No. A-09-802: **In re Interest of Marcell D. et al**. Appeal dismissed. See § 2-107(A)(2).

No. A-09-804: **State v. Brummett**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-09-806: **State v. Freeman**. Affirmed. See § 2-107(A)(1).

No. A-09-807: **State v. Rice**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-09-808: **State v. Goode**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

Nos. A-09-809 through A-09-811: **State v. Cortez**. Motions of appellee for summary affirmance sustained; judgments affirmed. See, § 2-107(B)(2); *State v. Branch*, 277 Neb. 738, 764 N.W.2d 867 (2009); *State v. Reid*, 274 Neb. 780, 743 N.W.2d 370 (2008); *State v. Decker*, 261 Neb. 382, 622 N.W.2d 903 (2001); *State v. Harrison*, 255 Neb. 990, 588 N.W.2d 556 (1999).

Nos. A-09-823 through A-09-826: **State v. Guilliatt**. Motions of appellee for summary affirmance sustained; judgments affirmed. See § 2-107(B)(2).

No. A-09-827: **Wedgewood v. U.S. Filter/Whittier, Inc**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1315(1) (Reissue 2008); *Cerny v. Todco Barricade Co.*, 273 Neb. 800, 733 N.W.2d 877 (2007); *Malolepszy v. State*, 270 Neb. 100, 699 N.W.2d 387 (2005).

No. A-09-830: **Bruce v. Glenn Investments**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1315(1) (Reissue 2008).

No. A-09-832: **State v. Reeves**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

Nos. A-09-834, A-09-850: **State v. Griffith**. Motions of appellee for summary affirmance sustained; judgments affirmed. See § 2-107(B)(2).

No. A-09-835: **In re Interest of D'Shawn M**. Appeal dismissed. See, § 2-107(A)(2); *In re Interest of Anthony R. et al.*, 264 Neb. 699, 651 N.W.2d 231 (2002).

No. A-09-836: **In re Interest of Dayton D**. Appeal dismissed. See, § 2-107(A)(2); *In re Interest of Anthony R. et al.*, 264 Neb. 699, 651 N.W.2d 231 (2002).

No. A-09-837: **In re Interest of Wesley W**. Stipulation allowed; appeal dismissed.

Nos. A-09-844, A-09-845: **State v. Sitzman**. Motions of appellee for summary affirmance sustained; judgments affirmed. See, § 2-107(B)(2); *State v. Branch*, 277 Neb. 738, 764 N.W.2d 867 (2009); *State v. Reid*, 274 Neb. 780, 743 N.W.2d 370 (2008); *State v. Decker*, 261 Neb. 382, 622 N.W.2d 903 (2001); *State v. Harrison*, 255 Neb. 990, 588 N.W.2d 556 (1999).

Nos. A-09-846, A-09-847: **State v. Payne**. Motions of appellee for summary affirmance sustained; judgments affirmed. See *State v. Segura*, 265 Neb. 903, 660 N.W.2d 512 (2003).

No. A-09-849: **State v. Rodriguez-Rojas**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-09-851: **State v. Roberts**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *Vokal v. Nebraska Acct. & Disclosure Comm.*, 276 Neb. 988, 759 N.W.2d 75 (2009).

No. A-09-852: **Nelson v. Nelson**. Stipulation allowed; appeal dismissed at cost of appellant.

No. A-09-856: **State v. Grimes**. By order of the court, appeal dismissed for failure to file briefs.

No. A-09-857: **Consteel Erectors v. Sampson Constr. Co**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-09-858: **Baker v. Baker**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1315(1) (Reissue 2008).

No. A-09-858: **Baker v. Baker**. Motion of appellant for rehearing sustained. Appeal reinstated.

No. A-09-860: **Young Constr. & Paving v. Lund-Ross Constructors**. Stipulation allowed; appeal dismissed.

No. A-09-861: **Webb v. Airlite Plastics**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-09-862: **State v. Sherrod**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-09-863: **State v. Collins**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-09-864: **State v. Bowman**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-09-868: **In re Trust of Wulf**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-09-872: **State v. Groninger**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1912(1) (Reissue 2008).

No. A-09-873: **State v. Arehart**. By order of the court, appeal dismissed for failure to file briefs.

No. A-09-874: **State v. Arehart**. By order of the court, appeal dismissed for failure to file briefs.

No. A-09-875: **State ex rel. Baker v. Baker**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1315(1) (Reissue 2008).

No. A-09-875: **State ex rel. Baker v. Baker**. Motion of appellant for rehearing sustained. Appeal reinstated.

No. A-09-877: **State v. Van Dorien**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1912(1) (Reissue 2008).

No. A-09-880: **Metzger v. State**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1912(1) (Reissue 2008).

No. A-09-881: **State v. Smith**. Motion of appellee to dismiss for lack of jurisdiction sustained. See § 2-107(B)(1).

No. A-09-883: **State v. Taylor**. By order of the court, appeal dismissed for failure to file briefs.

No. A-09-884: **Holmes v. Chief Industries**. Stipulation allowed; appeal dismissed.

No. A-09-885: **State v. Grathwohl**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, §§ 2-107(B)(2) and 2-109(D)(1)(e); *In re Interest of Hope L. et al.*, 278 Neb. 869, 775 N.W.2d 384 (2009).

No. A-09-886: **Widtfeldt v. Holt Cty. Bd. of Equal**. Appeal dismissed. See, § 2-107(A)(2); *Steven S. v. Mary S.*, 277 Neb. 124, 760 N.W.2d 28 (2009); *In re Interest of Michael U.*, 273 Neb. 198, 728 N.W.2d 116 (2007); *State of Florida v. Countrywide Truck Ins. Agency*, 270 Neb. 454, 703 N.W.2d 905 (2005).

No. A-09-887: **State v. Cantando**. Affirmed. See § 2-107(A)(1).

No. A-09-888: **State v. Hill**. Motion of appellee for summary affirmance sustained; judgment affirmed. See *State v. Segura*, 265 Neb. 903, 660 N.W.2d 512 (2003).

No. A-09-892: **In re Guardianship of Diana Z**. Appeal dismissed. See, § 2-107(A)(2); *State v. Haase*, 247 Neb. 817, 530 N.W.2d 617 (1995).

No. A-09-893: **Charlie's Twin Creek v. Marion**. Appeal dismissed. See § 2-107(A)(2).

No. A-09-894: **In re Guardianship of Matthew N**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1315(1) (Reissue 2008).

No. A-09-897: **State on behalf of Tolliver v. Garrett**. Appeal dismissed. See, § 2-107(A)(2); *Michael B. v. Donna M.*, 11 Neb. App. 346, 652 N.W.2d 618 (2002).

No. A-09-898: **State on behalf of Waters v. Garrett**. Appeal dismissed. See, § 2-107(A)(2); *Michael B. v. Donna M.*, 11 Neb. App. 346, 652 N.W.2d 618 (2002).

No. A-09-899: **In re Interest of J.P**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); Neb. Rev. Stat. § 71-1209 (Reissue 2009); *Walsh v. State*, 276 Neb. 1034, 759 N.W.2d 100 (2009).

No. A-09-902: **In re Name Change of Veleba**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-09-903: **State v. Valadez**. Affirmed. See, § 2-107(A)(1); *State v. Molina*, 279 Neb. 405, 778 N.W.2d 713 (2010).

No. A-09-904: **State v. Obley**. Motion of appellee for summary dismissal sustained; appeal dismissed. See, § 2-107(B)(1); Neb. Rev. Stat. §§ 25-1329 and 25-1912(3) (Reissue 2008); *State v. Bellamy*, 264 Neb. 784, 652 N.W.2d 86 (2002).

No. A-09-907: **In re Interest of Jazmin P**. Motion of appellant to dismiss appeal considered; appeal dismissed.

No. A-09-908: **In re Interest of Tahlia P**. Motion of appellant to dismiss appeal considered; appeal dismissed.

No. A-09-909: **In re Interest of Aneli P**. Motion of appellant to dismiss appeal considered; appeal dismissed.

No. A-09-910: **In re Interest of Remigio P**. Motion of appellant to dismiss appeal considered; appeal dismissed.

No. A-09-911: **In re Interest of Adrian P**. Motion of appellant to dismiss appeal considered; appeal dismissed.

No. A-09-913: **State v. Koch**. By order of the court, appeal dismissed for failure to file briefs.

No. A-09-918: **State v. Taylor**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, *State v. White*, 272 Neb. 421, 722 N.W.2d 343 (2006); *State v. Segura*, 265 Neb. 903, 660 N.W.2d 512 (2003).

No. A-09-919: **State v. Wulbern**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-09-920: **Smith v. Colerick**. Affirmed. See, § 2-107(A)(1); *Casey v. Levine*, 261 Neb. 1, 621 N.W.2d 482 (2001); *Frezell v. Iwersen*, 231 Neb. 365, 436 N.W.2d 194 (1989); *Hampton v. Shaw*, 14 Neb. App. 499, 710 N.W.2d 341 (2006).

Nos. A-09-921, A-09-1078: **In re Interest of Tiffany C. & Dustin H**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-09-922: **State v. Rodriguez**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-09-924: **United Fire & Cas. Co. v. Golf Servs. Group**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1315(1) (Reissue 2008).

No. A-09-925: **State v. Zerley**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *In re Interest of Hope L. et al.*, 278 Neb. 869, 775 N.W.2d 384 (2009); *State v. Branch*, 277 Neb. 738, 764 N.W.2d 867 (2009); *State v. Reid*, 274 Neb. 780, 743 N.W.2d 370 (2008); *State v. Decker*, 261 Neb. 382, 622 N.W.2d 903 (2001); *State v. Harrison*, 255 Neb. 990, 588 N.W.2d 556 (1999).

No. A-09-926: **State v. Lathrop**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Branch*, 277 Neb. 738, 764 N.W.2d 867 (2009); *State v. Reid*, 274 Neb. 780, 743 N.W.2d 370 (2008); *State v. Decker*, 261 Neb. 382, 622 N.W.2d 903 (2001); *State v. Harrison*, 255 Neb. 990, 588 N.W.2d 556 (1999).

No. A-09-927: **Beck v. Department of Corr. Servs**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *Knowlton v. Harvey*, 249 Neb. 693, 545 N.W.2d 434 (1996).

No. A-09-932: **Baltimore v. Baltimore**. By order of the court, appeal dismissed for failure to file briefs.

No. A-09-933: **Sonier v. I.E. Property**. Appeal dismissed. See, § 2-107(A)(2); *Goodman v. City of Omaha*, 274 Neb. 539, 742 N.W.2d 26 (2007).

No. A-09-934: **State v. Williams**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-09-935: **Dresser v. Union Pacific RR. Co**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1315 (Reissue 2008); *Cerny v. Todco Barricade Co.*, 273 Neb. 800, 733 N.W.2d 877 (2007); *Murphy v. Brown*, 15 Neb. App. 914, 738 N.W.2d 466 (2007).

No. A-09-937: **State v. Plummer**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1912(1) (Reissue 2008).

No. A-09-938: **State on behalf of Hurt v. Hurt**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1912(1) (Reissue 2008).

No. A-09-939: **Zapata v. Liquid Waste Mgmt**. By order of the court, appeal dismissed for failure to file briefs.

No. A-09-941: **State v. Pieper**. Appeal dismissed. See, § 2-107(A)(2); *State v. Haase*, 247 Neb. 817, 530 N.W.2d 617 (1995).

No. A-09-942: **Tyler v. Craig**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-2301.02 (Reissue 2008); *Martin v. McGinn*, 267 Neb. 931, 678 N.W.2d 737 (2004).

No. A-09-943: **Ellsworth v. Wilson**. Affirmed. See, § 2-107(A)(1); *In re Estate of Potthoff*, 273 Neb. 828, 733 N.W.2d 860 (2007).

No. A-09-945: **Widtfeldt v. Holt Cty. Bd. of Equal**. Motion of appellee for summary dismissal sustained; appeal dismissed as to Nebraska Tax Equalization and Review Commission and Attorney General. As to all remaining parties, final orders below are summarily affirmed.

No. A-09-946: **State v. Wecker**. Motion of appellee for summary affirmance sustained. See, §§ 6-1452(A)(7) and 6-1518; *State v. Griffin*, 270 Neb. 578, 705 N.W.2d 51 (2005); *State v. Anderson*, 14 Neb. App. 253, 706 N.W.2d 564 (2005).

No. A-09-947: **State v. Cogill**. By order of the court, appeal dismissed for failure to file briefs.

No. A-09-948: **State v. Villa**. Appeal dismissed. See, § 2-107(A)(2); *State v. Haase*, 247 Neb. 817, 530 N.W.2d 617 (1995).

No. A-09-952: **State v. Mann**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, *State v. Segura*, 265 Neb. 903, 660 N.W.2d 512 (2003); *Marteney v. State*, 210 Neb. 172, 313 N.W.2d 449 (1981); *State v. Parks*, 8 Neb. App. 491, 596 N.W.2d 712 (1999).

No. A-09-954: **Cummings v. Gordon Memorial Hosp. Dist**. Stipulation allowed; appeal dismissed.

No. A-09-955: **State v. Lovitt**. Affirmed. See, § 2-107(A)(1); Neb. Rev. Stat. § 27-803(3) (Reissue 2008); *State v. Babbitt*, 277 Neb. 327, 762 N.W.2d 58 (2009); *State v. Roenfeldt*, 241 Neb. 30, 486 N.W.2d 197 (1992); *State v. Vaught*, 12 Neb. App. 306, 672 N.W.2d 262 (2003); *State v. Max*, 1 Neb. App. 257, 492 N.W.2d 887 (1992).

No. A-09-956: **State v. Lewis**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-09-958: **Kudlacek v. Coon**. Motion of appellant to dismiss appeal sustained; appeal dismissed with prejudice; each party to pay own costs.

No. A-09-959: **State v. Schuck**. Motion of appellant to dismiss appeal sustained; appeal dismissed with prejudice.

No. A-09-960: **State v. Kennedy**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Branch*, 277 Neb. 738, 764 N.W.2d 867 (2009); *State v. Reid*, 274 Neb. 780, 743 N.W.2d 370 (2008); *State v. Decker*, 261 Neb. 382, 622 N.W.2d 903 (2001); *State v. Harrison*, 255 Neb. 990, 588 N.W.2d 556 (1999).

Nos. A-09-961, A-09-962: **State v. Coleman**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Molina*, 279 Neb. 405, 778 N.W.2d 713 (2010); *State v. McCroy*, 259 Neb. 709, 613 N.W.2d 1 (2000).

No. A-09-965: **State v. Zuck**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1912(1) (Reissue 2008).

No. A-09-965: **State v. Zuck**. Motion of appellant for rehearing sustained. Appeal reinstated.

No. A-09-965: **State v. Zuck**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-09-967: **State v. Burke**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Branch*, 277 Neb. 738, 764 N.W.2d 867 (2009); *State v. Reid*, 274 Neb. 780, 743 N.W.2d 370 (2008); *State v. Decker*, 261 Neb. 382, 622 N.W.2d 903 (2001); *State v. Harrison*, 255 Neb. 990, 588 N.W.2d 556 (1999).

Nos. A-09-968 through A-09-971: **State v. Wolfe**. Motions of appellee for summary affirmance sustained; judgments affirmed. See *State v. Segura*, 265 Neb. 903, 660 N.W.2d 512 (2003).

No. A-09-972: **State v. Ruffin**. Appeal dismissed. See, § 2-107(A)(2); *State v. Parmar*, 255 Neb. 356, 586 N.W.2d 279 (1998); *In re Interest of T.W. et al.*, 234 Neb. 966, 453 N.W.2d 436 (1990); *State v. Stuart*, 12 Neb. App. 283, 671 N.W.2d 239 (2003).

No. A-09-974: **State v. Hansen**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-09-977: **Martinez-Thibodeau v. Thibodeau**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-09-981: **State v. Price**. By order of the court, appeal dismissed for failure to file briefs.

No. A-09-984: **State v. Echols**. Appellee's suggestion of remand sustained. Cause remanded with directions. See *State v. McCroy*, 259 Neb. 709, 613 N.W.2d 1 (2000).

No. A-09-986: **State ex rel. Jacob v. Pepperl**. Appeal dismissed. See § 2-107(A)(2).

No. A-09-988: **Buggs v. Houston**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *Leach v. Dahm*, 277 Neb. 452, 763 N.W.2d 83 (2009); *Rust v. Gunter*, 228 Neb. 141, 421 N.W.2d 458 (1988).

No. A-09-992: **In re Interest of Marquaea R**. Stipulation allowed; appeal dismissed.

No. A-09-995: **Harms v. Harms**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-09-1000: **State v. Houser**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-09-1001: **State v. Cusatis**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-09-1002: **State v. Greuter**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Poindexter*, 277 Neb. 936, 766 N.W.2d 391 (2009); *State v. Williams*, 259 Neb. 234, 609 N.W.2d 313 (2000).

No. A-09-1006: **Abraham v. DMV**. Motion of appellee for summary dismissal sustained; appeal dismissed.

No. A-09-1007: **King v. State**. By order of the court, appeal dismissed for failure to file briefs.

Nos. A-09-1008, A-09-1009: **State v. Sturgis**. Motions of appellee for summary affirmance sustained; judgments affirmed. See § 2-107(B)(2).

No. A-09-1010: **State v. Kellogg**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-09-1011: **Looby v. Wulf**. Summarily affirmed. See § 2-107(A)(1).

No. A-09-1014: **Smith v. Houston**. By order of the court, appeal dismissed for failure to file briefs.

No. A-09-1015: **State v. Arnold**. Motion of appellee for summary affirmance sustained. See *State v. Branch*, 277 Neb. 738, 764 N.W.2d 867 (2009).

Nos. A-09-1016, A-09-1232: **Chesterman v. Chesterman**. Affirmed. See, § 2-107(A)(1); *Webster v. Webster*, 271 Neb. 788, 716 N.W.2d 47 (2006).

No. A-09-1018: **In re Interest of Timothy H**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-09-1022: **Poorman v. Neth**. Stipulation allowed; decision of district court reversed.

No. A-09-1027: **Atiqullah v. Bui**. By order of the court, appeal dismissed for failure to file briefs.

No. A-09-1030: **Ratay v. Ratay**. By order of the court, appeal dismissed for failure to file briefs.

No. A-09-1032: **State v. Fletcher**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Goodwin*, 278 Neb. 945, 774 N.W.2d 733 (2009); *State v. Rung*, 278 Neb. 855, 774 N.W.2d 621 (2009).

No. A-09-1033: **State v. Miller**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1912(1) (Reissue 2008).

No. A-09-1034: **Pserros v. State**. Affirmed. See, § 2-107(A)(1); *TracFone Wireless v. Nebraska Pub. Serv. Comm.*, 279 Neb. 426, 778 N.W.2d 452 (2010).

No. A-09-1035: **State v. Flege**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-09-1038: **Myers v. Department of Corr. Servs**. By order of the court, appeal dismissed for failure to file briefs.

No. A-09-1039: **In re Estate of Hue**. Affirmed. See, §§ 2-107(A)(1) and 2-109(D)(1)(e); *City of Gordon v. Montana Feeders, Corp.*, 273 Neb. 402, 730 N.W.2d 387 (2007); *Community Redev. Auth. v. Gizinski*, 16 Neb. App. 504, 745 N.W.2d 616 (2008).

No. A-09-1043: **General Motors Acceptance Corp. v. Leth**. Affirmed. See, § 2-107(A)(1); *Appleby v. Andreasen*, 276 Neb. 926, 758 N.W.2d 615 (2008).

No. A-09-1048: **In re Interest of Chelsey M**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-09-1049: **State v. Holzapfel**. Writ of mandamus entered by district court reversed and vacated. See *Henderson v. Department of Corr. Servs.*, 256 Neb. 314, 589 N.W.2d 520 (1999).

No. A-09-1052: **State v. Shelby**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-09-1062: **Rosentreader v. Neth**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-09-1063: **Smith v. Ellefson**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1912(1) (Reissue 2008).

No. A-09-1064: **Saint v. Department of Motor Vehicles**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); Neb. Rev. Stat. § 60-6,200 (Reissue 2004); *State v. Medina*, 227 Neb. 736, 419 N.W.2d 864 (1988); *Jensen v. Jensen*, 222 Neb. 23, 382 N.W.2d 9 (1986); *Wohlgemuth v. Pearson*, 204 Neb. 687, 285 N.W.2d 102 (1979).

No. A-09-1066: **Hillard v. Department of Corr. Servs**. Affirmed. See, § 2-107(A)(1); *Ahmann v. Nebraska Dept. of Corr. Servs.*, 278 Neb. 29, 767 N.W.2d 104 (2009).

No. A-09-1067: **Hillard v. Department of Corr. Servs**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, 68 Neb. Admin. Code, ch. 6, § 009.06 (2008); Neb. Rev. Stat. § 83-4,122(9) (Reissue 2008); *Ponce v. Nebraska Dept. of Corr. Servs.*, 263 Neb. 609, 641 N.W.2d 375 (2002).

No. A-09-1068: **Hillard v. Department of Corr. Servs**. Affirmed. See, § 2-107(A)(1); *Ahmann v. Nebraska Dept. of Corr. Servs.*, 278 Neb. 29, 767 N.W.2d 104 (2009).

No. A-09-1069: **Hillard v. Department of Corr. Servs**. Affirmed. See, § 2-107(A)(1); *Ahmann v. Nebraska Dept. of Corr. Servs.*, 278 Neb. 29, 767 N.W.2d 104 (2009).

No. A-09-1070: **Hillard v. Department of Corr. Servs**. Affirmed. See, § 2-107(A)(1); *Ahmann v. Nebraska Dept. of Corr. Servs.*, 278 Neb. 29, 767 N.W.2d 104 (2009).

No. A-09-1071: **Hillard v. Department of Corr. Servs**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, Neb. Rev. Stat. § 83-4,122(9) (Reissue 2008); *Ponce v. Nebraska Dept. of Corr. Servs.*, 263 Neb. 609, 641 N.W.2d 375 (2002).

No. A-09-1075: **Vitalix, Inc. v. Box Butte Cty. Bd. of Equal**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-09-1081: **State v. Penado**. Appellee's suggestion of remand sustained. Order vacated, and cause remanded with directions. See, § 2-107(B)(3); *State v. Jones*, 258 Neb. 695, 605 N.W.2d 434 (2000).

No. A-09-1082: **State v. Kinzenbaw**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-09-1083: **Tyser v. Farmland Foods**. Stipulation allowed; appeal dismissed.

No. A-09-1085: **Fitzgerald v. Britten**. By order of the court, appeal dismissed for failure to file briefs.

No. A-09-1088: **Craft v. Neth**. By order of the court, appeal dismissed for failure to file briefs.

No. A-09-1090: **In re Interest of Jamin G**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-2301.01 (Reissue 2008); *State v. Stuart*, 12 Neb. App. 283, 671 N.W.2d 239 (2003).

No. A-09-1092: **Floyd v. Douglas Cty. Correction Ctr**. By order of the court, appeal dismissed for failure to file briefs.

No. A-09-1093: **In re Estate of Tully**. Appeal dismissed. See, § 2-107(A)(2); *State v. Bellamy*, 264 Neb. 784, 652 N.W.2d 86 (2002).

No. A-09-1094: **State v. Mahlangeni-Byndon**. By order of the court, appeal dismissed for failure to file briefs.

No. A-09-1096: **State v. Cullum**. Stipulation considered; appeal dismissed.

No. A-09-1100: **Miljkovic v. Drivers Mgmt**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *Manchester v. Drivers Mgmt.*, 278 Neb. 776, 775 N.W.2d 179 (2009); *Zitterkopf v. Aulick Indus.*, 16 Neb. App. 829, 753 N.W.2d 370 (2008).

No. A-09-1101: **State on behalf of Gilliland v. Williams**. Affirmed. See, § 2-107(A)(1); Neb. Rev. Stat. § 29-901(3)(a) (Reissue 2008).

Nos. A-09-1104 through A-09-1106: **In re Interest of Zachary R**. Appeals dismissed. See § 2-107(A)(2).

No. A-09-1108: **State v. Snyder**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-09-1109: **In re Interest of Enrique P. et al**. By order of the court, appeal dismissed for failure to file briefs.

No. A-09-1110: **State v. Gillispie**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1912(1) (Reissue 2008).

No. A-09-1111: **State v. Mackey**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-09-1112: **State v. Box**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-09-1117: **Wilke v. Neth**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-09-1119: **State v. Mosley**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Branch*, 277 Neb. 738, 764 N.W.2d 867 (2009); *State v. Reid*, 274 Neb. 780, 743 N.W.2d 370 (2008); *State v. Decker*, 261 Neb. 382, 622 N.W.2d 903 (2001); *State v. Harrison*, 255 Neb. 990, 588 N.W.2d 556 (1999).

No. A-09-1120: **State v. Pope**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-09-1122: **State v. Wiig**. Appeal dismissed. See § 2-107(A)(2).

No. A-09-1124: **In re Interest of Dashanique H. & Alonzo B**. Appeal dismissed, and order of juvenile review panel vacated. See, § 2-107(A)(2); Neb. Rev. Stat. § 43-287.03 (Reissue 2008).

No. A-09-1125: **State v. Williams**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-09-1126: **McGeorge v. Mutual of Omaha Ins. Co**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1315(1) (Reissue 2008); *Malolepszy v. State*, 270 Neb. 100, 699 N.W.2d 387 (2005).

No. A-09-1129: **State v. Scott**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-09-1131: **State v. Marquart**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-09-1132: **State v. Schlick**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-09-1133: **State v. Adams**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Branch*, 277 Neb. 738, 764 N.W.2d 867 (2009); *State v. Reid*, 274 Neb. 780, 743 N.W.2d 370 (2008); *State v. Decker*, 261 Neb. 382, 622 N.W.2d 903 (2001); *State v. Harrison*, 255 Neb. 990, 588 N.W.2d 556 (1999).

No. A-09-1134: **State v. Stevens**. Stipulation allowed; appeal dismissed.

No. A-09-1135: **State v. Simpson**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-09-1136: **State v. Townsend**. Motion of appellee for summary affirmance sustained; judgment affirmed. See *State v. Segura*, 265 Neb. 903, 660 N.W.2d 512 (2003).

No. A-09-1138: **State v. Koehler**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-09-1139: **Schmer v. Neth**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-09-1144: **State v. Vallecillo-Sanchez**. Motion of appellee for summary affirmance sustained; judgment affirmed.

No. A-09-1145: **Graves v. Marketgraphics Midwest**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1315(1) (Reissue 2008).

No. A-09-1146: **Henson v. Department of Motor Vehicles**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-09-1147: **State v. Morse**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-09-1148: **State v. Coufal**. Stipulation allowed; appeal dismissed.

No. A-09-1150: **State v. Baltazar**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1912(1) (Reissue 2008).

No. A-09-1153: **Franzen v. Neth**. Appeal dismissed. See, § 2-107(A)(2); *Koch v. Aupperle*, 274 Neb. 52, 737 N.W.2d 869 (2007).

No. A-09-1154: **State v. Jones**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Lotter*, 278 Neb. 466, 771 N.W.2d 551 (2009); *State v. Jackson*, 275 Neb. 434, 747 N.W.2d 418 (2008); *State v. McLeod*, 274 Neb. 566, 741 N.W.2d 664 (2007); *State v. Marshall*, 272 Neb. 924, 725 N.W.2d 834 (2007); *State v. Deckard*, 272 Neb. 410, 722 N.W.2d 55 (2006).

No. A-09-1155: **Harper v. Department of Corr. Servs**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-09-1158: **Harris v. Frazier**. Appeal dismissed. See, § 2-107(A)(2); *Connelly v. City of Omaha*, 278 Neb. 311, 769 N.W.2d 394 (2009).

No. A-09-1162: **Gibbs v. DeBoer**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1912(1) (Reissue 2008).

No. A-09-1163: **State v. Thomas**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-09-1164: **State v. Harden**. Affirmed. See, § 2-107(A)(1); *State v. Haas*, 279 Neb. 812, 782 N.W.2d 584 (2010); *State v. Glover*, 278 Neb. 795, 774 N.W.2d 248 (2009); *State v. Jim*, 278 Neb. 238, 768 N.W.2d 464 (2009); *Epp v. Lauby*, 271 Neb. 640, 715 N.W.2d 501 (2006).

No. A-09-1168: **State v. Starr**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-09-1169: **State v. Woltemath**. Motion of appellee for summary affirmance sustained; judgment affirmed. See *State v. Segura*, 265 Neb. 903, 660 N.W.2d 512 (2003).

No. A-09-1172: **State v. Tomlin**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-09-1173: **State v. Carrillo**. Motion of appellee for summary dismissal sustained; appeal dismissed as moot. See, § 2-107(B)(1); *State v. York*, 278 Neb. 306, 770 N.W.2d 614 (2009).

No. A-09-1175: **Mandolfo v. Mandolfo**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1315(1) (Reissue 2008).

No. A-09-1175: **Mandolfo v. Mandolfo**. Motion of appellant for rehearing sustained. Appeal reinstated.

No. A-09-1176: **Northcutt v. Neth**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-09-1178: **State v. Hoffman**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Branch*, 277 Neb. 738, 764 N.W.2d 867 (2009); *State v. Reid*, 274 Neb. 780, 743 N.W.2d 370 (2008); *State v. Decker*, 261 Neb. 382, 622 N.W.2d 903 (2001); *State v. Harrison*, 255 Neb. 990, 588 N.W.2d 556 (1999).

No. A-09-1179: **State v. Kitto**. By order of the court, appeal dismissed for failure to file briefs.

Nos. A-09-1180, A-09-1181: **State v. Rodriguez**. Motions of appellee for summary affirmance sustained; judgments affirmed. See § 2-107(B)(2).

No. A-09-1187: **State v. Atem**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-09-1189: **Hansen v. Current & Future Members of Bd. of Parole**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); Neb. Rev. Stat. § 83-188 (Reissue 2008); *Garner v. Jones*, 529 U.S. 244, 120 S. Ct. 1362, 146 L. Ed. 2d 236 (2000); *Greenholtz v. Nebraska Penal Inmates*, 442 U.S. 1, 99 S. Ct. 2100, 60 L. Ed. 2d 668 (1979); *State v. Cook*, 236 Neb. 636, 463 N.W.2d 573 (1990).

No. A-09-1190: **State v. Parnell**. By order of the court, appeal dismissed for failure to file briefs.

No. A-09-1191: **State v. Summage**. Motion of appellee for summary affirmance sustained; judgment affirmed. See *State v. Segura*, 265 Neb. 903, 660 N.W.2d 512 (2003).

No. A-09-1192: **Slepicka v. Department of Motor Vehicles**. Motion of appellant to dismiss appeal sustained; appeal dismissed with prejudice.

No. A-09-1199: **State v. Lopez**. Motion of appellee for summary affirmance sustained as to excessive sentence allegations. See *State v. Segura*, 265 Neb. 903, 660 N.W.2d 512 (2003).

No. A-09-1200: **Rousseau v. Thermo King**. Affirmed. See, § 2-107(A)(1); *McNamee v. Marriott Reservation Ctr.*, 16 Neb. App. 626, 747 N.W.2d 30 (2008).

No. A-09-1202: **Schafer v. Schafer**. Motion of appellee for summary affirmance sustained. See, § 2-107(B)(2); *Parker v. State ex rel. Bruning*, 276 Neb. 359, 753 N.W.2d 843 (2008).

No. A-09-1203: **State v. Hardin**. Affirmed. See, § 2-107(A)(1); *State v. Hamilton*, 277 Neb. 593, 763 N.W.2d 731 (2009); *State v. Nelson*, 276 Neb. 997, 759 N.W.2d 260 (2009); *State v. Clapper*, 273 Neb. 750, 732 N.W.2d 657 (2007).

No. A-09-1205: **State v. Conn**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-09-1207: **Adair Asset Mgmt. v. Hulsebus**. Affirmed. See, § 2-107(A)(1); *First Nat. Bank of York v. Critel*, 251 Neb. 128, 555 N.W.2d 773 (1996).

No. A-09-1208: **State v. McCoy**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-09-1212: **Tessman v. Olson Land & Cattle Co**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-09-1213: **In re Interest of Ronnie G. et al**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1902 (Reissue 2008).

Nos. A-09-1215, A-10-047: **Lessor v. Gary Thompson Agency**. Motions of appellant to dismiss appeal sustained; appeals dismissed.

Nos. A-09-1216, A-09-1217: **State v. Davis**. Motions of appellee for summary affirmance sustained; judgments affirmed. See § 2-107(B)(2).

No. A-09-1218: **State v. Ticnor**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-09-1221: **Shonka v. Keenan**. By order of the court, appeal dismissed for failure to file briefs.

No. A-09-1223: **Jacobson v. Shresta**. Appeal dismissed and cause remanded with directions.

No. A-09-1225: **Vacanti v. Michael Martin Homes**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-09-1228: **Penigar v. Pierson**. By order of the court, appeal dismissed for failure to file briefs.

No. A-09-1231: **State v. Wells**. Stipulation allowed; appeal dismissed.

No. A-09-1233: **State v. Jackson**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2). See, also, *State v. Lotter*, 278 Neb. 466, 771 N.W.2d 551 (2009).

No. A-09-1236: **Douglas v. White**. Appeal dismissed. See § 2-107(A)(2).

No. A-09-1238: **State v. Seaton**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Branch*, 277 Neb. 738, 764 N.W.2d 867 (2009); *State v. Reid*, 274 Neb. 780, 743 N.W.2d 370 (2008); *State v. Decker*, 261 Neb. 382, 622 N.W.2d 903 (2001); *State v. Harrison*, 255 Neb. 990, 588 N.W.2d 556 (1999).

No. A-09-1239: **Looby v. Wulf**. Summarily affirmed. See, § 2-107(A)(1); Neb. Rev. Stat. § 30-1601 (Reissue 2008).

No. A-09-1240: **Looby v. Cameron**. Summarily affirmed. See, § 2-107(A)(1); Neb. Rev. Stat. § 30-1601 (Reissue 2008).

No. A-09-1242: **State v. Yeager**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Sims*, 277 Neb. 192, 761 N.W.2d 527 (2009).

No. A-09-1243: **State v. Schroeder**. Stipulation allowed; appeal dismissed.

No. A-09-1244: **Meyer v. Department of Motor Vehicles**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-09-1253: **State v. Floyd**. By order of the court, appeal dismissed for failure to file briefs.

No. A-09-1254: **State v. Smith**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-09-1255: **Jetz Service Co. v. Daubendieck Appliance**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-09-1257: **Dugan v. County of Cheyenne**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. §§ 25-1329 and 25-1912(1) (Reissue 2008).

No. A-09-1260: **Al-Zuheri v. Lincoln Plating Co**. Motion of appellant to dismiss appeal sustained; appeal dismissed with prejudice.

No. A-09-1262: **State v. McLaughlin**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-09-1263: **State v. Boswell**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Branch*, 277 Neb. 738, 764 N.W.2d 867 (2009); *State v. Reid*, 274 Neb. 780, 743 N.W.2d 370 (2008); *State v. Decker*, 261 Neb. 382, 622 N.W.2d 903 (2001); *State v. Harrison*, 255 Neb. 990, 588 N.W.2d 556 (1999).

No. A-09-1267: **Vollbrecht v. Vollbrecht**. Motion of appellant to dismiss appeal sustained; appeal dismissed at cost of appellant.

No. A-09-1268: **State v. Thurman**. Affirmed. See § 2-107(A)(1).

No. A-09-1270: **State v. Hoffmann**. Motion of appellee for summary affirmance sustained; judgment affirmed. See *State v. Segura*, 265 Neb. 903, 660 N.W.2d 512 (2003).

No. A-09-1271: **State v. Uribe**. Reversed, sentence vacated, and cause remanded for a new trial.

No. A-09-1272: **State v. Thomas**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Branch*, 277 Neb. 738, 764 N.W.2d 867 (2009); *State v. Reid*, 274 Neb. 780, 743 N.W.2d 370 (2008); *State v. Decker*, 261 Neb. 382, 622 N.W.2d 903 (2001); *State v. Harrison*, 255 Neb. 990, 588 N.W.2d 556 (1999).

No. A-09-1273: **Renneke v. Health & Human Servs**. Summarily affirmed. See § 2-107(A)(1).

Nos. A-09-1275, A-09-1276: **State v. Osler-White**. Motions of appellee for summary affirmance sustained; judgments affirmed. See § 2-107(B)(2).

No. A-09-1278: **State v. Hagen**. Motion of appellee for summary affirmance sustained; judgment affirmed. See *State v. Segura*, 265 Neb. 903, 660 N.W.2d 512 (2003).

No. A-09-1280: **Wedgewood v. U.S. Filter/Whittier**. Motion of appellant for rehearing sustained. Appeal reinstated.

No. A-09-1281: **State v. Luciano**. By order of the court, appeal dismissed for failure to serve initial brief and failure to file complying replacement brief, including service on opposing party.

Nos. A-09-1282, A-09-1283: **State v. Fieldgrove**. Affirmed. See § 2-107(A)(1).

No. A-09-1284: **State v. Moser**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. York*, 273 Neb. 660, 731 N.W.2d 597 (2007).

Nos. A-09-1285 through A-09-1288: **State v. Croghan**. Motions of appellee for summary affirmance sustained; judgments affirmed. See § 2-107(B)(2).

No. A-09-1289: **State v. Harshbarger**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-09-1290: **State v. Williams**. Motion of appellee for summary affirmance sustained; judgment affirmed. See *State v. Vo*, 279 Neb. 964, 783 N.W.2d 416 (2010).

No. A-09-1291: **State v. Loberg**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-09-1293: **Winters v. Armstrong**. By order of the court, appeal dismissed for failure to file briefs.

No. A-09-1294: **Coleman v. Department of Motor Vehicles**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-09-1295: **In re Estate of Stokes**. Appeal dismissed. See § 2-107(A)(2).

No. A-09-1297: **Hintz v. Wancewicz**. By order of the court, appeal dismissed for failure to file briefs.

No. A-09-1298: **State v. Hernandez**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-09-1299: **Coleman v. Pettis**. Affirmed. See, §§ 2-107(A)(1) and 2-109(D)(1); *City of Gordon v. Montana Feeders, Corp.*, 273 Neb. 402, 730 N.W.2d 387 (2007).

No. A-09-1301: **Goodnight v. Diemer**. Motion of appellee for summary dismissal sustained; appeal dismissed. See, § 2-107(B)(1); *Wagner v. Wagner*, 275 Neb. 693, 749 N.W.2d 137 (2008); *Bhuller v. Bhuller*, 17 Neb. App. 607, 767 N.W.2d 813 (2009).

No. A-09-1303: **Handsaker v. Handsaker**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1912(1) (Reissue 2008).

No. A-09-1306: **State v. Nicholson**. Stipulation allowed; appeal dismissed.

No. A-09-1307: **Goodwin v. Johnson**. By order of the court, appeal dismissed for failure to file briefs.

No. A-09-1308: **Pannell v. Pannell**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-09-1309: **Estate of Teague v. Crossroads Cooperative Assn**. Appeal dismissed. See, § 2-107(A)(2); *Interstate Printing Co. v. Department of Revenue*, 236 Neb. 110, 459 N.W.2d 519 (1990).

No. A-09-1309: **Estate of Teague v. Crossroads Cooperative Assn**. Motion of appellant for rehearing sustained. Appeal reinstated.

No. A-09-1310: **State v. Frey**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Young*, 279 Neb. 602, 780 N.W.2d 28 (2010); *State v. White*, 256 Neb. 536, 590 N.W.2d 863 (1999).

No. A-09-1315: **State v. Bennett**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-09-1316: **American Central City v. Joint Antelope Valley Auth**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1315 (Reissue 2008).

No. A-10-001: **Hillard v. Korslund**. By order of the court, appeal dismissed for failure to file briefs.

Nos. A-10-003, A-10-004: **McGraw v. Thompson**. Affirmed. See, § 2-107(A)(1); *Conley v. Brazer*, 278 Neb. 508, 772 N.W.2d 545 (2009); *Dunning v. Tallman*, 244 Neb. 1, 504 N.W.2d 85 (1993).

No. A-10-007: **In re Interest of Raeanne S. et al**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-10-008: **State v. Waters**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Vela*, 279 Neb. 94, 777 N.W.2d 266 (2010); *State v. Hedgcock*, 277 Neb. 805, 765 N.W.2d 469 (2009); *State v. Halligan*, 222 Neb. 866, 387 N.W.2d 698 (1986).

No. A-10-012: **State v. Croft**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. France*, 279 Neb. 49, 776 N.W.2d 510 (2009).

No. A-10-016: **Reynolds v. Reynolds**. Affirmed. See, §§ 2-107(A)(1) and 2-105(B)(1)(b); *Metcalf v. Metcalf*, 278 Neb. 258, 769 N.W.2d 386 (2009); *Ward v. Ward*, 220 Neb. 799, 373 N.W.2d 389 (1985).

No. A-10-019: **In re Guardianship & Conservatorship of Cheyenne W**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, Neb. Rev. Stat. §§ 43-272.01(2)(b) and 30-2616(a) (Reissue 2008); *In re Interest of Sabrina K.*, 262 Neb. 871, 635 N.W.2d 727 (2001).

No. A-10-020: **In re Guardianship & Conservatorship of Ryan W**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, Neb. Rev. Stat. §§ 43-272.01(2)(b) and 30-2616(a) (Reissue 2008); *In re Interest of Sabrina K.*, 262 Neb. 871, 635 N.W.2d 727 (2001).

No. A-10-023: **Carper v. Carper**. Motion of appellee for summary affirmance sustained. See, § 2-107(B)(2); *J.B. Contracting Servs. v. Universal Surety Co.*, 261 Neb. 586, 624 N.W.2d 13 (2001); *Sindelar v. Hanel Oil, Inc.*, 254 Neb. 975, 581 N.W.2d 405 (1998).

No. A-10-024: **State v. Brye**. Motion of appellee for summary affirmance sustained; judgment affirmed. See *State v. Walker*, 272 Neb. 725, 724 N.W.2d 552 (2006).

No. A-10-027: **In re Name Change of Malousek**. Remanded with directions. See *In re Change of Name of Picollo*, 12 Neb. App. 174, 668 N.W.2d 712 (2003).

No. A-10-028: **Robbins v. Pfizer, Inc**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1912 (Reissue 2008).

No. A-10-029: **Gallagher v. Jorgerson**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1912 (Reissue 2008).

No. A-10-032: **State v. Dean**. Motion of appellee for summary affirmance sustained; judgment affirmed. See *State v. Walker*, 272 Neb. 725, 724 N.W.2d 552 (2006).

No. A-10-034: **In re Interest of Jordan M**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-10-035: **In re Interest of Jordan M**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-10-036: **In re Interest of Jordan M**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-10-037: **State v. Phalen**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Branch*, 277 Neb. 738, 764 N.W.2d 867 (2009); *State v. Reid*, 274 Neb. 780, 743 N.W.2d 370 (2008); *State v. Decker*, 261 Neb. 382, 622 N.W.2d 903 (2001); *State v. Harrison*, 255 Neb. 990, 588 N.W.2d 556 (1999).

No. A-10-038: **State v. Gardner**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-10-040: **Trail v. Trail**. Summarily affirmed. See § 2-107(A)(1).

No. A-10-041: **State v. Andersen**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-10-044: **Hubbard v. Neth**. Reversed and remanded for further proceedings.

No. A-10-048: **Wright v. Omaha Pub. Sch. Dist**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1315(1) (Reissue 2008); *Malolepszy v. State*, 270 Neb. 100, 699 N.W.2d 387 (2005).

No. A-10-048: **Wright v. Omaha Pub. Sch. Dist**. Motion of appellant for rehearing sustained in part. Appeal reinstated. See, Neb. Rev. Stat. § 25-1912(2) (Reissue 2008); *Ferer v. Aaron Ferer & Sons Co.*, 16 Neb. App. 866, 755 N.W.2d 415 (2008).

No. A-10-050: **Blackline Fence Prod. v. Atlanta Simplicity Vinyl Sys**. Stipulation allowed; appeal dismissed.

No. A-10-051: **State v. Traster**. Motion of appellee for summary affirmance sustained; judgment affirmed. See *State v. Walker*, 272 Neb. 725, 724 N.W.2d 552 (2006).

No. A-10-052: **In re Interest of Lilybelle H. et al**. Appeal dismissed. See, § 2-107(A)(2); *In re Interest of Sarah K.*, 258 Neb. 52, 601 N.W.2d 780 (1999); *In re Interest of Hailey M.*, 15 Neb. App. 323, 726 N.W.2d 576 (2007).

No. A-10-054: **State v. Abram**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1902 (Reissue 2008); *State v. Engleman*, 5 Neb. App. 485, 560 N.W.2d 851 (1997).

No. A-10-055: **State v. Jones**. Appeal dismissed. See § 2-107(A)(2).

No. A-10-056: **Summage v. Moore**. Summarily reversed and cause remanded for a new hearing. See, § 2-107(A)(3); *In re Guardianship of Breeahana C.*, 14 Neb. App. 182, 706 N.W.2d 66 (2005).

No. A-10-061: **State v. Koenig**. Motion of appellee for summary affirmance sustained; judgment affirmed. See *State v. Amaya*, 276 Neb. 818, 758 N.W.2d 22 (2008).

No. A-10-062: **State v. Martinez**. By order of the court, appeal dismissed for failure to file briefs.

No. A-10-063: **State v. Hatcliff**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Goodwin*, 278 Neb. 945, 774 N.W.2d 733 (2009); *State v. Branch*, 277 Neb. 738, 764 N.W.2d 867 (2009); *State v. Reid*, 274 Neb. 780, 743 N.W.2d 370 (2008); *State v. Decker*, 261 Neb. 382, 622 N.W.2d 903 (2001); *State v. Harrison*, 255 Neb. 990, 588 N.W.2d 556 (1999).

Nos. A-10-064, A-10-065: **State v. Heger**. Motions of appellee for summary affirmance sustained; judgments affirmed. See *State v. Walker*, 272 Neb. 725, 724 N.W.2d 552 (2006).

No. A-10-066: **Glass v. Conley**. Appeal dismissed. See § 2-107(A)(2).

No. A-10-067: **Loyd v. Omaha Pub. Sch. Dist**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1315(1) (Reissue 2008); *Malolepszy v. State*, 270 Neb. 100, 699 N.W.2d 387 (2005).

No. A-10-067: **Loyd v. Omaha Pub. Sch. Dist**. Motion of appellant for rehearing sustained in part. Appeal reinstated. See, Neb. Rev. Stat. § 25-1912(2) (Reissue 2008); *Ferer v. Aaron Ferer & Sons Co.*, 16 Neb. App. 866, 755 N.W.2d 415 (2008).

No. A-10-069: **State v. Hodges**. Appeal dismissed. See § 2-107(A)(2).

No. A-10-070: **Bruhn v. Tyro Farms**. Stipulation allowed; appeal dismissed.

No. A-10-071: **Witmer v. Department of Corr. Servs**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *Witmer v. Nebraska Dept. of Corr. Servs.*, 13 Neb. App. 297, 691 N.W.2d 185 (2005).

No. A-10-072: **Albers on behalf of Albers v. Grimm**. Affirmed. See, § 2-107(A)(1); *Parker v. State ex rel. Bruning*, 276 Neb. 359, 753 N.W.2d 843 (2008).

No. A-10-073: **Pyle v. Exmark Mfg**. Affirmed. See, § 2-107(A)(1); *Bishop v. Speciality Fabricating Co.*, 277 Neb. 171, 760 N.W.2d 352 (2009).

No. A-10-075: **Equal Opp. Comm. on behalf of Gutierrez v. Barney G., Inc**. Appeal dismissed. See § 2-107(A)(2).

No. A-10-076: **Equal Opp. Comm. on behalf of Macias v. Barney G., Inc**. Appeal dismissed. See § 2-107(A)(2).

No. A-10-077: **Equal Opp. Comm. on behalf of Mendez v. Barney G., Inc**. Appeal dismissed. See § 2-107(A)(2).

No. A-10-078: **Equal Opp. Comm. on behalf of Perez v. Barney G., Inc**. Appeal dismissed. See § 2-107(A)(2).

No. A-10-079: **Equal Opp. Comm. on behalf of Quezada v. Barney G., Inc**. Appeal dismissed. See § 2-107(A)(2).

No. A-10-080: **Equal Opp. Comm. on behalf of Sancedo v. Barney G., Inc**. Appeal dismissed. See § 2-107(A)(2).

No. A-10-081: **Equal Opp. Comm. on behalf of Zamarripa v. Barney G., Inc**. Appeal dismissed. See § 2-107(A)(2).

No. A-10-082: **Equal Opp. Comm. on behalf of Placensia v. Barney G., Inc**. Appeal dismissed. See § 2-107(A)(2).

No. A-10-083: **Equal Opp. Comm. on behalf of Coronado v. Barney G., Inc**. Appeal dismissed. See § 2-107(A)(2).

No. A-10-084: **Equal Opp. Comm. on behalf of Velez v. Barney G., Inc**. Appeal dismissed. See § 2-107(A)(2).

No. A-10-085: **Equal Opp. Comm. on behalf of Gonzalez v. Barney G., Inc**. Appeal dismissed. See § 2-107(A)(2).

Nos. A-10-086, A-10-087: **State v. Weirich**. Motions of appellee for summary affirmance sustained; judgments affirmed. See, § 2-107(B)(2); *State v. Simnick*, 279 Neb. 499, 779 N.W.2d 335 (2010).

No. A-10-088: **State v. Gardner**. Motion of appellee for summary affirmance sustained; judgment affirmed. See *State v. Segura*, 265 Neb. 903, 660 N.W.2d 512 (2003).

No. A-10-089: **State v. Myers**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Segura*, 265 Neb. 903, 660 N.W.2d 512 (2003).

No. A-10-090: **State v. Myers**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Segura*, 265 Neb. 903, 660 N.W.2d 512 (2003).

No. A-10-091: **State v. Myers**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Segura*, 265 Neb. 903, 660 N.W.2d 512 (2003).

No. A-10-093: **Marti v. Anderson, Creager**. Appeal dismissed at cost of appellant. See *Frederick v. Seeba*, 16 Neb. App. 373, 745 N.W.2d 342 (2008).

No. A-10-095: **In re Interest of Ashley C. & Dillon A**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1912 (Reissue 2008).

No. A-10-096: **Teas v. Ferguson**. Motion of appellee for summary affirmance sustained.

Nos. A-10-097, A-10-098: **Vital Learning Corp. v. Point One**. Appeals dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1315(1) (Reissue 2008).

Nos. A-10-100, A-10-101: **State v. Murphy**. Motions of appellant to dismiss appeal sustained; appeals dismissed.

No. A-10-102: **State v. Ferguson**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-10-104: **Nutsch v. Department of Motor Vehicles**. By order of the court, appeal dismissed for failure to file briefs.

No. A-10-106: **State v. Vela-Montes**. Appellee's suggestion of remand sustained. Cause remanded with directions. See, Neb. Rev. Stat. § 29-1207(4)(a) to (f) (Reissue 2008); *State v. Williams*, 277 Neb. 133, 761 N.W.2d 514 (2009).

Nos. A-10-107, A-10-108: **State v. Johnson**. Motions of appellant to dismiss appeal sustained; appeals dismissed.

No. A-10-109: **Perry v. Kleveland**. Affirmed. See, § 2-107(A)(1); *Bellino v. McGrath North*, 274 Neb. 130, 738 N.W.2d 434 (2007).

No. A-10-110: **Kohl v. Alegent Health Bergan Mercy Health Sys**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1912 (Reissue 2008).

No. A-10-113: **State v. Lawson**. Stipulation allowed; appeal dismissed.

Nos. A-10-118, A-10-119: **State v. Green**. Motions of appellee for summary affirmance sustained; judgments affirmed. See, § 2-107(B)(2); *State v. Branch*, 277 Neb. 738, 764 N.W.2d 867 (2009); *State v. Reid*, 274 Neb. 780, 743 N.W.2d 370 (2008); *State v. Decker*, 261 Neb. 382, 622 N.W.2d 903 (2001); *State v. Harrison*, 255 Neb. 990, 588 N.W.2d 556 (1999).

No. A-10-124: **State v. Balvin**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Casillas*, 279 Neb. 820, 782 N.W.2d 882 (2010); *State v. Rung*, 278 Neb. 855, 774 N.W.2d 621 (2009); *State v. Dunster*, 278 Neb. 268, 769 N.W.2d 401 (2009); *State v. Hamilton*, 277 Neb. 593, 763 N.W.2d 731 (2009); *State v. Iromuanya*, 272 Neb. 178, 719 N.W.2d 263 (2006).

No. A-10-125: **Blakely v. Lancaster County**. Appeal dismissed. See § 2-107(A)(2).

No. A-10-125: **Blakely v. Lancaster County**. Motion of appellant for rehearing sustained. Appeal reinstated. See *McNally v. City of Omaha*, 273 Neb. 558, 731 N.W.2d 573 (2007).

No. A-10-125: **Blakely v. Lancaster County**. Remanded with directions. See Neb. Rev. Stat. § 25-1905 (Reissue 2008). See, also, *McNally v. City of Omaha*, 273 Neb. 558, 731 N.W.2d 573 (2007).

No. A-10-126: **Vanosdel on behalf of Vanosdel v. Vanosdel**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-10-128: **State v. McCraney**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-10-129: **State v. Lewis**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Branch*, 277 Neb. 738, 764 N.W.2d 867 (2009); *State v. Reid*, 274 Neb. 780, 743 N.W.2d 370 (2008); *State v. Decker*, 261 Neb. 382, 622 N.W.2d 903 (2001); *State v. Harrison*, 255 Neb. 990, 588 N.W.2d 556 (1999).

No. A-10-130: **State v. Dortch**. Stipulation allowed; appeal dismissed.

No. A-10-132: **State v. Reardon**. Motion of appellee for summary affirmance sustained; judgment affirmed. See *State v. Branch*, 277 Neb. 738, 764 N.W.2d 867 (2009).

No. A-10-133: **Siefkes v. Muller**. Affirmed. See, §§ 2-107(A)(1) and 2-109(D)(1)(e); *Community Redev. Auth. v. Gizinski*, 16 Neb. App. 504, 745 N.W.2d 616 (2008).

No. A-10-134: **Fritz v. Fritz**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1912 (Reissue 2008).

No. A-10-137: **State v. Fuentes**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-10-138: **State v. Fuentes**. Judgment affirmed as modified.

No. A-10-139: **State v. Fuentes**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-10-142: **State v. Brown**. Appeal dismissed. See, § 2-107(A)(2); *State v. Whitmore*, 234 Neb. 557, 452 N.W.2d 31 (1990).

No. A-10-144: **State v. Sempek**. Motion of appellee for summary affirmance sustained; judgment affirmed. See *State v. Segura*, 265 Neb. 903, 660 N.W.2d 512 (2003).

No. A-10-149: **Credit Mgmt. Servs. v. Anderson**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1902 (Reissue 2008); *Goeser v. Allen*, 14 Neb. App. 656, 714 N.W.2d 449 (2006).

No. A-10-152: **State v. Manchester**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-10-154: **State v. Filip**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-10-155: **Bedore v. Ranch Oil Co**. Appeal dismissed. See § 2-107(A)(2).

No. A-10-156: **Harrison v. State**. Appeal dismissed. See, § 2-107(A)(2); *Platte Valley Nat. Bank v. Lasen*, 273 Neb. 602, 732 N.W.2d 347 (2007).

No. A-10-159: **State v. Samek**. By order of the court, appeal dismissed for failure to file briefs.

Nos. A-10-163, A-10-164: **State v. Shiech**. Motions of appellee for summary affirmance sustained; judgments affirmed. See § 2-107(B)(2).

Nos. A-10-167, A-10-168: **State v. Cappellano**. Motions of appellee for summary affirmance sustained; judgments affirmed. See, § 2-107(B)(2); *State v. Branch*, 277 Neb. 738, 764 N.W.2d 867 (2009); *State v. Reid*, 274 Neb. 780, 743 N.W.2d 370 (2008); *State v. Decker*, 261 Neb. 382, 622 N.W.2d 903 (2001); *State v. Harrison*, 255 Neb. 990, 588 N.W.2d 556 (1999).

No. A-10-169: **Downey v. Western Community College Area**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1315 (Reissue 2008).

No. A-10-172: **State v. Madut**. Motion of appellee for summary affirmance sustained; judgment affirmed. See *State v. Walker*, 272 Neb. 725, 724 N.W.2d 552 (2006).

No. A-10-173: **State v. Ellingson**. By order of the court, appeal dismissed for failure to file briefs.

No. A-10-174: **State v. Parks**. Motion of appellee for summary dismissal sustained; appeal dismissed. See, § 2-107(B)(1); *State v. Wilson*, 15 Neb. App. 212, 724 N.W.2d 99 (2006).

No. A-10-175: **State v. Neville**. Affirmed. See, § 2-107(A)(1); Neb. Rev. Stat. § 60-696(2) (Reissue 2004); *State v. Babbitt*, 277 Neb. 327, 762 N.W.2d 58 (2009).

No. A-10-176: **In re Notice of Violation of NID 3110**. Stipulation allowed; appeal dismissed; each party to pay own costs.

No. A-10-178: **State v. Tyler**. Appeal dismissed. See § 2-107(A)(2).

No. A-10-181: **State v. Yashirin**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-10-182: **State Farm Fire & Cas. Co. v. Tonniges**. Motion of appellant to dismiss appeal sustained; appeal dismissed with prejudice; each party to pay own costs.

No. A-10-184: **State v. Neal**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); Neb. Rev. Stat. § 29-1207 (Reissue 2008); *State v. Vo*, 279 Neb. 964, 783 N.W.2d 416 (2010); *State v. Poindexter*, 277 Neb. 936, 766 N.W.2d 391 (2009); *State v. Moyer*, 271 Neb. 776, 715 N.W.2d 565 (2006); *State v. Neal*, 265 Neb. 693, 658 N.W.2d 694 (2003); *State v. Kinser*, 256 Neb. 56, 588 N.W.2d 794 (1999); *State v. Hilpert*, 213 Neb. 564, 330 N.W.2d 729 (1983).

No. A-10-186: **Nebraska Leasing Servs. v. Child Care Mgmt. Servs**. Affirmed. See, § 2-107(A)(1); *Capitol Construction v. Skinner*, 279 Neb. 419, 778 N.W.2d 721 (2010).

No. A-10-188: **State v. Tederman**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

Nos. A-10-189, A-10-190: **State v. Hall**. Motions of appellee for summary affirmance sustained; judgments affirmed. See *State v. Segura*, 265 Neb. 903, 660 N.W.2d 512 (2003).

No. A-10-191: **State v. Gomez**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Branch*, 277 Neb. 738, 764 N.W.2d 867 (2009); *State v. Reid*, 274 Neb. 780, 743 N.W.2d 370 (2008); *State v. Decker*, 261 Neb. 382, 622 N.W.2d 903 (2001); *State v. Harrison*, 255 Neb. 990, 588 N.W.2d 556 (1999).

No. A-10-193: **Fleming v. Fleming**. By order of the court, appeal dismissed for failure to file briefs.

No. A-10-196: **State v. Cassell**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Edwards*, 278 Neb. 55, 767 N.W.2d 784 (2009); *State v. Losinger*, 268 Neb. 660, 686 N.W.2d 582 (2004).

No. A-10-199: **State v. Morgan**. Affirmed. See, § 2-107(A)(1); *State v. Jackson*, 275 Neb. 434, 747 N.W.2d 418 (2008).

No. A-10-201: **Charlie's Twin Creek v. Marion**. By order of the court, appeal dismissed for failure to file briefs.

No. A-10-203: **State v. Reed**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1912(1) (Reissue 2008).

No. A-10-204: **State on behalf of Wilson v. Wilson**. Motion of appellee for summary affirmance sustained; judgment affirmed. See *In re Interest of Heather R. et al.*, 269 Neb. 653, 694 N.W.2d 659 (2005). See, also, *Reisig v. Allstate Ins. Co.*, 264 Neb. 74, 645 N.W.2d 544 (2002).

No. A-10-205: **Department of Education v. Hasty**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-10-207: **State v. Shelby**. Motion of appellee for summary affirmance sustained; judgment affirmed. See *Hall v. State*, 264 Neb. 151, 646 N.W.2d 572 (2002).

No. A-10-210: **State v. Benzel**. Motion of appellee for summary affirmance sustained; judgment affirmed. See *State v. Rung*, 278 Neb. 855, 774 N.W.2d 621 (2009).

No. A-10-211: **State v. Fowler**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-10-213: **State v. Eagleboy**. Affirmed. See *State v. Williams*, 276 Neb. 716, 757 N.W.2d 187 (2008).

No. A-10-214: **Bryan v. Bryan**. By order of the court, appeal dismissed for failure to file briefs.

No. A-10-215: **State v. Caniglia**. Stipulation allowed; appeal dismissed.

No. A-10-217: **Monjarez v. Monjarez**. Appeal dismissed. See, § 2-107(A)(2); *State v. Bellamy*, 264 Neb. 784, 652 N.W.2d 86 (2002).

No. A-10-218: **State v. Jones**. Motion of appellee for summary affirmance sustained; judgment affirmed. See *State v. Segura*, 265 Neb. 903, 660 N.W.2d 512 (2003).

No. A-10-220: **State v. Jansa**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-10-221: **State v. King**. Appeal dismissed. See, § 2-107(A)(2); *State v. Haase*, 247 Neb. 817, 530 N.W.2d 617 (1995).

No. A-10-222: **Moss v. Tyler**. Appeal dismissed. See, § 2-107(A)(2); *In re Interest of Taylor W.*, 276 Neb. 679, 757 N.W.2d 1 (2008).

No. A-10-223: **Handke v. Handke**. Appeal dismissed as having been improvidently docketed.

No. A-10-224: **Moss v. Tyler**. By order of the court, appeal dismissed for failure to file briefs.

No. A-10-226: **In re Estate of Osborne**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1315(1) (Reissue 2008).

Nos. A-10-227, A-10-228: **Monahan v. Douglas Cty. Bd. of Equal**. Summarily affirmed. See, § 2-107(A)(1); *Omaha Country Club v. Douglas Cty. Bd. of Equal.*, 11 Neb. App. 171, 645 N.W.2d 821 (2002).

No. A-10-230: **Gillispie v. Gillispie**. Affirmed. See § 2-107(A)(1).

No. A-10-233: **Arias v. Heineman**. Motion of appellees to dismiss on grounds of mootness sustained; appeal dismissed.

No. A-10-237: **CMAC, Inc. v. City of Omaha**. Appeal dismissed. See, § 2-107(A)(2); *State v. Agee*, 274 Neb. 445, 741 N.W.2d 161 (2007); *Koch v. Aupperle*, 274 Neb. 52, 737 N.W.2d 869 (2007).

No. A-10-238: **West Gate Bank v. Wanek**. Affirmed. See § 2-107(A)(1).

No. A-10-240: **State v. Neujahr**. Motion of appellee for summary dismissal sustained; appeal dismissed. See, § 2-107(B)(1); *State v. Wilson*, 15 Neb. App. 212, 724 N.W.2d 99 (2006).

No. A-10-241: **State v. Davis**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Branch*, 277 Neb. 738, 764 N.W.2d 867 (2009); *State v. Reid*, 274 Neb. 780, 743 N.W.2d 370 (2008); *State v. Decker*, 261 Neb. 382, 622 N.W.2d 903 (2001); *State v. Harrison*, 255 Neb. 990, 588 N.W.2d 556 (1999).

No. A-10-242: **State v. Mendoza**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-10-243: **Holguin v. Juranek**. Appeal dismissed. See, § 2-107(A)(2); *Law Offices of Ronald J. Palagi v. Howard*, 275 Neb. 334, 747 N.W.2d 1 (2008).

No. A-10-247: **Fitzgerald v. Community Redevelopment Corp**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1315(1) (Reissue 2008).

No. A-10-248: **State v. Grundmann**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Segura*, 265 Neb. 903, 660 N.W.2d 512 (2003).

No. A-10-249: **State v. Wulf**. Affirmed. See, § 2-107(A)(1); *State v. Dunster*, 278 Neb. 268, 769 N.W.2d 401 (2009); *State v. Branch*, 277 Neb. 738, 764 N.W.2d 867 (2009); *State v. Reid*, 274 Neb. 780, 743 N.W.2d 370 (2008); *State v. Decker*, 261 Neb. 382, 622 N.W.2d 903 (2001); *State v. Harrison*, 255 Neb. 990, 588 N.W.2d 556 (1999).

No. A-10-250: **Devese v. Transguard Ins. Co**. Affirmed. See, § 2-107(A)(1); *Steffensmeier v. Le Mars Mut. Ins. Co.*, 276 Neb. 86, 752 N.W.2d 155 (2008); *Omaha Sky Divers Parachute Club, Inc. v. Ranger Ins. Co.*, 189 Neb. 610, 204 N.W.2d 162 (1973).

No. A-10-254: **In re Interest of Aliee P**. Appeal dismissed. See, § 2-107(A)(2); *In re Interest of Tayla R.*, 17 Neb. App. 595, 767 N.W.2d 127 (2009).

No. A-10-255: **State v. Van Natter**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Sepulveda*, 278 Neb. 972, 775 N.W.2d 40 (2009); *State v. Lotter*, 278 Neb. 466, 771 N.W.2d 551 (2009); *State v. Mata*, 273 Neb. 474, 730 N.W.2d 396 (2007); *State v. Marshall*, 272 Neb. 924, 725 N.W.2d 834 (2007); *State v. Dandridge*, 264 Neb. 707, 651 N.W.2d 567 (2002).

No. A-10-258: **Tyler v. Graves**. By order of the court, appeal dismissed for failure to file briefs.

Nos. A-10-259, A-10-260: **State v. Goodwin**. Motions of appellee for summary affirmance sustained; judgments affirmed. See *State v. Branch*, 277 Neb. 738, 764 N.W.2d 867 (2009).

No. A-10-261: **State v. Arredondo**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Haas*, 279 Neb. 812, 782 N.W.2d 584 (2010); *State v. Sepulveda*, 278 Neb. 972, 775 N.W.2d 40 (2009); *State v. Thomas*, 278 Neb. 248, 769 N.W.2d 357 (2009); *State v. Thomas*, 262 Neb. 138, 629 N.W.2d 503 (2001); *State v. Luff*, 18 Neb. App. 422, 783 N.W.2d 625 (2010).

No. A-10-262: **In re Interest of W.P**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-10-263: **Bietz v. Bietz**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-10-264: **State v. Cruces**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Branch*, 277 Neb. 738, 764 N.W.2d 867 (2009); *State v. Reid*, 274 Neb. 780, 743 N.W.2d 370 (2008); *State v. Decker*, 261 Neb. 382, 622 N.W.2d 903 (2001); *State v. Harrison*, 255 Neb. 990, 588 N.W.2d 556 (1999).

No. A-10-266: **State v. Smith**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); Neb. Rev. Stat. §§ 60-6,197.02(1) and 60-6,197.03(6) (Cum. Supp. 2008); *State v. Thorpe*, 280 Neb. 11, 783 N.W.2d 749 (2010); *State v. Casillas*, 279 Neb. 820, 782 N.W.2d 882 (2010); *State v. Rung*, 278 Neb. 855, 774 N.W.2d 621 (2009); *State v. Grizzle*, 18 Neb. App. 48, 774 N.W.2d 634 (2009).

No. A-10-268: **In re Estate of DeMay**. Reversed and remanded with directions.

No. A-10-269: **Mason v. Neapco, Inc**. Affirmed. See § 2-107(A)(1).

No. A-10-271: **State v. Zitterkopf**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, *State v. Segura*, 265 Neb. 903, 660 N.W.2d 512 (2003); *State v. Zitterkopf*, 236 Neb. 743, 463 N.W.2d 616 (1990).

No. A-10-272: **State v. Holmstedt**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-10-275: **State v. Roberts**. Motion of appellee for summary affirmance sustained; conviction and sentence affirmed. See § 2-107(B)(2).

No. A-10-278: **State v. Sidzyik**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); Neb. Rev. Stat. § 29-2261 (Reissue 2008); *State v. Glover*, 278 Neb. 795; 774 N.W.2d 248 (2009); *State v. Branch*, 277 Neb. 738, 764 N.W.2d 867 (2009); *State v. Nelson*, 262 Neb. 896, 636 N.W.2d 620 (2001).

No. A-10-280: **StoreVisions v. Omaha Tribe of Neb**. Appeal dismissed. See, § 2-107(A)(2); *Qwest Bus. Resources v. Headliners–1299 Farnam*, 15 Neb. App. 405, 727 N.W.2d 724 (2007).

No. A-10-280: **StoreVisions v. Omaha Tribe of Neb**. Motion of appellant for rehearing sustained. Appeal reinstated.

No. A-10-281: **Wagner v. ITT Technical Institute**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-10-282: **In re Estate of Arnold**. Appeal dismissed. See § 2-107(A)(2).

No. A-10-283: **Equal Opp. Comm. on behalf of Gutierrez v. Barney G., Inc**. Summarily affirmed. See, § 2-107(A)(1); Neb. Rev. Stat. § 25-2301.02 (Reissue 2008); *Tyler v. Natvig*, 17 Neb. App. 358, 762 N.W.2d 621 (2009).

No. A-10-284: **Equal Opp. Comm. on behalf of Macias v. Barney G., Inc**. Summarily affirmed. See, § 2-107(A)(1); Neb. Rev. Stat. § 25-2301.02 (Reissue 2008); *Tyler v. Natvig*, 17 Neb. App. 358, 762 N.W.2d 621 (2009).

No. A-10-285: **Equal Opp. Comm. on behalf of Mendez v. Barney G., Inc**. Summarily affirmed. See, § 2-107(A)(1); Neb. Rev. Stat. § 25-2301.02 (Reissue 2008); *Tyler v. Natvig*, 17 Neb. App. 358, 762 N.W.2d 621 (2009).

No. A-10-286: **Equal Opp. Comm. on behalf of Perez v. Barney G., Inc**. Summarily affirmed. See, § 2-107(A)(1); Neb. Rev. Stat. § 25-2301.02 (Reissue 2008); *Tyler v. Natvig*, 17 Neb. App. 358, 762 N.W.2d 621 (2009).

No. A-10-287: **Equal Opp. Comm. on behalf of Quezada v. Barney G., Inc**. Summarily affirmed. See, § 2-107(A)(1); Neb. Rev. Stat. § 25-2301.02 (Reissue 2008); *Tyler v. Natvig*, 17 Neb. App. 358, 762 N.W.2d 621 (2009).

No. A-10-288: **Equal Opp. Comm. on behalf of Saucedo v. Barney G., Inc**. Summarily affirmed. See, § 2-107(A)(1); Neb. Rev. Stat. § 25-2301.02 (Reissue 2008); *Tyler v. Natvig*, 17 Neb. App. 358, 762 N.W.2d 621 (2009).

No. A-10-289: **Equal Opp. Comm. on behalf of Zamarripa v. Barney G., Inc**. Summarily affirmed. See, § 2-107(A)(1); Neb. Rev. Stat. § 25-2301.02 (Reissue 2008); *Tyler v. Natvig*, 17 Neb. App. 358, 762 N.W.2d 621 (2009).

No. A-10-290: **Equal Opp. Comm. on behalf of Placensia v. Barney G., Inc**. Summarily affirmed. See, § 2-107(A)(1); Neb. Rev. Stat. § 25-2301.02 (Reissue 2008); *Tyler v. Natvig*, 17 Neb. App. 358, 762 N.W.2d 621 (2009).

No. A-10-291: **Equal Opp. Comm. on behalf of Coronado v. Barney G., Inc**. Summarily affirmed. See, § 2-107(A)(1); Neb. Rev. Stat. § 25-2301.02 (Reissue 2008); *Tyler v. Natvig*, 17 Neb. App. 358, 762 N.W.2d 621 (2009).

No. A-10-292: **Equal Opp. Comm. on behalf of Velez v. Barney G., Inc**. Summarily affirmed. See, § 2-107(A)(1); Neb. Rev. Stat. § 25-2301.02 (Reissue 2008); *Tyler v. Natvig*, 17 Neb. App. 358, 762 N.W.2d 621 (2009).

No. A-10-293: **Equal Opp. Comm. on behalf of Gonzalez v. Barney G., Inc**. Summarily affirmed. See, § 2-107(A)(1); Neb. Rev. Stat. § 25-2301.02 (Reissue 2008); *Tyler v. Natvig*, 17 Neb. App. 358, 762 N.W.2d 621 (2009).

No. A-10-297: **State v. Meints**. Appeal dismissed. See § 2-107(A)(2).

No. A-10-297: **State v. Meints**. Motion of appellant for rehearing sustained. Appeal reinstated.

No. A-10-297: **State v. Meints**. Motion of appellee for summary affirmance sustained; judgment affirmed.

No. A-10-298: **Hillard v. Department of Corr. Servs**. By order of the court, appeal dismissed for failure to file briefs.

No. A-10-299: **Hillard v. Department of Corr. Servs**. By order of the court, appeal dismissed for failure to file briefs.

No. A-10-300: **State v. Langenberg**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-10-306: **Lewallen v. Lewallen**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-10-308: **In re Interest of Ronnie G. et al**. Appeal dismissed. See, § 2-107(A)(2); *In re Interest of Laura O. & Joshua O.*, 6 Neb. App. 554, 574 N.W.2d 776 (1998).

No. A-10-309: **State v. Ellis**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Branch*, 277 Neb. 738, 764 N.W.2d 867 (2009); *State v. Williams*, 276 Neb. 716, 757 N.W.2d 187 (2008); *State v. Hall*, 268 Neb. 91, 679 N.W.2d 760 (2004); *State v. Erlewine*, 234 Neb. 855, 452 N.W.2d 764 (1990); *State v. Goree*, 11 Neb. App. 685, 659 N.W.2d 344 (2003).

No. A-10-310: **State v. Pierce**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Segura*, 265 Neb. 903, 660 N.W.2d 512 (2003).

No. A-10-313: **In re Guardianship & Conservatorship of Maria G**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1912(3) (Reissue 2008); *Beckman v. McAndrew*, 16 Neb. App. 217, 742 N.W.2d 778 (2007).

No. A-10-314: **Workman v. Andrews**. Affirmed. See § 2-107(A)(1).

No. A-10-316: **In re Interest of Cheyenne R. & Ryan W**. Appeal dismissed. See, § 2-107(A)(2); *In re Interest of Artharena D.*, 253 Neb. 613, 571 N.W.2d 608 (1997).

No. A-10-317: **State v. Horst**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-10-318: **Jetz Service Co. v. Appliance Barn of Neb**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-10-319: **In re Estate of Stuthman**. Appeal dismissed. See § 2-107(A)(2).

No. A-10-321: **Becker v. Becker**. Appeal dismissed. See § 2-107(A)(2).

No. A-10-324: **Bell v. Bell**. Summarily remanded with directions. See, § 4-203; *Rutherford v. Rutherford*, 277 Neb. 301, 761 N.W.2d 922 (2009).

No. A-10-325: **State v. Bernhardt**. Affirmed. See, § 2-107(A)(1); *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *State v. Watkins*, 277 Neb. 428, 762 N.W.2d 589 (2009); *State v. Bazer*, 276 Neb. 7, 751 N.W.2d 619 (2008); *State v. Moore*, 272 Neb. 71, 718 N.W.2d 537 (2006); *State v. Moyer*, 271 Neb. 776, 715 N.W.2d 565 (2006); *State v. Roeder*, 262 Neb. 951, 636 N.W.2d 870 (2001); *State v. Burkhardt*, 258 Neb. 1050, 607 N.W.2d 512 (2000).

No. A-10-327: **State v. Cantando**. Motion of appellee for summary dismissal for lack of jurisdiction sustained; appeal dismissed. See, § 2-107(B)(1); Neb. Rev. Stat. § 25-1912 (Reissue 2008); *DeBose v. State*, 267 Neb. 116, 672 N.W.2d 426 (2003).

No. A-10-328: **State v. Bouaphakeo**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Branch*, 277 Neb. 738, 764 N.W.2d 867 (2009); *State v. Reid*, 274 Neb. 780, 743 N.W.2d 370 (2008); *State v. Decker*, 261 Neb. 382, 622 N.W.2d 903 (2001); *State v. Harrison*, 255 Neb. 990, 588 N.W.2d 556 (1999).

No. A-10-329: **In re Interest of Enrique P. et al**. Appeal dismissed. See, § 2-107(A)(2); *State v. Sklenar*, 269 Neb. 98, 690 N.W.2d 631 (2005); *Mathews v. Mathews*, 267 Neb. 604, 676 N.W.2d 42 (2004); *In re Interest of Sarah K.*, 258 Neb. 52, 601 N.W.2d 780 (1999).

No. A-10-331: **Robinson v. AFGI, L.L.C**. Affirmed. See, § 2-107(A)(1); *Hull v. Aetna Ins. Co.*, 247 Neb. 713, 529 N.W.2d 783 (1995); *Pearson v. Lincoln Telephone Co.*, 2 Neb. App. 703, 513 N.W.2d 361 (1994).

No. A-10-332: **State v. Burries**. Appeal dismissed. See, § 2-107(A)(2); *State v. Haase*, 247 Neb. 817, 530 N.W.2d 617 (1995).

No. A-10-333: **State v. Burries**. Appeal dismissed. See, § 2-107(A)(2); *State v. Haase*, 247 Neb. 817, 530 N.W.2d 617 (1995).

No. A-10-334: **State v. Ortiz-Ortiz**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Branch*, 277 Neb. 738, 764 N.W.2d 867 (2009); *State v. Reid*, 274 Neb. 780, 743 N.W.2d 370 (2008); *State v. Decker*, 261 Neb. 382, 622 N.W.2d 903 (2001); *State v. Harrison*, 255 Neb. 990, 588 N.W.2d 556 (1999); *State v. Start*, 239 Neb. 571, 477 N.W.2d 20 (1991).

No. A-10-338: **Moss v. Tyler**. By order of the court, appeal dismissed for failure to file briefs.

No. A-10-339: **Tyler on behalf of Moss v. Moss**. Appeal dismissed. See § 2-107(A)(2).

No. A-10-341: **Pieper v. Pieper**. By order of the court, appeal dismissed for failure to file briefs.

No. A-10-343: **Baxter v. Baxter**. Appeal dismissed. See, § 2-107(A)(2); *Peterson v. Peterson*, 14 Neb. App. 778, 714 N.W.2d 793 (2006).

No. A-10-345: **State v. Holladay**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Dunster*, 278 Neb. 268, 769 N.W.2d 401 (2009); *State v. Gunther*, 278 Neb. 173, 768 N.W.2d 453 (2009).

No. A-10-346: **In re Interest of April R. & Leila A**. Affirmed. See, § 2-107(A)(1); *In re Interest of Cornelius K.*, 280 Neb. 291, 785 N.W.2d 849 (2010).

No. A-10-347: **State v. Runningbear**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-10-349: **State v. Cech**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, *State v. Thomas*, 278 Neb. 248, 769 N.W.2d 357 (2009); *State v. Branch*, 277 Neb. 738, 764 N.W.2d 867 (2009).

No. A-10-350: **State v. Hicken**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Williams*, 277 Neb. 133, 761 N.W.2d 514 (2009); *State v. Schmader*, 13 Neb. App. 321, 691 N.W.2d 559 (2005); *State v. Dailey*, 10 Neb. App. 793, 639 N.W.2d 141 (2002).

No. A-10-351: **State v. Buckingham**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Segura*, 265 Neb. 903, 660 N.W.2d 512 (2003).

No. A-10-354: **State v. Bagby**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-10-355: **Sivick v. Hendrix**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1315(1) (Reissue 2008).

No. A-10-356: **Donner v. Hans**. Affirmed. See, § 2-107(A)(1); *Rutherford v. Rutherford*, 277 Neb. 301, 761 N.W.2d 922 (2009); *Vogel v. Vogel*, 262 Neb. 1030, 637 N.W.2d 611 (2002).

No. A-10-358: **Podtburg v. Podtburg**. Appeal dismissed. See, § 2-107(A)(2); *Macke v. Pierce*, 263 Neb. 868, 643 N.W.2d 673 (2002).

No. A-10-359: **State v. Segura**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1902 (Reissue 2008).

No. A-10-361: **Schropp Indus. v. Washington Cty. Attorney's Office**. Summarily dismissed. See, § 2-107(A)(2); *Stetson v. Silverman*, 278 Neb. 389, 770 N.W.2d 632 (2009); *Hallie Mgmt. Co. v. Perry*, 272 Neb. 81, 718 N.W.2d 531 (2006); *State ex rel. Acme Rug Cleaner v. Likes*, 256 Neb. 34, 588 N.W.2d 783 (1999).

No. A-10-362: **State v. Martinez**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-10-363: **State v. Martinez**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Branch*, 277 Neb. 738, 764 N.W.2d 867 (2009); *State v. Reid*, 274 Neb. 780, 743 N.W.2d 370 (2008); *State v. Decker*, 261 Neb. 382, 622 N.W.2d 903 (2001); *State v. Harrison*, 255 Neb. 990, 588 N.W.2d 556 (1999).

No. A-10-364: **State v. Hinkeldey**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-10-366: **Kirchhevel v. Andress**. Affirmed in part, and in part vacated and remanded with directions.

No. A-10-368: **State v. Idles**. Affirmed. See, § 2-107(A)(1); *State v. Gibilisco*, 279 Neb. 308, 778 N.W.2d 106 (2010); *State v. Plant*, 248 Neb. 52, 532 N.W.2d 619 (1995); *State v. Petitte*, 228 Neb. 144, 421 N.W.2d 460 (1988).

No. A-10-371: **Jannati v. Conant**. Affirmed. See, § 2-107(A)(1); *Bevard v. Kelly*, 15 Neb. App. 960, 739 N.W.2d 243 (2007).

No. A-10-372: **Starman v. Neth**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-10-373: **Cloyd v. Exmark Manufacturing**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *Manchester v. Drivers Mgmt.*, 278 Neb. 776, 775 N.W.2d 179 (2009); *Lowe v. Drivers Mgmt., Inc.*, 274 Neb. 732, 743 N.W.2d 82 (2007).

No. A-10-377: **State v. Pettis**. Motion of appellee for summary affirmance sustained; judgment affirmed. See *State v. Segura*, 265 Neb. 903, 660 N.W.2d 512 (2003).

No. A-10-378: **Thelen v. Hy-Vee, Inc**. Stipulation allowed; appeal dismissed.

No. A-10-381: **Boldt on behalf of Boldt v. Tyler**. Appeal dismissed. See § 2-107(A)(2).

No. A-10-382: **State v. Cotton**. Motion of appellee for summary affirmance sustained; judgment affirmed. See *State v. Walker*, 272 Neb. 725, 724 N.W.2d 552 (2006).

No. A-10-383: **State on behalf of Moss v. Tyler**. Appeal dismissed. See § 2-107(A)(2).

No. A-10-385: **Countrywide Home Loans v. Allender**. By order of the court, appeal dismissed for failure to file briefs.

No. A-10-386: **Myers v. Ford Motor Credit**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-10-387: **Barfield v. Exxon Corp**. Appeal dismissed. See, § 2-107(A)(2); *State v. Haase*, 247 Neb. 817, 530 N.W.2d 617 (1995).

No. A-10-389: **State v. Stairs**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-10-390: **In re Interest of Amir M**. Motion of appellee for summary dismissal sustained; appeal dismissed. See, Neb. Rev. Stat. §§ 29-2317 to 29-2319 and 43-2,106.01(2) (Reissue 2008); *State v. Steinbach*, 11 Neb. App. 468, 652 N.W.2d 632 (2002).

No. A-10-395: **Warnke v. Straightline Builders**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-10-396: **Andrews v. Workman**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-2301.02 (Reissue 2008); *Martin v. McGinn*, 267 Neb. 931, 678 N.W.2d 737 (2004).

No. A-10-397: **Jack v. Workman**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-2301.02 (Reissue 2008); *Martin v. McGinn*, 267 Neb. 931, 678 N.W.2d 737 (2004).

No. A-10-401: **Dunn v. Melcher**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1912 (Reissue 2008).

No. A-10-402: **State v. Duffek**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-10-403: **State v. Cooper**. Appeal dismissed. See, § 2-107(A)(2); *State v. Sklenar*, 269 Neb. 98, 690 N.W.2d 631 (2005).

No. A-10-405: **Moss v. Department of Banking & Finance**. Stipulation allowed; appeal dismissed.

No. A-10-409: **Connerly v. Connerly**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-10-411: **Pittman v. Stickney**. Affirmed. See, § 2-107(A)(1); *Walton v. Patil*, 279 Neb. 974, 783 N.W.2d 438 (2010).

No. A-10-413: **In re SID No. 1 of Polk**. Stipulation allowed; appeal dismissed.

No. A-10-416: **State v. McLemore**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-10-417: **Collins v. Tyson, Inc**. Affirmed. See, § 2-107(A)(1); *Bamford v. Bamford, Inc.*, 279 Neb. 259, 777 N.W.2d 573 (2010); *Kuhn v. Wells Fargo Bank of Neb.*, 278 Neb. 428, 771 N.W.2d 103 (2009).

No. A-10-419: **State v. Donovan**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Williams*, 278 Neb. 841, 774 N.W.2d 384 (2009).

No. A-10-420: **State v. Hagens**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-10-421: **State v. Gonzalez**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); Neb. Rev. Stat. § 29-1819.02(2) (Reissue 2008); *State v. Yos-Chiguil*, 278 Neb. 591, 772 N.W.2d 574 (2009).

No. A-10-422: **Brown v. Brown**. Affirmed. See, § 2-107(A)(1); Neb. Rev. Stat. § 25-2001(1) (Reissue 2008).

No. A-10-424: **In re Interest of Dion C**. Summarily affirmed. See §§ 2-107(A)(1) and 2-101(B)(1)(b).

No. A-10-425: **In re Interest of Sianna O**. Summarily affirmed. See §§ 2-107(A)(1) and 2-101(B)(1)(b).

No. A-10-426: **State v. Cross**. Motion of appellee for summary affirmance sustained; convictions and sentences affirmed. See, § 2-107(B)(2); *State v. Dinslage*, 280 Neb. 659, 789 N.W.2d 29 (2010); *State v. Losinger*, 268 Neb. 660, 686 N.W.2d 582 (2004). See, also, Neb. Rev. Stat. § 28-1205(1)(b) (Cum. Supp. 2010).

No. A-10-428: **State v. Kudron**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-10-433: **Young v. Prentice**. Appeal dismissed. See, § 2-107(A)(2); *Willliams v. Baird*, 273 Neb. 977, 735 N.W.2d 383 (2007).

No. A-10-435: **State v. Allison**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-10-437: **Douglas v. White**. Stipulation allowed; appeal dismissed at cost of appellant.

No. A-10-438: **Brayman v. Brown**. Appeal dismissed. See § 2-107(A)(2).

No. A-10-439: **In re Interest of Piper B**. Motion of appellee for summary dismissal sustained; appeal dismissed. See, § 2-107(B)(1); *Pennfield Oil Co. v. Winstrom*, 267 Neb. 288, 673 N.W.2d 558 (2004); *CenTra, Inc. v. Chandler Ins. Co.*, 248 Neb. 844, 520 N.W.2d 318 (1995).

No. A-10-440: **State v. Martinez**. Stipulation allowed; appeal dismissed.

No. A-10-441: **State v. Hollins**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, *State v. Branch*, 277 Neb. 738, 764 N.W.2d 867 (2009); *State v. Taylor*, 262 Neb. 639, 634 N.W.2d 744 (2001).

No. A-10-443: **State v. Bart**. Motion of appellee for summary affirmance sustained; judgment affirmed. See *State v. Segura*, 265 Neb. 903, 660 N.W.2d 512 (2003).

Nos. A-10-444, A-10-445: **State v. Brown**. Motions of appellee for summary affirmance sustained; judgments affirmed. See § 2-107(B)(2).

No. A-10-446: **Adams v. Adams**. Stipulation allowed; appeal dismissed.

Nos. A-10-447, A-10-448: **State v. Shortbull**. Motions of appellee for summary affirmance sustained; judgments affirmed. See *State v. Walker*, 272 Neb. 725, 724 N.W.2d 552 (2006).

No. A-10-449: **Gray v. City of Lincoln**. Affirmed. See § 2-107(A)(1). See, also, *State v. Cortis*, 237 Neb. 97, 465 N.W.2d 132 (1991); *State v. Huggins*, 186 Neb. 704, 185 N.W.2d 849 (1971).

No. A-10-450: **Nebraska Equal Opp. Comm. v. Widtfeldt**. Appeal dismissed. See § 2-107(A)(2).

No. A-10-453: **State v. Buckman**. Affirmed. See § 2-107(A)(1).

No. A-10-456: **State v. Le**. Motion of appellee for summary affirmance of appellant's conviction and sentences sustained.

No. A-10-460: **Mid City Bank v. Wright**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1315 (Reissue 2008).

No. A-10-462: **State v. Erickson**. Stipulation allowed; appeal dismissed.

No. A-10-463: **State v. Ajok**. Affirmed. See, § 2-107(A)(1); *State v. Dinslage*, 280 Neb. 659, 789 N.W.2d 29 (2010).

No. A-10-464: **State v. Vargas**. Motion of appellee for summary affirmance sustained; judgment affirmed. See *State v. Segura*, 265 Neb. 903, 660 N.W.2d 512 (2003).

No. A-10-465: **State v. Seaman**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Branch*, 277 Neb. 738, 764 N.W.2d 867 (2009); *State v. Reid*, 274 Neb. 780, 743 N.W.2d 370 (2008); *State v. Decker*, 261 Neb. 382, 622 N.W.2d 903 (2001); *State v. Harrison*, 255 Neb. 990, 588 N.W.2d 556 (1999).

No. A-10-466: **Cain v. Cain**. Appeal dismissed. See, § 2-107(A)(2); *McCaul v. McCaul*, 17 Neb. App. 801, 771 N.W.2d 222 (2009).

No. A-10-468: **State ex rel. Ohrt v. Lawson**. Appeal dismissed. See § 2-107(A)(2).

No. A-10-469: **Doyle v. Doyle**. Cause remanded with directions. See *Rutherford v. Rutherford*, 277 Neb. 301, 761 N.W.2d 922 (2009).

No. A-10-473: **State v. Carson**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-10-475: **Hurd v. Gunia**. Motion of appellant to dismiss appeal sustained; appeal dismissed at cost of appellant.

No. A-10-477: **In re Interest of Darius L**. Motion of appellee for summary dismissal sustained; appeal dismissed. See, § 2-107(B)(1); Neb. Rev. Stat. § 25-1912 (Reissue 2008).

No. A-10-479: **State v. Hodgdon**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Dinslage*, 280 Neb. 659, 789 N.W.2d 29 (2010).

No. A-10-480: **State v. Rosberg**. Motion of appellee for summary affirmance sustained. See, § 2-107(B)(2); *State v. Thompson*, 278 Neb. 320, 770 N.W.2d 598 (2009).

No. A-10-481: **State v. Hoffman**. Motion of appellee for summary affirmance sustained; judgment affirmed. See *State v. Walker*, 272 Neb. 725, 724 N.W.2d 552 (2006).

No. A-10-482: **Gittins v. Union Pacific RR. Co**. Stipulation allowed; appeal dismissed.

No. A-10-485: **Rairigh v. Rairigh**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-10-486: **Boutin v. Padilla**. Motion of appellant to dismiss appeal considered; appeal dismissed.

No. A-10-488: **State v. Cayou**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-10-490: **Wilson v. Wilson**. Appeal dismissed. See § 2-107(A)(2).

No. A-10-492: **Arlt v. Farmers Co-op**. Affirmed. See, §§ 2-107(A)(1) and 2-109(D)(1)(e); *Community Redev. Auth. v. Gizinski*, 16 Neb. App. 504, 745 N.W.2d 616 (2008).

No. A-10-494: **State v. Stauffer**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-10-497: **Farm Credit Servs. of America v. Norby**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1315(1) (Reissue 2008).

No. A-10-498: **State v. Gutierrez**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); Neb. Rev. Stat. § 29-2028 (Reissue 2008); *State v. Branch*, 277 Neb. 738, 764 N.W.2d 867 (2009); *State v. Andersen*, 232 Neb. 187, 440 N.W.2d 203 (1989).

No. A-10-501: **Barkmeier v. Cole**. Stipulation allowed; appeal dismissed.

No. A-10-503: **In re Interest of Joshua S. et al**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-10-504: **In re Interest of Aliee P**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 43-287.06 (Reissue 2008).

Nos. A-10-505, A-10-506: **In re Interest of Ashton P**. Appeals dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 43-287.06 (Reissue 2008).

No. A-10-508: **State v. Jenkins**. Motion of appellee for summary affirmance sustained; judgment affirmed. See *State v. Segura*, 265 Neb. 903, 660 N.W.2d 512 (2003).

No. A-10-509: **Barkley v. Barkley**. Motion of appellant to dismiss appeal sustained; appeal dismissed with prejudice.

No. A-10-510: **Moses v. Moses**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-10-512: **Stevens v. Dolan**. Motion of appellee for summary affirmance sustained; decree affirmed. See *Anderson v. Houston*, 277 Neb. 907, 766 N.W.2d 94 (2009).

No. A-10-513: **State v. Wiig**. Appeal dismissed. See § 2-107(A)(2).

No. A-10-514: **Swedlund v. Phillips**. Affirmed. See, § 2-107(A)(1); Neb. Rev. Stat. § 36-202 (Reissue 2008); *Cerny v. Todco Barricade Co.*, 273 Neb. 800, 733 N.W.2d 877 (2007).

No. A-10-515: **McDaniel v. Homebuyers, Inc**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1315(1) (Reissue 2008); *Connelly v. City of Omaha*, 278 Neb. 311, 769 N.W.2d 394 (2009).

No. A-10-517: **State v. Marriott**. Convictions reversed, sentences vacated, and cause remanded for further proceedings.

No. A-10-518: **Glaser v. Glaser**. By order of the court, appeal dismissed for failure to file briefs.

No. A-10-519: **Jones v. Jones**. Appeal dismissed. See, § 2-107(A)(2); *Smeal Fire Apparatus Co. v. Kreikemeier*, 279 Neb. 661, 782 N.W.2d 848 (2010).

No. A-10-520: **In re Guardianship of Nellie P**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-10-524: **Mora v. Mora**. Appeal dismissed. See § 2-107(A)(2).

No. A-10-528: **Purdy v. Department of Corr. Servs**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1912(1) (Reissue 2008).

No. A-10-529: **State v. Burback**. Appeal dismissed. See § 2-107(A)(2).

Nos. A-10-530 through A-10-532: **State v. Chizek**. Motions of appellee for summary affirmance sustained; judgments affirmed. See *State v. Segura*, 265 Neb. 903, 660 N.W.2d 512 (2003).

No. A-10-533: **State v. Chizek**. Appellee's suggestion of remand sustained. Cause remanded with directions to vacate conviction and sentence. See *State v. Dodson*, 250 Neb. 584, 550 N.W.2d 347 (1996).

No. A-10-534: **Reilly v. Nebraska Methodist Health Sys**. Appeal dismissed. See, § 2-107(A)(2); *J & H Swine v. Hartington Concrete*, 12 Neb. App. 885, 687 N.W.2d 9 (2004).

No. A-10-536: **State v. Ramos**. Appeal dismissed. See § 2-107(A)(2).

No. A-10-538: **Eden Cemetery Assn. v. Cramer**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1315(1) (Reissue 2008).

No. A-10-539: **Chalupa v. Madelung**. By order of the court, appeal dismissed for failure to file briefs.

No. A-10-542: **Sanks v. Barham**. By order of the court, appeal dismissed for failure to file briefs.

No. A-10-543: **Monjarez v. Monjarez**. Affirmed. See § 2-107(A)(1).

No. A-10-544: **Klene v. Kardell**. Stipulation allowed; appeal dismissed.

No. A-10-548: **Conaway v. Deffenbaugh Indus**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-10-551: **Hillard v. Houston**. By order of the court, appeal dismissed for failure to file briefs.

No. A-10-552: **Broveak v. Broveak**. By order of the court, appeal dismissed for failure to file briefs.

No. A-10-553: **State v. Roundtree**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Thompson*, 278 Neb. 320, 770 N.W.2d 598 (2009); *State v. Martin*, 18 Neb. App. 338, 782 N.W.2d 37 (2010).

Nos. A-10-554, A-10-555: **State v. Richardson**. Motions of appellee for summary affirmance sustained; judgments affirmed. See § 2-107(B)(2).

No. A-10-561: **Halac v. Girton**. Appeal dismissed. See, § 2-107(A)(2); *Connelly v. City of Omaha*, 278 Neb. 311, 769 N.W.2d 394 (2009).

No. A-10-563: **State v. Lowery**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Branch*, 277 Neb. 738, 764 N.W.2d 867 (2009); *State v. Reid*, 274 Neb. 780, 743 N.W.2d 370 (2008); *State v. Decker*, 261 Neb. 382, 622 N.W.2d 903 (2001); *State v. Harrison*, 255 Neb. 990, 588 N.W.2d 556 (1999).

No. A-10-564: **Patmon v. Health & Human Servs**. Affirmed. See § 2-107(A)(1).

No. A-10-565: **Wells Fargo Bank v. Thunderstone, L.L.C**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-10-567: **State v. Filbert**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-10-569: **Foster v. York County Attorney**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1912(1) (Reissue 2008).

No. A-10-570: **State v. Sharp**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, *State v. Segura*, 265 Neb. 903, 660 N.W.2d 512 (2003); *State v. Louthan*, 257 Neb. 174, 595 N.W.2d 917 (1999); *State v. Dyke*, 231 Neb. 621, 437 N.W.2d 164 (1989).

No. A-10-571: **State v. Camacho-DeJesus**. Stipulation allowed; appeal dismissed.

No. A-10-573: **Herbst v. Herbst**. Appeal dismissed. See § 2-107(A)(2).

No. A-10-574: **State v. McIntosh**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Branch*, 277 Neb. 738, 764 N.W.2d 867 (2009); *State v. Reid*, 274 Neb. 780, 743 N.W.2d 370 (2008); *State v. Decker*, 261 Neb. 382, 622 N.W.2d 903 (2001); *State v. Harrison*, 255 Neb. 990, 588 N.W.2d 556 (1999).

No. A-10-576: **Blatherwick v. Hotovy**. Appeal dismissed. See, § 2-107(A)(2); *Salkin v. Jacobsen*, 263 Neb. 521, 641 N.W.2d 356 (2002).

No. A-10-577: **State v. Dewane**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-10-578: **State v. Collins**. Motion of appellee for summary affirmance sustained; judgment affirmed. See *State v. Segura*, 265 Neb. 903, 660 N.W.2d 512 (2003).

Nos. A-10-579, A-10-580: **State v. Thompson**. Summarily affirmed. See § 2-107(A)(1).

No. A-10-584: **Vanosdel on behalf of Vanosdel v. Vanosdel**. Appeal dismissed. See, § 2-107(A)(2); *Haber v. V & R Joint Venture*, 263 Neb. 529, 641 N.W.2d 31 (2002).

No. A-10-585: **In re Estate of Therien**. Appeal dismissed. See, § 2-107(A)(2); *In re Estate of Emery*, 258 Neb. 789, 606 N.W.2d 750 (2000).

No. A-10-586: **In re Estate of Clark**. Appeal dismissed. See, § 2-107(A)(2); *In re Guardianship & Conservatorship of Woltemath*, 268 Neb. 33, 680 N.W.2d 142 (2004); *Salkin v. Jacobsen*, 263 Neb. 521, 641 N.W.2d 356 (2002).

No. A-10-587: **State v. Burtis**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, *State v. France*, 279 Neb. 49, 776 N.W.2d 510 (2009); *State v. Segura*, 265 Neb. 903, 660 N.W.2d 512 (2003); *State v. Archbold*, 217 Neb. 345, 350 N.W.2d 500 (1984).

No. A-10-588: **State v. Lathrop**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Vo*, 279 Neb. 964, 783 N.W.2d 416 (2010); *State v. Perry*, 268 Neb. 179, 681 N.W.2d 729 (2004).

No. A-10-592: **State v. Brown**. Stipulation allowed; appeal dismissed.

No. A-10-593: **State v. Salameh**. Stipulation allowed; appeal dismissed.

No. A-10-594: **Granite Reinsurance Co. v. State ex rel. Frohman**. By order of the court, appeal dismissed for failure to file briefs.

No. A-10-595: **Musich v. Musich**. By order of the court, appeal dismissed for failure to file briefs.

No. A-10-597: **State v. Gakle**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1912(1) (Reissue 2008).

No. A-10-598: **State v. Burries**. Appeal dismissed. See § 2-107(A)(2).

No. A-10-599: **State v. Burries**. Appeal dismissed. See § 2-107(A)(2).

No. A-10-601: **Slater v. Neth**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *Murray v. Neth*, 279 Neb. 947, 783 N.W.2d 424 (2010).

Nos. A-10-602, A-10-603: **State v. Spidell**. Affirmed. See, § 2-107(A)(1); *State v. McGhee*, 280 Neb. 558, 787 N.W.2d 700 (2010).

No. A-10-604: **State v. Thompson**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Young*, 279 Neb. 602, 780 N.W.2d 28 (2010); *State v. Moore*, 277 Neb. 111, 759 N.W.2d 698 (2009).

No. A-10-606: **Hofeldt v. Neth**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Blackman*, 254 Neb. 941, 580 N.W.2d 546 (1998).

No. A-10-607: **Fries v. Fries**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-10-610: **State v. Trejo**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Branch*, 277 Neb. 738, 764 N.W.2d 867 (2009); *State v. Reid*, 274 Neb. 780, 743 N.W.2d 370 (2008); *State v. Decker*, 261 Neb. 382, 622 N.W.2d 903 (2001); *State v. Harrison*, 255 Neb. 990, 588 N.W.2d 556 (1999).

No. A-10-620: **State v. Wiig**. By order of the court, appeal dismissed for failure to file briefs.

No. A-10-626: **Van Dorien v. Barna**. By order of the court, appeal dismissed for failure to file briefs.

No. A-10-629: **Meyer v. Nestle Purina**. Stipulation allowed; appeal dismissed.

No. A-10-630: **State on behalf of Partee v. Partee**. By order of the court, appeal dismissed for failure to file briefs.

No. A-10-631: **State v. Spangler**. Stipulation allowed; appeal dismissed.

Nos. A-10-632, A-10-633: **State v. Hunt**. Motions of appellee for summary affirmance sustained; judgments affirmed. See § 2-107(B)(2).

Nos. A-10-634 through A-10-636: **State v. Svoboda**. Motions of appellee for summary affirmance sustained; judgments affirmed. See, § 2-107(B)(2); *State v. Vo*, 279 Neb. 964, 783 N.W.2d 416 (2010); *State v. Start*, 239 Neb. 571, 477 N.W.2d 20 (1991); *State v. Stranghoener*, 212 Neb. 203, 322 N.W.2d 407 (1982).

No. A-10-638: **Northern Agri-Services v. Prokop**. Affirmed. See, §§ 2-107(A)(1) and 2-109(D)(1)(e); *Community Redev. Auth. v. Gizinski*, 16 Neb. App. 504, 745 N.W.2d 616 (2008).

No. A-10-639: **State v. Hardnett**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-10-640: **Alberts v. Hoppes**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-10-641: **State v. Drees**. Appeal dismissed. See, § 2-107(A)(2); *State v. McArthur*, 12 Neb. App. 657, 685 N.W.2d 733 (2004); *State v. Ruiz-Medina*, 8 Neb. App. 529, 597 N.W.2d 403 (1999).

No. A-10-642: **State v. Sines**. Appeal dismissed. See, § 2-107(A)(2); *State v. McArthur*, 12 Neb. App. 657, 685 N.W.2d 733 (2004); *State v. Ruiz-Medina*, 8 Neb. App. 529, 597 N.W.2d 403 (1999).

No. A-10-649: **Tyler v. Denker**. Appeal dismissed. See, § 2-107(A)(2); *Waite v. City of Omaha*, 263 Neb. 589, 641 N.W.2d 351 (2002).

No. A-10-650: **Dunn v. Melcher**. Appeal dismissed. See, § 2-107(A)(2); *Vrana Paving Co. v. City of Omaha*, 220 Neb. 269, 369 N.W.2d 613 (1985); *Peterson v. Damoude*, 95 Neb. 469, 145 N.W. 847 (1914).

No. A-10-654: **State v. Morgan**. Appeal dismissed. See, § 2-107(A)(2); *State v. Beverlin*, 244 Neb. 615, 508 N.W.2d 271 (1993).

No. A-10-656: **State v. Neal**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1902 (Reissue 2008); *State v. Schlund*, 249 Neb. 173, 542 N.W.2d 421 (1996).

No. A-10-659: **State v. Lowery**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-10-661: **State v. Davis**. Motion of appellee for summary affirmance sustained; judgment affirmed. See *State v. Branch*, 277 Neb. 738, 764 N.W.2d 867 (2009).

No. A-10-663: **Harris v. Department of Corr. Servs**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1902 (Reissue 2008).

No. A-10-664: **State v. Bekish**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Dinslage*, 280 Neb. 659, 789 N.W.2d 29 (2010); *Miller v. Brunswick*, 253 Neb. 141, 571 N.W.2d 245 (1997).

No. A-10-665: **In re Interest of Charity N. & Maximilian K**. Appeal dismissed for lack of jurisdiction.

No. A-10-672: **State v. Brass**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Branch*, 277 Neb. 738, 764 N.W.2d 867 (2009); *State v. Reid*, 274 Neb. 780, 743 N.W.2d 370 (2008); *State v. Decker*, 261 Neb. 382, 622 N.W.2d 903 (2001); *State v. Harrison*, 255 Neb. 990, 588 N.W.2d 556 (1999).

No. A-10-673: **Wells Fargo Bank v. Bettenhausen**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1902 (Reissue 2008).

No. A-10-674: **In re Interest of Yolanda H. et al**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-10-675: **State v. Baker**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Branch*, 277 Neb. 738, 764 N.W.2d 867 (2009); *State v. Reid*, 274 Neb. 780, 743 N.W.2d 370 (2008); *State v. Decker*, 261 Neb. 382, 622 N.W.2d 903 (2001); *State v. Harrison*, 255 Neb. 990, 588 N.W.2d 556 (1999).

Nos. A-10-679, A-10-680: **State v. Duryea**. Motions of appellee for summary affirmance sustained; judgments affirmed. See § 2-107(B)(2).

No. A-10-681: **State v. Sanjuampa**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-10-682: **State v. Perkins**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-10-683: **Onuachi v. Meylan Enterprises**. Affirmed. See § 2-107(A)(1).

No. A-10-684: **State v. Dillon**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-10-685: **Harris v. Department of Corr. Servs**. Appeal dismissed. See § 2-107(A)(2).

Nos. A-10-686, A-10-687: **State v. Agnew**. Motions of appellee for summary affirmance sustained; judgments affirmed. See *State v. Branch*, 277 Neb. 738, 764 N.W.2d 867 (2009).

No. A-10-688: **Freeman v. Groskopf**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-10-689: **In re Interest of Nevaeh M**. Motion of appellee for summary dismissal sustained; appeal dismissed. See *In re Interest of William G.*, 256 Neb. 788, 592 N.W.2d 499 (1999).

Nos. A-10-690, A-10-691: **State v. Aguilar**. Motions of appellee for summary affirmance sustained; judgments affirmed. See *State v. Branch*, 277 Neb. 738, 764 N.W.2d 867 (2009).

No. A-10-692: **State v. Smith**. By order of the court, appeal dismissed for failure to file briefs.

No. A-10-693: **State v. Montgomery**. Motion of appellee for summary affirmance sustained; judgment affirmed. See *State v. Segura*, 265 Neb. 903, 660 N.W.2d 512 (2003).

No. A-10-694: **State v. Purvis**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-10-695: **State v. Kiick**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-10-697: **Betts v. Betts**. Motion of appellee for summary dismissal sustained; appeal dismissed. See, § 2-107(B)(1); Neb. Rev. Stat. § 25-1902 (Reissue 2008); *Waite v. City of Omaha*, 263 Neb. 589, 641 N.W.2d 351 (2002).

No. A-10-700: **Employees United Labor Assn. v. Douglas Cty**. Stipulation allowed; appeal dismissed.

No. A-10-702: **Kopetzky v. Kopetzky**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-10-703: **State v. Bacon**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Sandoval*, 280 Neb. 309, 788 N.W.2d 172 (2010); *State v. Branch*, 277 Neb. 738, 764 N.W.2d 867 (2009).

No. A-10-704: **Mastny v. State Farm Fire & Cas. Co**. By order of the court, appeal dismissed for failure to file briefs.

No. A-10-711: **Drake v. Hodgman**. Affirmed. See, § 2-107(A)(1); *Ditmars v. Ditmars*, 18 Neb. App. 568, 788 N.W.2d 817 (2010).

No. A-10-714: **In re Interest of Nevaeh W**. Affirmed. See, § 2-107(A)(1); *In re Interest of Devin W. et al.*, 270 Neb. 640, 707 N.W.2d 758 (2005). See, also, *In re Interest of Amber G. et al.*, 250 Neb. 973, 554 N.W.2d 142 (1996).

No. A-10-716: **State v. Pestka**. Motion of appellee for summary affirmance sustained.

No. A-10-718: **State v. Evans**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-10-719: **State v. Greuter**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. §§ 25-1329 and 25-1912(1) (Reissue 2008).

No. A-10-720: **Koziel v. Koziel**. Appeal dismissed. See § 2-107(A)(2).

No. A-10-721: **Youngman v. Youngman**. By order of the court, appeal dismissed for failure to file briefs.

No. A-10-725: **State v. Porter**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Branch*, 277 Neb. 738, 764 N.W.2d 867 (2009); *State v. Reid*, 274 Neb. 780, 743 N.W.2d 370 (2008); *State v. Decker*, 261 Neb. 382, 622 N.W.2d 903 (2001); *State v. Harrison*, 255 Neb. 990, 588 N.W.2d 556 (1999).

No. A-10-726: **State v. Foster**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. McGhee*, 280 Neb. 558, 787 N.W.2d 700 (2010); *State v. Vo*, 279 Neb. 964, 783 N.W.2d 416 (2010); *State v. Amaya*, 276 Neb. 818, 758 N.W.2d 22 (2008).

No. A-10-728: **Abbott v. Frontier Savings Bank**. Motion of appellant to dismiss appeal sustained; appeal dismissed with prejudice; each party to pay own costs.

No. A-10-729: **Eberspacher v. Lancaster Cty. Bd. of Equal**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-10-730: **State v. Johnson**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-10-731: **Cooper v. Cooper**. Reversed and remanded with directions.

No. A-10-733: **In re Interest of Cassandra B**. Affirmed. See § 2-107(A)(1).

No. A-10-736: **State v. Arganda**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-10-739: **State v. Hassenplug**. Motion of appellee for summary affirmance sustained; judgment affirmed. See *State v. Walker*, 272 Neb. 725, 724 N.W.2d 552 (2006).

No. A-10-744: **Goodwater v. Goodwater**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-10-745: **In re Interest of Christina M. et al**. Motion of appellee for summary dismissal sustained; appeal dismissed for lack of jurisdiction. See, § 2-107(B)(1); *Poppert v. Dicke*, 275 Neb. 562, 747 N.W.2d 629 (2008); *In re Interest of Marcella B. & Juan S.*, 18 Neb. App. 153, 775 N.W.2d 470 (2009).

No. A-10-746: **Eran Industries v. Albracht**. By order of the court, appeal dismissed for failure to file briefs.

No. A-10-747: **State v. Obermier**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, §§ 2-107(B)(2) and 2-109(D)(1)(e); *State v. Philipps*, 242 Neb. 894, 496 N.W.2d 874 (1993); *State v. Moore*, 235 Neb. 955, 458 N.W.2d 232 (1990); *Community Redev. Auth. v. Gizinski*, 16 Neb. App. 504, 745 N.W.2d 616 (2008); *State v. Wade*, 7 Neb. App. 169, 581 N.W.2d 906 (1998).

No. A-10-749: **Cioffero v. Health & Human Servs**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. §§ 84-917(2)(a) and 25-510.02(1) (Reissue 2008); *Concordia Teachers College v. Neb. Dept. of Labor*, 252 Neb. 504, 563 N.W.2d 345 (1997).

No. A-10-751: **Whited v. Menards, Inc**. Stipulation allowed; appeal dismissed with prejudice.

No. A-10-752: **Baumgartner v. Baumgartner**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-10-754: **Klingelhoefer v. Monif**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1315(1) (Reissue 2008); *Cerny v. Todco Barricade Co.*, 273 Neb. 800, 733 N.W.2d 877 (2007); *Murphy v. Brown*, 15 Neb. App. 914, 738 N.W.2d 466 (2007).

No. A-10-756: **Mason v. Creighton University**. By order of the court, appeal dismissed for failure to file briefs.

No. A-10-757: **State v. Nguyen**. Motion of appellee for summary affirmance sustained; judgment affirmed. See *State v. Segura*, 265 Neb. 903, 660 N.W.2d 512 (2003).

No. A-10-758: **Nebraska Eq. Opp. Comm. on behalf of Gutierrez v. Barney G., Inc**. Motion of appellee for summary affirmance sustained; judgment summarily affirmed.

No. A-10-759: **Nebraska Eq. Opp. Comm. on behalf of Macias v. Barney G., Inc**. Motion of appellee for summary affirmance sustained; judgment summarily affirmed.

No. A-10-760: **Nebraska Eq. Opp. Comm. on behalf of Mendez v. Barney G., Inc**. Motion of appellee for summary affirmance sustained; judgment summarily affirmed.

No. A-10-761: **Nebraska Eq. Opp. Comm. on behalf of Perez v. Barney G., Inc**. Motion of appellee for summary affirmance sustained; judgment summarily affirmed.

No. A-10-762: **Nebraska Eq. Opp. Comm. on behalf of Quezada v. Barney G., Inc**. Motion of appellee for summary affirmance sustained; judgment summarily affirmed.

No. A-10-763: **Nebraska Eq. Opp. Comm. on behalf of Sancedo v. Barney G., Inc**. Motion of appellee for summary affirmance sustained; judgment summarily affirmed.

No. A-10-764: **Nebraska Eq. Opp. Comm. on behalf of Zamarripa v. Barney G., Inc**. Motion of appellee for summary affirmance sustained; judgment summarily affirmed.

No. A-10-765: **Nebraska Eq. Opp. Comm. on behalf of Placensia v. Barney G., Inc**. Motion of appellee for summary affirmance sustained; judgment summarily affirmed.

No. A-10-766: **Nebraska Eq. Opp. Comm. on behalf of Coronado v. Barney G., Inc**. Motion of appellee for summary affirmance sustained; judgment summarily affirmed.

No. A-10-767: **Nebraska Eq. Opp. Comm. on behalf of Gonzalez v. Barney G., Inc**. Motion of appellee for summary affirmance sustained; judgment summarily affirmed.

No. A-10-768: **Nebraska Eq. Opp. Comm. on behalf of Velez v. Barney G., Inc**. Motion of appellee for summary affirmance sustained; judgment summarily affirmed.

No. A-10-771: **State v. Yearsley**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-10-777: **Dent v. Dent**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-10-779: **Herren v. Herren**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1912(1) (Reissue 2008); *Meister v. Meister*, 274 Neb. 705, 742 N.W.2d 746 (2007); *Simmons v. Lincoln*, 176 Neb. 71, 125 N.W.2d 63 (1963).

No. A-10-780: **In re Interest of Kristen D**. Appeal dismissed. See, § 2-107(A)(2); *Smeal Fire Apparatus Co. v. Kreikemeier*, 279 Neb. 661, 782 N.W.2d 848 (2010); *Meisinger v. Meisinger*, 230 Neb. 37, 429 N.W.2d 721 (1988).

No. A-10-781: **Stinson v. Nebraska Furniture Mart**. Affirmed. See § 2-107(A)(1).

No. A-10-784: **State v. Maley**. Affirmed. See, § 2-107(A)(1); *State v. Macek*, 278 Neb. 967, 774 N.W.2d 749 (2009); *State v. Rung*, 278 Neb. 855, 774 N.W.2d 621 (2009).

No. A-10-785: **Sherrod v. Department of Corr. Servs**. Appeal dismissed. See, § 2-107(A)(2); *State v. Haase*, 247 Neb. 817, 530 N.W.2d 617 (1995).

No. A-10-786: **State v. Tyler**. Appeal dismissed. See, § 2-107(A)(2); *In re Interest of Tayla R.*, 17 Neb. App. 595, 767 N.W.2d 127 (2009).

No. A-10-787: **Tyler v. White**. Appeal dismissed. See § 2-107(A)(2).

No. A-10-788: **State v. Fernandez**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-10-796: **Neibel v. BHD, L.L.C**. Stipulation allowed; appeal dismissed with prejudice; each party to pay own costs.

No. A-10-797: **Selser Two v. Nebraska Liquor Control Comm**. Stipulation allowed; appeal dismissed without prejudice at cost of appellant.

No. A-10-798: **State v. Haltom**. Motion of appellee for summary affirmance sustained; judgment affirmed. See *State v. Segura*, 265 Neb. 903, 660 N.W.2d 512 (2003).

No. A-10-799: **Melena on behalf of Melena v. H.H.S**. Affirmed. See Neb. Rev. Stat. § 25-2301.02 (Reissue 2008).

No. A-10-800: **Dieguez v. Boswell**. By order of the court, appeal dismissed for failure to file briefs.

No. A-10-801: **Boswell v. Dieguez**. By order of the court, appeal dismissed for failure to file briefs.

No. A-10-802: **State v. Benish**. Motion of appellee for summary affirmance sustained; judgment affirmed. See *State v. Boppre*, 280 Neb. 774, 790 N.W.2d 417 (2010).

No. A-10-803: **State v. Horton**. By order of the court, appeal dismissed for failure to file briefs.

No. A-10-807: **Evans v. Reaves**. Stipulation allowed; appeal dismissed.

No. A-10-808: **Ornelas-Escorza v. Williams**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1315(1) (Reissue 2008).

No. A-10-809: **Iodence v. Wildy**. Stipulation allowed; appeal dismissed.

No. A-10-810: **Dancer v. Neth**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-10-812: **State on behalf of Moss v. Tyler**. By order of the court, appeal dismissed for failure to file briefs.

No. A-10-814: **State v. Johnson**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1912(1) (Reissue 2008).

No. A-10-815: **State v. Nebraska Diamond Sales Co**. Appeal dismissed. See, § 2-107(A)(2); *In re Interest of Marcella B. & Juan S.*, 18 Neb. App. 153, 775 N.W.2d 470 (2009).

No. A-10-820: **State v. Ackley**. By order of the court, appeal dismissed for failure to file briefs.

No. A-10-821: **State v. Page**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-10-822: **State v. Hytche**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-10-823: **State v. Page**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-10-825: **In re Trust of Gibreal**. Appeal dismissed. See, § 2-107(A)(2); *Kilgore v. Nebraska Dept. of Health & Human Servs.*, 277 Neb. 456, 763 N.W.2d 77 (2009).

No. A-10-826: **In re Interest of Nevaeh M**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1902 (Reissue 2008).

Nos. A-10-827, A-10-828: **State v. Sauer**. Motions of appellee for summary affirmance sustained; judgments affirmed. See § 2-107(B)(2).

No. A-10-829: **Ducharme v. Ducharme**. Appeal dismissed. See, § 2-107(A)(2); *State v. Sklenar*, 269 Neb. 98, 690 N.W.2d 631 (2005).

No. A-10-830: **Schaeffer v. Department of Corr. Servs**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-10-832: **Meyer v. Department of Motor Vehicles**. Stipulation allowed; appeal dismissed.

No. A-10-834: **Dangberg v. Kirby**. Appeal dismissed. See, § 2-107(A)(2); *Huffman v. Huffman*, 236 Neb. 101, 459 N.W.2d 215 (1990); *Gerber v. Gerber*, 218 Neb. 228, 353 N.W.2d 4 (1984); *Koziol v. Koziol*, 10 Neb. App. 675, 636 N.W.2d 890 (2001); *Paulsen v. Paulsen*, 10 Neb. App. 269, 634 N.W.2d 12 (2001).

No. A-10-835: **In re Interest of Aliee P**. Appeal dismissed. See, § 2-107(A)(2); *In re Interest of Tayla R.*, 17 Neb. App. 595, 767 N.W.2d 127 (2009).

No. A-10-836: **State v. Carmona-Marichal**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-10-838: **Midamerican Energy v. San Lorenzo Ruiz Builders**. Appeal dismissed. See, § 2-107(A)(2); *Haber v. V & R Joint Venture*, 263 Neb. 529, 641 N.W.2d 31 (2002).

No. A-10-839: **Castonguay v. Castonguay**. Appeal dismissed. See § 2-107(A)(2).

No. A-10-840: **Hurlbut v. Hahn**. Appeal dismissed. See § 2-107(A)(2).

No. A-10-841: **State v. Nguyen**. Stipulation to dismiss appeal sustained; appeal dismissed.

No. A-10-842: **State v. Hutchinson**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-10-843: **State v. Hutchinson**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-10-844: **Erickson v. Lincoln Electric System**. Stipulation allowed; appeal dismissed; each party to pay own costs.

No. A-10-848: **State v. Cunningham**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-10-850: **Nebraska Eq. Opp. Comm. on behalf of Gutierrez v. Barney G., Inc**. Summarily affirmed. See § 2-107(A)(1).

No. A-10-851: **Nebraska Eq. Opp. Comm. on behalf of Macias v. Barney G., Inc**. Summarily affirmed. See § 2-107(A)(1).

No. A-10-852: **Nebraska Eq. Opp. Comm. on behalf of Mendez v. Barney G., Inc**. Summarily affirmed. See § 2-107(A)(1).

No. A-10-853: **Nebraska Eq. Opp. Comm. on behalf of Perez v. Barney G., Inc**. Summarily affirmed. See § 2-107(A)(1).

No. A-10-854: **Nebraska Eq. Opp. Comm. on behalf of Quezada v. Barney G., Inc**. Summarily affirmed. See § 2-107(A)(1).

No. A-10-855: **Nebraska Eq. Opp. Comm. on behalf of Sancedo v. Barney G., Inc**. Summarily affirmed. See § 2-107(A)(1).

No. A-10-856: **Nebraska Eq. Opp. Comm. on behalf of Zamarripa v. Barney G., Inc**. Summarily affirmed. See § 2-107(A)(1).

No. A-10-857: **Nebraska Eq. Opp. Comm. on behalf of Placensia v. Barney G., Inc**. Summarily affirmed. See § 2-107(A)(1).

No. A-10-858: **Nebraska Eq. Opp. Comm. on behalf of Velez v. Barney G., Inc**. Summarily affirmed. See § 2-107(A)(1).

No. A-10-859: **Nebraska Eq. Opp. Comm. on behalf of Gonzalez v. Barney G., Inc**. Summarily affirmed. See § 2-107(A)(1).

No. A-10-860: **Nebraska Eq. Opp. Comm. on behalf of Coronado v. Barney G., Inc**. Summarily affirmed. See § 2-107(A)(1).

No. A-10-862: **In re Interest of Arthur L**. Affirmed. See § 2-107(A)(1).

No. A-10-862: **In re Interest of Arthur L**. Motion of appellant for rehearing sustained. Appeal reinstated.

No. A-10-863: **State v. Kopf**. Motion of appellee for summary affirmance sustained; judgment affirmed. See *State v. Branch*, 277 Neb. 738, 764 N.W.2d 867 (2009).

No. A-10-864: **State v. Nevrivy**. Appellee's suggestion of remand sustained. Order reversed, and cause remanded for further proceedings.

No. A-10-865: **State v. Nevrivy**. Appellee's suggestion of remand sustained. Order reversed, and cause remanded for further proceedings.

No. A-10-868: **Glass v. Rasmussen**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1315 (Reissue 2008).

No. A-10-871: **Brooks v. Brooks**. Affirmed. See, § 2-107(A)(1); Neb. Rev. Stat. § 25-2301.02 (Reissue 2008); *Martin v. McGinn*, 265 Neb. 403, 657 N.W.2d 217 (2003).

No. A-10-872: **State v. Kumm**. Motion of appellee for summary affirmance sustained; judgment affirmed. See *State v. Segura*, 265 Neb. 903, 660 N.W.2d 512 (2003). See, also, Neb. Rev. Stat. § 60-6,197.06 (Reissue 2008).

No. A-10-873: **State v. Kor**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1912(3) (Reissue 2008).

No. A-10-878: **State v. Garrette**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Huff*, 279 Neb. 68, 776 N.W.2d 498 (2009); *State v. Robinson*, 272 Neb. 582, 724 N.W.2d 35 (2006).

No. A-10-881: **Ramsey v. Ramsey**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-10-884: **State v. Grady**. Stipulation allowed; appeal dismissed.

No. A-10-895: **State v. Weaver**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-10-903: **Reinke Mfg. Co. v. Rogers Technical Servs**. By order of the court, appeal dismissed for failure to file briefs.

No. A-10-904: **State v. Kaluza**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-10-909: **State v. Atkinson**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-10-911: **Mumin v. Hart**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1315(1) (Reissue 2008).

No. A-10-913: **Schmall v. Schmall**. Stipulation allowed; appeal dismissed.

No. A-10-916: **State v. Smith**. Appeal dismissed. See § 2-107(A)(2).

No. A-10-917: **Blatny v. Blatny**. Motion of appellant to dismiss appeal considered; appeal dismissed.

No. A-10-918: **Banning v. Ruffner**. Stipulation allowed; appeal dismissed.

No. A-10-921: **Falkner v. Department of Corr. Servs**. Appeal dismissed as moot. See § 2-107(D).

No. A-10-925: **State v. Riek**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Lewis*, 280 Neb. 246, 785 N.W.2d 834 (2010); *State v. Taylor*, 262 Neb. 639, 634 N.W.2d 744 (2001); *State v. Cebuhar*, 252 Neb. 796, 567 N.W.2d 129 (1997).

No. A-10-928: **State v. Scott**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-10-930: **State v. Alboujawari**. Appeal dismissed. See, § 2-107(A)(2); *State v. Hess*, 261 Neb. 368, 622 N.W.2d 891 (2001).

No. A-10-932: **Mitchell v. Homes by Design One**. By order of the court, appeal dismissed for failure to file briefs.

No. A-10-933: **Dupre v. Neth**. Appeal dismissed. See § 2-107(A)(2).

No. A-10-934: **State v. Mundhenke**. Motion of appellee for summary affirmance sustained; judgment affirmed. See *State v. Branch*, 277 Neb. 738, 764 N.W.2d 867 (2009).

No. A-10-935: **Midstates Development v. Jones**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. §§ 25-2729 and 25-1144.01 (Reissue 2008).

No. A-10-937: **State v. Griffin**. Motion of appellee for summary affirmance sustained; judgment affirmed. See *State v. Segura*, 265 Neb. 903, 660 N.W.2d 512 (2003).

No. A-10-944: **State v. Romero**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-10-947: **State v. Mukoma**. Reversed and remanded with directions.

No. A-10-949: **State v. Abram**. Appeal dismissed. See, § 2-107(A)(2); *State v. Engleman*, 5 Neb. App. 485, 560 N.W.2d 851 (1997).

No. A-10-950: **Casale v. Robert McGill Constr. Co**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-10-956: **State v. Echols**. Affirmed. See, § 2-107(A)(1); *State v. Amaya*, 276 Neb. 818, 758 N.W.2d 22 (2008).

No. A-10-957: **State v. Hanssen**. Motion of appellee for summary affirmance sustained; judgment affirmed. See *State v. Segura*, 265 Neb. 903, 660 N.W.2d 512 (2003).

Nos. A-10-961, A-10-962: **In re Interest of Emelie R**. Stipulations allowed; appeals dismissed.

No. A-10-966: **Tonniges on behalf of Kernick v. Tonniges**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-10-970: **Gray v. Houston**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1315(1) (Reissue 2008).

No. A-10-972: **State v. Williams**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Bell*, 242 Neb. 138, 493 N.W.2d 339 (1992).

No. A-10-977: **In re Interest of Ryder J**. Appeal dismissed. See, § 2-107(A)(2); *In re Interest of Clifford M. et al.*, 258 Neb. 800, 606 N.W.2d 743 (2000).

No. A-10-978: **Surratt v. Salts**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-10-979: **State v. Keyser**. Appeal dismissed. See, § 2-107(A)(2); *State v. Hall*, 252 Neb. 885, 566 N.W.2d 121 (1997); *State v. Wieczorek*, 252 Neb. 705, 565 N.W.2d 481 (1997).

No. A-10-981: **State v. Nadeem**. Appeal dismissed. See, § 2-107(A)(2); *State v. Haase*, 247 Neb. 817, 530 N.W.2d 617 (1995).

No. A-10-981: **State v. Nadeem**. Motion of appellant for rehearing sustained. Appeal reinstated.

No. A-10-983: **State v. Hansen**. Affirmed. See § 2-107(A)(1).

No. A-10-984: **State v. Abdi**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-10-985: **State v. Scott**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Sidzyik*, 281 Neb. 305, 795 N.W.2d 281 (2011); *State v. McGhee*, 280 Neb. 558, 787 N.W.2d 700 (2010); *State v. Vo*, 279 Neb. 964, 783 N.W.2d 416 (2010); *State v. Duncan*, 278 Neb. 1006, 775 N.W.2d 922 (2009).

No. A-10-989: **State v. Johnson**. Motion of appellee for summary affirmance sustained; judgment affirmed. See *State v. Segura*, 265 Neb. 903, 660 N.W.2d 512 (2003).

No. A-10-990: **Hess v. State**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-10-992: **Schubert v. Schubert**. Appeal dismissed. See, § 2-107(A)(2); *State v. Bellamy*, 264 Neb. 784, 652 N.W.2d 86 (2002); *Haber v. V & R Joint Venture*, 263 Neb. 529, 641 N.W.2d 31 (2002).

No. A-10-993: **In re Interest of Paul C. et al**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-10-996: **Barfield v. Exxon Corporation**. Affirmed. See § 2-107(A)(1).

No. A-10-1004: **State v. Rockford**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1912(1) (Reissue 2008).

No. A-10-1005: **State v. Rockford**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1912(1) (Reissue 2008).

No. A-10-1022: **State v. Hart**. Motion of appellee for summary affirmance sustained; judgment affirmed. See *State v. Rung*, 278 Neb. 855, 774 N.W.2d 621 (2009).

No. A-10-1023: **Grabowsky v. Neth**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-10-1024: **Brown v. Brown**. Appeal dismissed. See, § 2-107(A)(2); *Holste v. Burlington Northern RR. Co.*, 256 Neb. 713, 592 N.W.2d 894 (1999).

No. A-10-1025: **Cada-Love v. Love**. Appeal dismissed. See, § 2-107(A)(2); *Gerber v. Gerber*, 218 Neb. 228, 353 N.W.2d 4 (1984); *McCaul v. McCaul*, 17 Neb. App. 801, 771 N.W.2d 222 (2009); *Paulsen v. Paulsen*, 10 Neb. App. 269, 634 N.W.2d 12 (2001).

No. A-10-1026: **Harris v. Frazier**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1902 (Reissue 2008).

No. A-10-1027: **State v. Henrichs**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Erickson*, 281 Neb. 31, 793 N.W.2d 155 (2011); *State v. Branch*, 277 Neb. 738, 764 N.W.2d 867 (2009); *State v. Reid*, 274 Neb. 780, 743 N.W.2d 370 (2008); *State v. Decker*, 261 Neb. 382, 622 N.W.2d 903 (2001); *State v. Harrison*, 255 Neb. 990, 588 N.W.2d 556 (1999).

No. A-10-1028: **Wolfe v. Leffingwell**. Motion of appellant to dismiss appeal sustained; appeal dismissed with prejudice.

No. A-10-1029: **State v. Kelley**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-10-1032: **Farm Credit Servs. of America v. Norby**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-10-1034: **Littler v. Department of Motor Vehicles**. By order of the court, appeal dismissed for failure to file briefs.

No. A-10-1035: **State v. Williams**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-10-1040: **State v. Schneider**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-10-1042: **State v. Nash**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-10-1045: **Jones v. Legal Aid of Nebraska**. Affirmed. See § 2-107(A)(1).

No. A-10-1052: **State v. Hutton**. Stipulation allowed; appeal dismissed.

No. A-10-1057: **In re Interest of Joseph W**. Appeal dismissed. See, § 2-107(A)(2); *In re Interest of Tayla R.*, 17 Neb. App. 595, 767 N.W.2d 127 (2009).

No. A-10-1058: **State v. Jimenez**. Motion of appellee for summary affirmance sustained; judgment affirmed. See *State v. Segura*, 265 Neb. 903, 660 N.W.2d 512 (2003).

No. A-10-1060: **State v. Tyler**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. §§ 25-1912 and 25-2301.02(1) (Reissue 2008); *Martin v. McGinn*, 267 Neb. 931, 678 N.W.2d 737 (2004).

No. A-10-1061: **State v. Bacon**. Motion of appellee for summary affirmance sustained; judgment affirmed. See *State v. Segura*, 265 Neb. 903, 660 N.W.2d 512 (2003).

No. A-10-1062: **Ronco Constr. Co. v. City of Omaha**. Appeal dismissed. See, § 2-107(A)(2); *Koch v. Aupperle*, 274 Neb. 52, 737 N.W.2d 869 (2007).

No. A-10-1064: **Dunning v. Neth**. Motion of appellant to dismiss appeal sustained; appeal dismissed at cost of appellant.

No. A-10-1067: **State v. Weaver**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-10-1069: **State v. Wyman**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-10-1070: **In re Interest of Mohammed W**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. §§ 25-2301.02 and 25-1912(1) (Reissue 2008); *Martin v. McGinn*, 267 Neb. 931, 678 N.W.2d 737 (2004); *Martin v. McGinn*, 265 Neb. 403, 657 N.W.2d 217 (2003).

No. A-10-1072: **State v. Mendoza**. Motion of appellee for summary affirmance sustained; judgment affirmed. See *State v. White*, 276 Neb. 573, 755 N.W.2d 604 (2008).

Nos. A-10-1076, A-10-1077: **State v. Mohamed**. Motions of appellee for summary affirmance sustained; judgments affirmed. See *State v. Thompson*, 278 Neb. 320, 770 N.W.2d 598 (2009).

No. A-10-1080: **State v. Lopez**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Branch*, 277 Neb. 738, 764 N.W.2d 867 (2009); *State v. Reid*, 274 Neb. 780, 743 N.W.2d 370 (2008); *State v. Decker*, 261 Neb. 382, 622 N.W.2d 903 (2001); *State v. Harrison*, 255 Neb. 990, 588 N.W.2d 556 (1999).

No. A-10-1081: **Lyons-Meyer v. Health & Human Servs**. Motion of appellee for summary dismissal sustained; appeal dismissed. See § 2-107(B)(1).

No. A-10-1082: **Kailath Lakeside Shoppes v. Reaction, Inc**. By order of the court, appeal dismissed for failure to file briefs.

No. A-10-1086: **Steppuhn v. Steppuhn**. By order of the court, appeal dismissed for failure to file briefs.

No. A-10-1090: **State v. Smith**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-10-1093: **State v. Solis**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-10-1094: **State v. Alboujawari**. Stipulation allowed; appeal dismissed.

No. A-10-1095: **In re Interest of Shelby K**. Appeal dismissed. See, § 2-107(A)(2); *State v. Haase*, 247 Neb. 817, 530 N.W.2d 617 (1995).

No. A-10-1099: **Morales v. ConAgra Foods**. Pursuant to court ruling of March 10, 2011, appeal dismissed for failure to file briefs.

No. A-10-1100: **In re Interest of Mohammed W**. By order of the court, appeal dismissed for failure to file briefs.

No. A-10-1103: **State v. Calderon**. By order of the court, appeal dismissed for failure to file briefs.

No. A-10-1107: **State v. Waid**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Branch*, 277 Neb. 738, 764 N.W.2d 867 (2009); *State v. Reid*, 274 Neb. 780, 743 N.W.2d 370 (2008); *State v. Decker*, 261 Neb. 382, 622 N.W.2d 903 (2001); *State v. Harrison*, 255 Neb. 990, 588 N.W.2d 556 (1999).

No. A-10-1108: **State v. Holmes**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-10-1110: **State v. Walters**. Motion of appellee for summary affirmance sustained; judgment affirmed. See *State v. Segura*, 265 Neb. 903, 660 N.W.2d 512 (2003).

No. A-10-1111: **State on behalf of Keever v. Keever**. By order of the court, appeal dismissed for failure to file briefs.

No. A-10-1118: **State v. Harrington**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Erickson*, 281 Neb. 31, 793 N.W.2d 155 (2011); *State v. Sellers*, 279 Neb. 220, 777 N.W.2d 779 (2010); *State v. Glover*, 278 Neb. 795, 774 N.W.2d 248 (2009).

No. A-10-1119: **State v. Jackson**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-10-1120: **State v. Vasquez**. Stipulation allowed; appeal dismissed.

Nos. A-10-1128, A-10-1129: **State v. Lee**. Motions of appellee for summary affirmance sustained; judgments affirmed. See *State v. Thompson*, 278 Neb. 320, 770 N.W.2d 598 (2009).

No. A-10-1136: **Evezic v. Evezic**. Appeal dismissed as filed out of time. See Neb. Rev. Stat. § 25-1912(1) (Reissue 2008).

No. A-10-1137: **Calvin L. Hinz Architects v. Maple Two, L.L.C**. Stipulation allowed; appeal dismissed with prejudice; each party to pay own costs.

No. A-10-1138: **In re Guardianship & Conservatorship of Elvera K**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. §§ 30-1601(1) and 25-1912(1) (Reissue 2008).

No. A-10-1140: **In re Kountze Heirloom Trust**. Appeal dismissed. See, § 2-107(A)(2); *Salkin v. Jacobsen*, 263 Neb. 521, 641 N.W.2d 356 (2002).

No. A-10-1141: **Hurtado v. Muhle**. Appeal dismissed. See, § 2-107(A)(2); *Parker v. Parker*, 10 Neb. App. 658, 636 N.W.2d 385 (2001).

No. A-10-1143: **State v. Prochaska**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Branch*, 277 Neb. 738, 764 N.W.2d 867 (2009); *State v. Reid*, 274 Neb. 780, 743 N.W.2d 370 (2008); *State v. Decker*, 261 Neb. 382, 622 N.W.2d 903 (2001); *State v. Harrison*, 255 Neb. 990, 588 N.W.2d 556 (1999).

No. A-10-1145: **State v. Coufal**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-10-1146: **Jensen v. Jensen**. Appeal dismissed. See § 2-107(A)(2).

No. A-10-1147: **Jensen v. Jensen**. By order of the court, appeal dismissed for failure to file replacement brief as ordered.

No. A-10-1148: **Loye v. Department of Motor Vehicles**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-10-1152: **State v. Jensen**. Motion of appellee for summary affirmance considered and sustained. See *State v. Kinkennon*, 275 Neb. 570, 747 N.W.2d 437 (2008).

No. A-10-1153: **State v. Agee**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-10-1154: **State v. Rising**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-10-1155: **State v. Younger**. Motion of appellee for summary affirmance sustained; judgment affirmed. See *State v. Thompson*, 278 Neb. 320, 770 N.W.2d 598 (2009).

No. A-10-1156: **Mayhue v. Duff**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-10-1157: **State v. Leroux**. By order of the court, appeal dismissed for failure to file briefs.

No. A-10-1158: **State v. Crippen**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-10-1164: **State v. Witmer**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Boppre*, 280 Neb. 774, 790 N.W.2d 417 (2010).

No. A-10-1166: **State v. Castonguay**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Boppre*, 280 Neb. 774, 790 N.W.2d 417 (2010); *State v. Haas*, 279 Neb. 812, 782 N.W.2d 584 (2010); *State v. Albrecht*, 18 Neb. App. 402, 790 N.W.2d 1 (2010).

No. A-10-1167: **State v. Barber**. Stipulation allowed; appeal dismissed.

No. A-10-1168: **State v. Barber**. Stipulation allowed; appeal dismissed.

No. A-10-1173: **State v. Manhim**. Motion of appellee for summary affirmance sustained. See *State v. Thompson*, 278 Neb. 320, 770 N.W.2d 598 (2009).

No. A-10-1176: **State v. Dancer**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-10-1180: **State v. Anderson**. Stipulation to dismiss appeal sustained; appeal dismissed.

No. A-10-1181: **State v. Nickman**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-10-1182: **Smith v. City of Norfolk**. By order of the court, appeal dismissed for failure to file briefs.

No. A-10-1185: **State v. Seizys**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, *State v. Nelson*, 276 Neb. 997, 759 N.W.2d 260 (2009); *State v. Svoboda*, 13 Neb. App. 266, 690 N.W.2d 821 (2005); *State v. Glover*, 3 Neb. App. 932, 535 N.W.2d 724 (1995).

No. A-10-1187: **Charity Field Farms v. Smith**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1912(1) (Reissue 2008).

No. A-10-1189: **DeCoteau v. Department of Corrections**. Appeal dismissed. See, § 2-107(A)(2); *Martin v. McGinn*, 267 Neb. 931, 678 N.W.2d 737 (2004).

No. A-10-1192: **State v. Nunn**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Dinslage*, 280 Neb. 659, 789 N.W.2d 29 (2010); *State v. Fiene*, 219 Neb. 397, 363 N.W.2d 385 (1985); *State v. Ernest*, 200 Neb. 615, 264 N.W.2d 677 (1978).

No. A-10-1195: **Farmers Co-op Elev. Co. v. Edward Jelinek Estate**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-10-1202: **Malone v. City of Omaha**. Appeal dismissed. See § 2-107(A)(2).

No. A-10-1204: **Schmid v. Ellis**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-10-1206: **State v. Beecham**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-10-1213: **State v. Bravo**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

Nos. A-10-1214 through A-10-1216: **State v. Rogers**. Motions of appellee for summary affirmance sustained; judgments affirmed. See, § 2-107(B)(2); *State v. Start*, 239 Neb. 571, 477 N.W.2d 20 (1991).

No. A-10-1221: **Harris v. Bowie**. Appeal dismissed. See § 2-107(A)(2).

No. A-10-1225: **In re Interest of Robert H**. Appeal dismissed. See, § 2-107(A)(2); *Martin v. McGinn*, 267 Neb. 931, 678 N.W.2d 737 (2004).

No. A-10-1227: **State v. Ray**. By order of the court, appeal dismissed for failure to file briefs.

Nos. A-10-1230, A-10-1231: **State v. Burns**. Motions of appellee for summary affirmance sustained; judgments affirmed. See, § 2-107(B)(2); *State v. Erickson*, 281 Neb. 31, 793 N.W.2d 155 (2011); *State v. Branch*, 277 Neb. 738, 764 N.W.2d 867 (2009); *State v. Reid*, 274 Neb. 780, 743 N.W.2d 370 (2008); *State v. Decker*, 261 Neb. 382, 622 N.W.2d 903 (2001); *State v. Harrison*, 255 Neb. 990, 588 N.W.2d 556 (1999).

No. A-10-1240: **Skidmore v. City of La Vista**. Motion of appellant to dismiss appeal without prejudice considered; appeal dismissed.

No. A-10-1244: **Old Republic Ins. Co. v. Babcock**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-10-1245: **Gray v. Houston**. Motions of appellees for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-11-009: **Patterson v. Department of Corr. Servs**. Appeal dismissed. See § 2-107(A)(2).

No. A-11-022: **Quintero v. Department of Corr. Servs**. Appeal dismissed. See, § 2-107(A)(2); *Martin v. McGinn*, 267 Neb. 931, 678 N.W.2d 737 (2004).

No. A-11-031: **In re Estate of Skutchen**. Motion of appellee for summary dismissal sustained; appeal dismissed. See § 2-107(B)(1).

No. A-11-038: **Wiley v. Smith**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-11-039: **In re Estate of Giventer**. Appeal dismissed. See, § 2-107(A)(2); *Wagner v. Wagner*, 275 Neb. 693, 749 N.W.2d 137 (2008).

No. A-11-043: **In re Interest of Alejandro G**. Motion of appellant to dismiss appeal considered; appeal dismissed.

No. A-11-055: **Great Western Bank v. Yasinskiy**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1315 (Reissue 2008).

No. A-11-059: **Chambers v. Neyland**. Appeal dismissed. See § 2-107(A)(2).

No. A-11-066: **Johnson v. Department of Corr. Servs**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1912(1) (Reissue 2008).

No. A-11-071: **Kocina-Kerzman v. Kerzman**. Appeal dismissed. See, § 2-107(A)(2); *Smeal Fire Apparatus Co. v. Kreikemeier*, 279 Neb. 661, 782 N.W.2d 848 (2010); *Meisinger v. Meisinger*, 230 Neb. 37, 429 N.W.2d 721 (1988).

No. A-11-085: **State v. Milton**. Appeal dismissed. See, § 2-107(A)(2); *Smith v. Lincoln Meadows Homeowners Assn.*, 267 Neb. 849, 678 N.W.2d 726 (2004).

No. A-11-098: **Gomez v. Wolfe**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1315 (Reissue 2008).

No. A-11-105: **State v. Alford**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1912(1) (Reissue 2008).

No. A-11-108: **American National Bank v. Arbor Bank**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1315(1) (Reissue 2008).

No. A-11-129: **Clauff v. Clauff**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. §§ 25-1315(1) and 25-1329 (Reissue 2008).

No. A-11-141: **State ex rel. Jacob v. Houston**. Appeal dismissed. See § 2-107(A)(2).

No. A-11-171: **Tibke v. Department of Motor Vehicles**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-11-173: **State v. Desomber**. Stipulation allowed; appeal dismissed.

No. A-11-182: **Engler v. Accountability & Disclosure Comm**. Appeal dismissed. See, § 2-107(A)(2); *Kaplan v. McClurg*, 271 Neb. 101, 710 N.W.2d 96 (2006).

No. A-11-187: **State v. Wells**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1912(1) (Reissue 2008).

No. A-11-248: **State v. Flynn**. Appeal dismissed. See, § 2-107(A)(2); *Kaplan v. McClurg*, 271 Neb. 101, 710 N.W.2d 96 (2006).

No. A-11-259: **State v. Woita**. Stipulation allowed; appeal dismissed.

LIST OF CASES ON PETITION FOR FURTHER REVIEW

No. A-05-1507: **Community Memorial Hospital v. Humboldt Clinic**. Petition of appellant for further review denied on January 21, 2010.

No. A-05-1509: **Community Memorial Hospital v. Humboldt Healthcare**. Petition of appellant for further review denied on January 21, 2010.

No. A-07-1229: **State v. Hausmann**. Petition of appellant for further review denied on December 23, 2009.

No. A-08-130: **Bacon v. DBI/SALA**. Petition of appellant for further review denied on September 23, 2009.

No. A-08-130: **Bacon v. DBI/SALA**. Petition of appellee DBI/SALA for further review denied on September 23, 2009.

No. A-08-211: **Barnett v. Department of Motor Vehicles**, 17 Neb. App. 795 (2009). Petition of appellee for further review denied on January 13, 2010.

No. A-08-526: **Thompson v. Thompson**. Petition of appellant for further review denied on November 12, 2009.

No. S-08-588: **Capitol Construction v. Skinner**, 17 Neb. App. 662 (2009). Petition of appellant for further review sustained on December 23, 2009.

No. S-08-628: **State v. Drahota**, 17 Neb. App. 678 (2009). Petition of appellant for further review sustained on September 30, 2009.

No. A-08-723: **State v. Fletcher**. Petition of appellant for further review denied on November 18, 2009.

Nos. A-08-796, A-09-088: **Graham v. Dietze**. Petitions of appellee for further review denied on September 9, 2010.

No. S-08-806: **Murray v. Neth**, 17 Neb. App. 900 (2009). Petition of appellant for further review sustained on December 23, 2009.

No. A-08-837: **State v. Glassco**. Petition of appellant for further review denied on October 21, 2009.

No. A-08-886: **Stonington Ins. Co. v. Beimdiek Ins. Agency**. Petition of appellees for further review denied on September 9, 2009.

No. A-08-898: **Bazar v. Department of Motor Vehicles**, 17 Neb. App. 910 (2009). Petition of appellee for further review denied on November 12, 2009.

No. S-08-959: **State v. Simnick**, 17 Neb. App. 766 (2009). Petition of appellant for further review sustained on September 16, 2009.

No. A-08-975: **Adams v. Cargill Meat Solutions**, 17 Neb. App. 708 (2009). Petition of appellee for further review denied on December 23, 2009.

No. A-08-1024: **Bartak v. Bartak**. Petition of appellee for further review denied on January 27, 2010.

No. A-08-1026: **Mace-Main v. City of Omaha**, 17 Neb. App. 857 (2009). Petition of appellant for further review denied on October 21, 2009.

No. A-08-1038: **Hronek v. Tri-State By-Products**. Petition of appellant for further review denied on October 28, 2009.

No. A-08-1041: **Wiegert-Stathes v. American Fam. Mut. Ins. Co**. Petition of appellant for further review denied on January 21, 2010.

No. A-08-1043: **Save Our Hills v. Board of Suprvs., Washington Cty**. Petition of appellant for further review denied on December 10, 2009.

No. A-08-1060: **State v. Tylka**. Petition of appellant for further review denied on October 21, 2009.

No. A-08-1082: **State v. Bartlett**. Petition of appellant for further review denied on December 16, 2009.

No. A-08-1083: **State v. Bartlett**. Petition of appellant for further review denied on September 30, 2009.

No. A-08-1101: **Knight v. City of Fort Calhoun**. Petition of appellee for further review denied on October 21, 2009.

No. A-08-1103: **State v. Gay**, 18 Neb. App. 163 (2009). Petition of appellant for further review denied on January 13, 2010.

No. A-08-1149: **Hurbenca v. Nebraska Dept. of Corr. Servs.**, 18 Neb. App. 31 (2009). Petition of appellant for further review denied on December 16, 2009.

No. A-08-1206: **Chipman v. Chipman**. Petition of appellant for further review denied on September 16, 2009.

No. A-08-1223: **Rockhold v. KL and DC Corp**. Petition of appellant for further review denied on September 9, 2009.

No. A-08-1232: **State v. Sanders**. Petition of appellant for further review denied on December 23, 2009.

No. S-08-1259: **Deviney v. Union Pacific RR. Co.**, 18 Neb. App. 134 (2009). Petition of appellee for further review sustained on January 13, 2010.

No. A-08-1262: **Barrett v. Fabian**. Petition of appellant for further review denied on February 18, 2010.

No. A-08-1268: **Wilson v. Neth**, 18 Neb. App. 41 (2009). Petition of appellant for further review denied on November 18, 2009.

No. A-08-1272: **Mengedoht v. Blick**. Petition of appellant for further review denied on October 21, 2009.

No. A-08-1293: **State v. Holladay**. Petition of appellant for further review denied on March 17, 2010.

No. A-08-1326: **Durham v. City of Lincoln**. Petition of appellant for further review denied on November 18, 2009.

No. A-08-1332: **Lopez v. M.G. Waldbaum Co**. Petition of appellant for further review denied on September 9, 2009.

No. A-08-1334: **State v. Wabashaw**. Petition of appellant for further review denied on December 23, 2009.

No. A-08-1337: **State v. Wilson**, 17 Neb. App. 846 (2009). Petition of appellant for further review denied on September 30, 2009.

No. A-09-011: **Fry v. Fry**, 18 Neb. App. 75 (2009). Petition of appellant for further review denied on January 13, 2010.

No. S-09-019: **Bauermeister v. Waste Mgmt. Co**. Petition of appellee for further review sustained on January 21, 2010.

No. A-09-019: **Bauermeister v. Waste Mgmt. Co**. Petition of appellant for further review denied on January 27, 2011.

No. A-09-059: **Firstar Fiber v. Outlook Nebraska**. Petition of appellant for further review denied on January 13, 2010.

No. A-09-070: **In re Interest of Leslie S. et al.**, 17 Neb. App. 828 (2009). Petition of appellant for further review denied on September 23, 2009.

No. A-09-074: **State v. Guerrero**. Petition of appellant for further review denied on November 12, 2009.

No. A-09-105: **In re Interest of Louis S. et al.**, 17 Neb. App. 867 (2009). Petition of appellant for further review denied on October 28, 2009.

No. A-09-105: **In re Interest of Louis S. et al.**, 17 Neb. App. 867 (2009). Petition of appellee Carmela F. for further review denied on October 28, 2009.

No. A-09-113: **County of Sarpy v. Courtney, LLC**. Petition of appellant for further review denied on February 3, 2010.

No. A-09-122: **Betts v. Betts**. Petition of appellee for further review denied on December 23, 2009.

No. A-09-126: **State v. Bayone**. Petition of appellant for further review denied on September 9, 2009.

Nos. A-09-127 through A-09-129, A-09-227, A-09-228: **In re Interest of Allen G. et al**. Petitions of Tabitha G. for further review denied on January 13, 2010.

No. A-09-149: **State v. Braun**. Petition of appellant for further review denied on September 9, 2009.

No. A-09-163: **Polen v. Polen**. Petition of appellant for further review denied on December 16, 2009.

No. A-09-175: **State v. Biloff**, 18 Neb. App. 215 (2009). Petition of appellant for further review denied on January 21, 2010.

No. A-09-180: **State v. Sinner**. Petition of appellant for further review denied on December 28, 2009, as untimely filed.

No. A-09-181: **State v. Lopez**. Petition of appellant for further review denied on February 3, 2010.

No. A-09-182: **Peterson Land & Livestock v. Gotschall**. Petition of appellant for further review denied on March 24, 2010.

No. A-09-188: **State v. Lopez**. Petition of appellant for further review denied on April 14, 2010.

No. A-09-201: **State v. Sherrod**. Petition of appellant for further review denied on September 16, 2009.

No. A-09-206: **State v. Chae**. Petition of appellant for further review denied on October 21, 2009.

No. A-09-207: **In re Interest of Renee R**. Petition of appellant for further review denied on September 16, 2009.

No. A-09-207: **In re Interest of Renee R**. Petition of appellee Thomas R. for further review denied on September 16, 2009.

No. A-09-208: **In re Interest of Joey R**. Petition of appellant for further review denied on September 16, 2009.

No. A-09-208: **In re Interest of Joey R**. Petition of appellee Thomas R. for further review denied on September 16, 2009.

No. A-09-221: **State v. Roberts**. Petition of appellant for further review denied on October 21, 2009.

No. S-09-223: **State v. Tamayo**, 18 Neb. App. 430 (2010). Petition of appellee for further review sustained on June 30, 2010.

No. A-09-229: **State v. Moen**. Petition of appellant for further review denied on October 28, 2009.

No. A-09-237: **Taylor v. Chapman**. Petition of appellant for further review denied on September 30, 2009.

No. A-09-238: **Cenovic v. Cenovic**. Petition of appellant for further review denied on May 20, 2010.

No. A-09-243: **State v. Graves**. Petition of appellant for further review denied on December 10, 2009.

No. A-09-250: **State v. Smith**. Petition of appellant for further review denied on October 9, 2009.

No. A-09-252: **In re Interest of Alivia H. & Savanah H**. Petition of appellant for further review denied on December 16, 2009.

No. A-09-287: **Mayfield v. Nebraska Pub. Serv. Comm**. Petition of appellant for further review denied on February 18, 2010.

No. A-09-290: **Daugherty v. County of Douglas**, 18 Neb. App. 228 (2010). Petition of appellant for further review denied on April 14, 2010.

No. A-09-290: **Daugherty v. County of Douglas**, 18 Neb. App. 228 (2010). Petition of appellee for further review denied on April 14, 2010.

No. A-09-295: **State v. Montin**. Petition of appellant for further review denied on February 3, 2010.

No. A-09-295: **State v. Montin**. Petition of appellant pro se for further review denied on February 3, 2010.

No. A-09-309: **In re Interest of Malaki H**. Petition of appellant for further review denied on November 18, 2009.

No. A-09-314: **State v. Rodriguez**, 18 Neb. App. 104 (2009). Petition of appellant for further review denied on December 23, 2009.

No. A-09-322: **Ottaco Acceptance v. Larkin**. Petition of appellant for further review denied on April 14, 2010.

No. A-09-326: **Gloe v. Leaman**. Petition of appellant for further review denied on April 14, 2010.

No. A-09-334: **State v. Jones**. Petition of appellant for further review denied on February 18, 2010.

No. A-09-335: **Dekock v. Dekock**. Petition of appellant for further review denied on December 23, 2009.

No. A-09-338: **State v. Sobey**. Petition of appellant pro se for further review denied on March 10, 2010.

No. A-09-346: **In re Interest of Marianne B**. Petition of appellant for further review denied on November 18, 2009.

No. A-09-347: **In re Interest of Joseph F**. Petition of appellant for further review denied on November 18, 2009.

No. A-09-356: **Troia Family Ltd. Partnership v. Kool**. Petition of appellee for further review denied on March 24, 2010.

No. A-09-362: **State v. Jaramillo**. Petition of appellant for further review denied on October 28, 2009.

No. A-09-370: **State v. Slater**. Petition of appellant for further review denied on January 13, 2010.

No. A-09-378: **Sears v. Sears**. Petition of appellant for further review denied on December 10, 2009.

No. S-09-382: **In re Interest of Marcella B. & Juan S.**, 18 Neb. App. 153 (2009). Petition of appellant for further review sustained on January 13, 2010.

No. A-09-391: **Kubr v. Kubr**. Petition of appellant for further review denied on September 9, 2009.

No. A-09-403: **State v. Rodriguez**. Petition of appellant for further review denied on January 13, 2010.

No. A-09-406: **State v. Aschenbrenner**. Petition of appellant for further review denied on January 27, 2010.

No. A-09-417: **State v. Alfredson**. Petition of appellant for further review denied on November 12, 2009.

No. A-09-419: **State v. O'Neal**. Petition of appellant for further review denied on April 14, 2010.

No. A-09-453: **State ex rel. Jacob v. Houston**. Petition of appellants for further review denied on March 10, 2010.

No. A-09-460: **In re Estate of Schademan**. Petition of appellant for further review denied on April 21, 2010.

No. A-09-461: **State ex rel. Bonner v. McSwine**. Petition of appellant for further review denied on May 20, 2010.

No. A-09-465: **Harris v. Harris**. Petition of appellant for further review denied on September 23, 2009.

No. A-09-479: **State v. Kurtzhals**. Petition of appellant for further review denied on October 28, 2009.

No. A-09-482: **State ex rel. Jacob v. Pirsch**. Petition of appellants for further review denied on February 3, 2010.

No. A-09-492: **State v. Forbes**. Petition of appellant for further review denied on November 12, 2009.

No. A-09-505: **In re Interest of Nylang M. et al**. Petition of appellant for further review denied on January 27, 2010.

No. A-09-506: **State v. McBride**. Petition of appellant for further review denied on November 12, 2009.

No. A-09-508: **Pflug Bros. Enters. v. Pratt**. Petition of appellant for further review denied on June 9, 2010.

No. A-09-510: **Lugonja v. Chief Industries**. Petition of appellant for further review denied on January 27, 2010.

No. A-09-517: **State v. Rivera**. Petition of appellant for further review denied on January 21, 2010.

No. A-09-518: **State v. Harris**. Petition of appellant for further review denied on December 23, 2009.

No. A-09-519: **State v. Kendall**. Petition of appellant for further review denied on January 13, 2010.

No. A-09-520: **Young v. Nebraska Insurance Commissioner**. Petition of appellant for further review denied on November 12, 2009.

Nos. A-09-524, A-09-525: **State v. Argo**. Petitions of appellant for further review denied on November 12, 2009.

No. A-09-531: **Meadows v. Meadows**, 18 Neb. App. 333 (2010). Petition of appellant for further review denied on May 5, 2010.

No. S-09-532: **Schuette v. Schuette**. Petition of appellant for further review sustained on May 20, 2010.

No. A-09-533: **Werthman v. Werthman**. Petition of appellant for further review denied on January 21, 2010.

No. A-09-537: **State v. Ramirez**, 18 Neb. App. 241 (2010). Petition of appellant for further review denied on February 24, 2010.

Nos. A-09-541, A-09-557: **State v. Craven**. Petitions of appellant for further review denied on March 10, 2010.

Nos. A-09-542, A-09-543: **State v. Albrecht**, 18 Neb. App. 402 (2010). Petitions of appellant for further review denied on June 23, 2010.

No. A-09-554: **Miller v. Lehman**. Petition of appellant for further review denied on November 12, 2009.

No. A-09-560: **Glesmann v. Kolesik**. Petition of appellant for further review denied on March 10, 2010.

No. A-09-566: **State v. Daringer**. Petition of appellant for further review denied on January 10, 2010, as untimely filed.

No. A-09-579: **State v. Tompkins**. Petition of appellant for further review denied on February 18, 2010.

No. A-09-589: **Stoler v. Otis Bed**. Petition of appellant for further review denied on May 5, 2010.

No. A-09-602: **State v. Maser**. Petition of appellant for further review denied on October 21, 2009.

No. A-09-603: **State v. Stoltenberg**. Petition of appellant for further review denied on December 10, 2009.

No. A-09-609: **Maati v. State**. Petition of appellant for further review denied on March 10, 2010.

No. A-09-611: **Thunder Bay, Inc. v. Kawa**. Petition of appellant for further review denied on November 10, 2010.

No. A-09-611: **Thunder Bay, Inc. v. Kawa**. Petition of appellee for further review denied on November 10, 2010.

No. A-09-630: **Penner v. Penner**. Petition of appellant for further review denied on June 30, 2010.

No. A-09-653: **Gordon Livestock Market v. Pribil**. Petition of appellant for further review denied on February 18, 2010.

No. A-09-654: **Anderson v. Douglas Cty. Bd. of Equal**. Petition of appellant for further review denied on January 27, 2010.

No. A-09-656: **In re Interest of Damion H. & Alexandria J**. Petition of appellant for further review denied on February 24, 2010.

No. A-09-665: **Whisenhunt v. Whisenhunt**. Petition of appellant for further review denied on November 17, 2010.

No. A-09-667: **State v. Passerini**, 18 Neb. App. 552 (2010). Petition of appellee for further review denied on January 27, 2011.

No. A-09-669: **State v. Merheb**. Petition of appellant for further review denied on March 10, 2010.

No. A-09-670: **In re Interest of Christian L.**, 18 Neb. App. 276 (2010). Petition of appellee for further review denied on April 14, 2010.

No. S-09-676: **Village of Wilsonville v. Chambers**. Petition of appellant for further review sustained on December 23, 2009.

No. A-09-683: **State v. Rainey**. Petition of appellant for further review denied on April 7, 2010.

No. A-09-684: **State v. Giles**. Petition of appellant for further review denied on January 27, 2010.

No. S-09-687: **Tolbert v. Omaha Housing Authority**. Petition of appellant for further review sustained on May 12, 2010.

No. A-09-690: **Nebraska Acct. & Disclosure Comm. v. Prokop**. Petition of appellant for further review denied on July 2, 2010, as untimely and for lack of jurisdiction.

No. A-09-694: **State v. Davis**. Petition of appellant for further review denied on June 17, 2010.

No. A-09-694: **State v. Davis**. Petition of appellant pro se for further review denied on June 17, 2010.

No. A-09-698: **In re Estate of Kabasinskas**. Petition of appellee for further review denied on September 9, 2010.

No. A-09-706: **Manary v. Manary**. Petition of appellant for further review denied on August 25, 2010.

No. A-09-719: **In re Interest of Baby T**. Petition of appellant for further review denied on February 24, 2010.

No. A-09-720: **State v. Rea**. Petition of appellant for further review denied on June 3, 2010.

No. A-09-724: **State v. Gonzalez**. Petition of appellant for further review denied on November 16, 2009. Motion to proceed in forma pauperis improvidently granted; order of November 6, 2009, vacated.

No. A-09-729: **Samson Constr. Corp. v. Double D Excavating**. Petition of appellee for further review denied on August 25, 2010.

No. A-09-737: **Faltys v. Department of Motor Vehicles**. Petition of appellant for further review denied on February 18, 2010.

No. A-09-742: **State v. Ellis**. Petition of appellant for further review denied on June 17, 2010.

No. A-09-751: **State v. Purdie**. Petition of appellant for further review denied on March 10, 2010.

No. A-09-759: **Bhuller v. Bhuller**. Petition of appellant for further review denied on February 3, 2010.

No. A-09-769: **State v. Poole**. Petition of appellant for further review denied on June 30, 2010.

No. A-09-780: **State ex rel. Motsinger v. City of North Platte**. Petition of appellant for further review denied on June 23, 2010.

No. A-09-781: **Menkens v. Morse**. Petition of appellee for further review denied on March 10, 2010.

No. A-09-790: **In re Interest of A.H**. Petition of appellant for further review denied on June 3, 2010.

No. A-09-800: **Watkins Concrete Block Co. v. Pacha**. Petition of appellant for further review denied on September 9, 2010.

No. A-09-814: **Norby v. Farnam Bank**. Petition of appellant for further review denied on June 4, 2010.

No. A-09-816: **Sullivan v. Farmers Ins. Exch**. Petition of appellant for further review denied on August 25, 2010.

No. A-09-817: **Villas of Southwind v. Southwind Homeowners Assn**. Petition of appellant for further review denied on June 30, 2010.

Nos. A-09-821, A-09-822: **In re Interest of Tauteyana J. et al**. Petitions of appellant for further review denied on April 7, 2010.

No. A-09-838: **Glass Lake v. Hofer**. Petition of appellee for further review denied on May 20, 2010.

No. A-09-839: **Hall v. Hall**, 18 Neb. App. 384 (2010). Petition of appellant for further review denied on June 30, 2010.

No. A-09-851: **State v. Roberts**. Petition of appellant for further review denied on June 25, 2010, as untimely filed.

No. A-09-855: **State v. Allen**. Petition of appellant for further review denied on June 3, 2010.

No. A-09-859: **Jones v. Jones**. Petition of appellee for further review denied on May 24, 2010. See § 2-102(F)(1).

No. A-09-867: **Morehouse v. Nast**. Petition of appellant for further review denied on January 27, 2011.

No. A-09-886: **Widtfeldt v. Holt Cty. Bd. of Equal**. Petition of appellant for further review denied on January 13, 2010.

No. A-09-891: **In re Interest of Nadia S. et al**. Petition of appellant for further review denied on April 21, 2010.

No. A-09-899: **In re Interest of J.P**. Petition of appellant for further review denied on April 14, 2010. See §§ 2-102(F)(3) and 2-107(B)(2).

No. A-09-899: **In re Interest of J.P**. Supplemental petition of appellant for further review denied on April 14, 2010. See, *State v. Williams*, 253 Neb. 619, 573 N.W.2d 106 (1997); *State v. Start*, 229 Neb. 575, 427 N.W.2d 800 (1988).

No. A-09-903: **State v. Valadez**. Petition of appellant for further review denied on April 14, 2010.

No. A-09-918: **State v. Taylor**. Petition of appellant for further review denied on June 23, 2010.

No. A-09-920: **Smith v. Colerick**. Petition of appellant for further review denied on May 5, 2010.

No. A-09-926: **State v. Lathrop**. Petition of appellant for further review denied on January 27, 2010.

No. A-09-940: **E & E Prop. Holdings v. Universal Cos.**, 18 Neb. App. 532 (2010). Petition of appellant for further review denied on November 10, 2010.

No. A-09-941: **State v. Pieper**. Petition of appellant for further review denied on December 10, 2009.

No. S-09-944: **Maycock v. Hoody**. Petition of appellant David A. Maycock for further review denied on January 12, 2011.

No. S-09-944: **Maycock v. Hoody**. Petition of appellees for further review sustained on January 12, 2011.

No. A-09-945: **Widtfeldt v. Holt Cty. Bd. of Equal**. Petition of appellant for further review denied on December 7, 2009, as premature.

No. A-09-946: **State v. Wecker**. Petition of appellant for further review denied on May 20, 2010.

No. A-09-950: **State v. Pitzer**. Petition of appellant for further review denied on August 25, 2010.

No. A-09-951: **In re Guardianship & Conservatorship of Shannon**. Petition of appellant for further review denied on March 30, 2011.

No. A-09-952: **State v. Mann**. Petition of appellant for further review denied on June 17, 2010.

No. A-09-953: **In re Interest of Carrdale H.**, 18 Neb. App. 350 (2010). Petition of appellee for further review denied on June 17, 2010.

No. A-09-965: **State v. Zuck**. Petition of appellant for further review denied on May 20, 2010.

Nos. A-09-968 through A-09-971: **State v. Wolfe**. Petitions of appellant for further review denied on May 5, 2010.

No. S-09-972: **State v. Ruffin**. Petition of appellant for further review sustained on January 13, 2010.

No. A-09-973: **State v. Armstrong**. Petition of appellant for further review denied on November 5, 2010, as untimely.

No. A-09-974: **State v. Hansen**. Petition of appellant for further review denied on June 30, 2010.

No. A-09-975: **Beckman v. Federated Mut. Ins. Co.**, 18 Neb. App. 513 (2010). Petition of appellee for further review denied on September 29, 2010.

No. A-09-978: **Bailey v. Bachman**. Petition of appellants for further review denied on January 12, 2011.

No. A-09-986: **State ex rel. Jacob v. Pepperl**. Petition of appellant for further review denied on January 13, 2010.

No. A-09-988: **Buggs v. Houston**. Petition of appellant for further review denied on April 14, 2010.

No. A-09-993: **In re Interest of Ray'Cine L.** Petition of appellee for further review denied on June 17, 2010.

No. A-09-994: **In re Interest of Dejan L.** Petition of appellee for further review denied on June 17, 2010.

No. A-09-999: **State v. Smith**. Petition of appellant for further review denied on June 30, 2010.

No. A-09-1001: **State v. Cusatis**. Petition of appellant for further review denied on April 14, 2010.

No. A-09-1002: **State v. Greuter**. Petition of appellant for further review denied on June 3, 2010.

No. A-09-1003: **Maxson v. Maxson**. Petition of appellant for further review denied on September 15, 2010.

No. A-09-1006: **Abraham v. DMV**. Petition of appellant for further review denied on June 3, 2010.

Nos. A-09-1008, A-09-1009: **State v. Sturgis**. Petitions of appellant for further review denied on May 5, 2010.

No. A-09-1010: **State v. Kellogg**. Petition of appellant for further review denied on March 10, 2010.

No. A-09-1011: **Looby v. Wulf**. Petition of appellant for further review denied on September 9, 2010.

No. A-09-1016: **Chesterman v. Chesterman**. Petition of appellant for further review denied on August 25, 2010.

No. A-09-1023: **In re Interest of Ipolita B.** Petition of appellant for further review denied on June 17, 2010.

No. A-09-1024: **In re Interest of Patience I**. Petition of appellant for further review denied on August 25, 2010.

No. A-09-1034: **Pserros v. State**. Petition of appellant for further review denied on September 29, 2010.

No. A-09-1039: **In re Estate of Hue**. Petition of appellant for further review denied on May 5, 2010.

No. A-09-1043: **General Motors Acceptance Corp. v. Leth**. Petition of appellant for further review denied on June 30, 2010.

No. A-09-1045: **Harden v. Hormel Foods Corp**. Petition of appellant for further review denied on June 30, 2010.

No. A-09-1047: **State v. Sanders**. Petition of appellant for further review denied on June 17, 2010.

No. A-09-1057: **In re Interest of Bianca H. & Eternity H**. Petition of appellant for further review denied on June 3, 2010.

No. A-09-1060: **In re Interest of Justice H**. Petition of appellant for further review denied on August 25, 2010.

No. A-09-1061: **State v. Luff**, 18 Neb. App. 422 (2010). Petition of appellant for further review denied on June 17, 2010.

No. A-09-1065: **Americo Fin. Life v. Reed Enters**. Petition of appellant for further review denied on September 9, 2010.

No. A-09-1072: **Elder-Keep v. Aksamit**. Petition of appellant for further review denied on October 4, 2010, for lack of jurisdiction.

No. S-09-1084: **State v. Borst**. Petition of appellant for further review sustained on September 15, 2010.

No. A-09-1089: **State v. Balvin**, 18 Neb. App. 690 (2010). Petition of appellant for further review denied on January 27, 2011.

No. A-09-1090: **In re Interest of Jamin G**. Petition of appellant for further review denied on March 10, 2010.

No. A-09-1091: **State v. Garner**. Petition of appellant for further review denied on September 29, 2010.

No. A-09-1113: **State v. Kelly**. Petition of appellant for further review denied on August 25, 2010.

No. S-09-1118: **Dobrovolny v. Ford Motor Co.**, 18 Neb. App. 483 (2010). Petition of appellee for further review sustained on September 9, 2010.

No. A-09-1132: **State v. Schlick**. Petition of appellant for further review denied on April 14, 2010.

No. A-09-1133: **State v. Adams**. Petition of appellant for further review denied on June 9, 2010.

No. A-09-1137: **State v. Benish**. Petition of appellant for further review denied on August 25, 2010.

No. A-09-1142: **In re Interest of Shayla H. et al**. Petition of appellant for further review denied on June 17, 2010.

No. A-09-1143: **State v. Killingsworth**. Petition of appellant for further review denied on January 12, 2011.

No. A-09-1154: **State v. Jones**. Petition of appellant for further review denied on May 20, 2010.

No. A-09-1154: **State v. Jones**. Petition of appellant for further review denied on June 3, 2010.

No. A-09-1155: **Harper v. Department of Corr. Servs**. Petition of appellant for further review denied on June 17, 2010.

No. A-09-1156: **In re Interest of Shireen S**. Petition of appellant for further review denied on November 24, 2010.

No. A-09-1159: **Freeman v. Neth**, 18 Neb. App. 592 (2010). Petition of appellant for further review denied on December 8, 2010.

No. A-09-1161: **State v. Fisher**. Petition of appellant for further review denied on August 25, 2010.

No. A-09-1164: **State v. Harden**. Petition of appellant for further review denied on August 25, 2010.

No. A-09-1178: **State v. Hoffman**. Petition of appellant for further review denied on May 20, 2010.

No. A-09-1182: **Guthrie v. Runge**. Petition of appellants for further review denied on November 24, 2010.

No. A-09-1198: **Thies v. Wild West**. Petition of appellant for further review denied on August 20, 2010, as filed out of time.

No. A-09-1200: **Rousseau v. Thermo King**. Petition of appellant for further review denied on March 17, 2010.

No. A-09-1211: **Lewis v. Vacanti**. Petition of appellant for further review denied on January 27, 2011.

No. A-09-1213: **In re Interest of Ronnie G. et al**. Petition of appellant Justine F. and cross-appellant Ronald G. for further review denied on February 18, 2010.

No. A-09-1218: **State v. Ticnor**. Petition of appellant for further review denied on June 30, 2010.

No. A-09-1222: **State v. Fick**, 18 Neb. App. 666 (2010). Petition of appellant for further review denied on January 12, 2011.

No. A-09-1229: **In re Interest of Marquesha C. et al**. Petition of appellant for further review denied on September 15, 2010.

No. A-09-1230: **State v. Craven**, 18 Neb. App. 633 (2010). Petition of appellant for further review denied on December 8, 2010.

No. A-09-1233: **State v. Jackson**. Petition of appellant for further review denied on October 14, 2010.

No. A-09-1234: **State v. Kuta**. Petition of appellant for further review denied on October 4, 2010, for lack of jurisdiction.

No. A-09-1237: **State v. Gonzales**. Petition of appellant for further review denied on August 25, 2010.

No. A-09-1238: **State v. Seaton**. Petition of appellant for further review denied on May 12, 2010.

No. A-09-1239: **Looby v. Wulf**. Petition of appellant for further review denied on September 9, 2010.

No. A-09-1240: **Looby v. Cameron**. Petition of appellant for further review denied on September 9, 2010.

No. A-09-1241: **Kandel v. Nebraska Med. Ctr**. Petition of appellant for further review denied on November 19, 2010, as untimely filed.

No. A-09-1256: **Smokey Ridge Feeders v. Magill**. Petition of appellant for further review denied on November 17, 2010.

No. A-09-1257: **Dugan v. County of Cheyenne**. Petition of appellant for further review denied on March 10, 2010.

No. A-09-1264: **State v. Zimbelman**. Petition of appellant for further review denied on September 9, 2010.

No. A-09-1266: **Gard v. City of Omaha**, 18 Neb. App. 504 (2010). Petition of appellants for further review denied on November 10, 2010.

No. A-09-1273: **Renneke v. Health & Human Servs**. Petition of appellant for further review denied on May 20, 2010.

Nos. A-09-1275, A-09-1276: **State v. Osler-White**. Petitions of appellant for further review denied on July 20, 2010, as filed out of time.

No. A-09-1278: **State v. Hagen**. Petition of appellant for further review denied on August 25, 2010.

No. A-09-1279: **JONWL, L.L.C. v. Starostka**. Petition of appellee for further review denied on February 9, 2011.

Nos. A-09-1282, A-09-1283: **State v. Fieldgrove**. Petitions of appellant for further review denied on September 22, 2010.

No. A-09-1290: **State v. Williams**. Petition of appellant for further review denied on September 9, 2010.

No. A-09-1301: **Goodnight v. Diemer**. Petition of appellant for further review denied on June 23, 2010.

No. S-09-1313: **State v. Landis**. Petition of appellee for further review sustained on September 22, 2010.

No. A-10-016: **Reynolds v. Reynolds**. Petition of appellant for further review denied on February 24, 2011.

No. A-10-017: **Larsen v. Union Pacific RR. Co**. Petition of appellee for further review dismissed on March 9, 2011, as moot.

No. A-10-021: **In re Interest of Wendi L**. Petition of appellant for further review denied on September 29, 2010.

No. A-10-022: **State v. Dyer**. Petition of appellant for further review denied on December 15, 2010.

No. A-10-031: **In re Interest of Josiah J**. Petition of appellant for further review denied on February 16, 2011.

No. A-10-037: **State v. Phalen**. Petition of appellant for further review denied on August 25, 2010.

No. A-10-041: **State v. Andersen**. Petition of appellant for further review denied on August 25, 2010.

No. A-10-046: **E & A Consulting Group v. RSV**. Petition of appellant for further review denied on February 24, 2011.

No. A-10-049: **McNew v. Hunt**. Petition of appellee for further review denied on December 15, 2010.

No. A-10-053: **State v. Castonguay**. Petition of appellant for further review denied on June 17, 2010.

No. A-10-054: **State v. Abram**. Petition of appellant for further review denied on April 14, 2010.

No. A-10-059: **State v. Marsh**. Petition of appellant for further review denied on March 16, 2011.

No. A-10-075: **Equal Opp. Comm. on behalf of Gutierrez v. Barney G., Inc**. Petition of appellant for further review denied on May 12, 2010.

No. A-10-076: **Equal Opp. Comm. on behalf of Macias v. Barney G., Inc**. Petition of appellant for further review denied on May 12, 2010.

No. A-10-077: **Equal Opp. Comm. on behalf of Mendez v. Barney G., Inc**. Petition of appellant for further review denied on May 12, 2010.

No. A-10-078: **Equal Opp. Comm. on behalf of Perez v. Barney G., Inc**. Petition of appellant for further review denied on May 12, 2010.

No. A-10-079: **Equal Opp. Comm. on behalf of Quezada v. Barney G., Inc**. Petition of appellant for further review denied on May 12, 2010.

No. A-10-080: **Equal Opp. Comm. on behalf of Sancedo v. Barney G., Inc**. Petition of appellant for further review denied on May 12, 2010.

No. A-10-081: **Equal Opp. Comm. on behalf of Zamarripa v. Barney G., Inc**. Petition of appellant for further review denied on May 12, 2010.

No. A-10-082: **Equal Opp. Comm. on behalf of Placensia v. Barney G., Inc**. Petition of appellant for further review denied on May 12, 2010.

No. A-10-083: **Equal Opp. Comm. on behalf of Coronado v. Barney G., Inc**. Petition of appellant for further review denied on May 12, 2010.

No. A-10-084: **Equal Opp. Comm. on behalf of Velez v. Barney G., Inc**. Petition of appellant for further review denied on May 12, 2010.

No. A-10-085: **Equal Opp. Comm. on behalf of Gonzalez v. Barney G., Inc**. Petition of appellant for further review denied on May 12, 2010.

Nos. A-10-086, A-10-087: **State v. Weirich**. Petitions of appellant for further review denied on August 25, 2010.

No. A-10-093: **Marti v. Anderson, Creager**. Petition of appellant for further review denied on June 17, 2010.

No. A-10-094: **In re Interest of Justin H. et al.**, 18 Neb. App. 718 (2010). Petition of appellee for further review denied on January 27, 2011.

No. A-10-099: **Scott v. Khan**, 18 Neb. App. 600 (2010). Petition of appellee for further review denied on December 22, 2010.

No. S-10-103: **Tierney v. Four H Land Co**. Petition of appellants for further review sustained on December 22, 2010.

No. A-10-124: **State v. Balvin**. Petition of appellant for further review denied on August 25, 2010.

No. A-10-129: **State v. Lewis**. Petition of appellant for further review denied on August 25, 2010.

No. A-10-136: **Great West Cas. Co. v. Michigan Millers Mut. Ins. Co**. Petition of appellee for further review denied on December 15, 2010.

No. A-10-142: **State v. Brown**. Petition of appellant for further review denied on May 5, 2010.

No. A-10-147: **State v. Gray**. Petition of appellant for further review denied on August 25, 2010.

No. A-10-150: **State v. Hubbard**. Petition of appellant for further review denied on March 30, 2011.

No. A-10-152: **State v. Manchester**. Petition of appellant for further review denied on September 15, 2010.

No. A-10-174: **State v. Parks**. Petition of appellant for further review denied on August 25, 2010.

No. A-10-175: **State v. Neville**. Petition of appellant for further review overruled on September 17, 2010, as untimely.

No. A-10-179: **State v. Gonzalez**. Petition of appellant for further review denied on January 27, 2011.

No. A-10-181: **State v. Yashirin**. Petition of appellant for further review denied on June 17, 2010.

No. A-10-183: **State v. Beins**. Petition of appellant for further review denied on February 9, 2011.

No. A-10-184: **State v. Neal**. Petition of appellant for further review denied on January 19, 2011, as untimely filed.

No. A-10-197: **In re Interest of Vincent L**. Petition of appellant for further review denied on December 8, 2010.

No. A-10-198: **State v. Baker**. Petition of appellant for further review denied on October 14, 2010.

No. A-10-199: **State v. Morgan**. Petition of appellant for further review denied on November 24, 2010, as untimely filed.

No. A-10-200: **Krivohlavek v. Dorchester Farmers Co-op**. Petition of appellant for further review denied on January 19, 2011.

No. A-10-207: **State v. Shelby**. Petition of appellant for further review denied on December 15, 2010.

No. S-10-208: **In re Interest of Jamyia M.**, 18 Neb. App. 679 (2010). Petition of appellee for further review sustained on February 24, 2011.

No. A-10-209: **In re Interest of Ayla R. & Marciana R**. Petition of appellant for further review denied on January 27, 2011.

No. A-10-209: **In re Interest of Ayla R. & Marciana R**. Petition of appellee State for further review denied on January 27, 2011.

No. A-10-213: **State v. Eagleboy**. Petition of appellant for further review denied on November 10, 2010.

No. A-10-219: **State v. Abram**. Petition of appellant for further review denied on March 9, 2011.

Nos. A-10-227, A-10-228: **Monahan v. Douglas Cty. Bd. of Equal**. Petitions of appellant for further review denied on April 13, 2011.

No. S-10-235: **Armstrong v. County of Dixon**. Petition of appellant for further review sustained on April 21, 2011.

No. A-10-236: **In re Loyal W. Sheen Family Trust**. Petition of appellee for further review denied on March 9, 2011.

No. A-10-242: **State v. Mendoza**. Petition of appellant for further review denied on August 25, 2010.

No. A-10-245: **State v. Marking**. Petition of appellant for further review denied on November 17, 2010.

No. A-10-246: **Davenport Ltd. Partnership v. 75th & Dodge II, L.P**. Petition of appellant for further review denied on January 12, 2011.

No. S-10-250: **Devese v. Transguard Ins. Co**. Petition of appellant for further review sustained on February 9, 2011.

No. A-10-251: **Green v. Beatty**. Petition of appellants for further review denied on March 30, 2011.

No. A-10-254: **In re Interest of Aliee P**. Petition of appellant for further review denied on August 25, 2010.

No. A-10-266: **State v. Smith**. Petition of appellant for further review denied on November 17, 2010.

No. A-10-273: **In re Interest of Elizabeth L**. Petition of appellant for further review denied on November 17, 2010.

No. A-10-275: **State v. Roberts**. Petition of appellant for further review overruled on October 5, 2010, as premature.

No. A-10-275: **State v. Roberts**. Petition of appellant for further review denied on January 27, 2011.

No. S-10-278: **State v. Sidzyik**. Petition of appellant for further review sustained on October 14, 2010.

No. A-10-279: **Masek v. Estate of Masek**. Petition of appellant for further review denied on February 9, 2011.

No. A-10-294: **State v. Helmstadter**. Petition of appellant for further review denied on December 22, 2010.

No. A-10-297: **State v. Meints**. Petition of appellant for further review denied on February 9, 2011.

No. A-10-325: **State v. Bernhardt**. Petition of appellant for further review denied on November 17, 2010.

No. A-10-329: **In re Interest of Enrique P. et al**. Petition of appellant for further review denied on August 25, 2010.

No. A-10-330: **Brown v. Drivers Mgmt**. Petition of appellant for further review denied on February 16, 2011.

No. A-10-336: **Killinger v. Grand Island Radiology Assocs**. Petition of appellant for further review denied on April 21, 2011.

No. A-10-345: **State v. Holladay**. Petition of appellant for further review denied on October 14, 2010.

No. A-10-353: **State v. White**. Petition of appellant for further review denied on February 9, 2011.

No. S-10-361: **Schropp Indus. v. Washington Cty. Attorney's Office**. Petition of appellant for further review sustained on September 9, 2010.

No. A-10-368: **State v. Idles**. Petition of appellant for further review denied on November 10, 2010.

No. A-10-373: **Cloyd v. Exmark Manufacturing**. Petition of appellant for further review denied on September 29, 2010.

No. A-10-375: **In re Interest of J.M**. Petition of appellant for further review denied on January 27, 2011.

No. A-10-379: **Krebs v. Sanders**. Petition of appellant for further review denied on October 29, 2010, as untimely filed.

No. A-10-404: **Carpenter v. Carpenter**. Petition of appellant for further review denied on December 22, 2010.

No. A-10-410: **Sobotka v. Woockman**. Petition of appellants for further review denied on February 9, 2011.

No. A-10-411: **Pittman v. Stickney**. Petition of appellant for further review denied on April 13, 2011.

Nos. A-10-414, A-10-415: **State v. Deckard**. Petitions of appellant for further review denied on March 23, 2011.

No. A-10-419: **State v. Donovan**. Petition of appellant for further review denied on March 23, 2011.

No. A-10-426: **State v. Cross**. Petition of appellant for further review denied on January 27, 2011.

No. A-10-427: **State v. Lopez**. Petition of appellant pro se for further review denied on March 30, 2011.

No. A-10-428: **State v. Kudron**. Petition of appellant for further review denied on November 10, 2010.

No. A-10-433: **Young v. Prentice**. Petition of appellant for further review denied on August 25, 2010.

No. A-10-449: **Gray v. City of Lincoln**. Petition of appellant for further review denied on October 27, 2010.

No. A-10-450: **Nebraska Equal Opp. Comm. v. Widtfeldt**. Petition of appellant for further review denied on September 9, 2010.

No. A-10-453: **State v. Buckman**. Petition of appellant for further review denied on January 27, 2011.

No. A-10-463: **State v. Ajok**. Petition of appellant for further review denied on December 8, 2010.

No. A-10-464: **State v. Vargas**. Petition of appellant for further review denied on November 17, 2010.

No. A-10-466: **Cain v. Cain**. Petition of appellant for further review denied on September 22, 2010.

No. A-10-479: **State v. Hodgdon**. Petition of appellant for further review denied on December 22, 2010.

No. A-10-480: **State v. Rosberg**. Petition of appellant for further review denied on January 12, 2011.

No. A-10-480: **State v. Rosberg**. Petition of appellant for further review denied on February 22, 2011.

No. A-10-494: **State v. Stauffer**. Petition of appellant for further review denied on December 8, 2010.

No. A-10-514: **Swedlund v. Phillips**. Petition of appellant for further review denied on January 27, 2011.

No. A-10-535: **Shannon v. Omaha Pub. Power Dist**. Petition of appellee for further review denied on April 21, 2011.

No. A-10-538: **Eden Cemetery Assn. v. Cramer**. Petition of appellant for further review denied on October 5, 2010, as untimely.

Nos. A-10-554, A-10-555: **State v. Richardson**. Petitions of appellant for further review denied on December 8, 2010.

No. A-10-561: **Halac v. Girton**. Petition of appellant for further review denied on October 14, 2010.

No. A-10-563: **State v. Lowery**. Petition of appellant for further review denied on November 24, 2010.

No. A-10-578: **State v. Collins**. Petition of appellant for further review denied on November 10, 2010.

No. A-10-580: **State v. Thompson**. Petition of appellant for further review denied on December 8, 2010.

No. A-10-588: **State v. Lathrop**. Petition of appellant for further review denied on December 8, 2010.

Nos. A-10-602, A-10-603: **State v. Spidell**. Petitions of appellant for further review denied on January 27, 2011.

No. A-10-604: **State v. Thompson**. Petition of appellant for further review denied on February 16, 2011.

No. A-10-612: **Dawson v. Zachry Constr. Corp**. Petition of appellant for further review denied on April 21, 2011.

No. A-10-641: **State v. Drees**. Petition of appellant for further review denied on September 13, 2010.

No. A-10-642: **State v. Sines**. Petition of appellant for further review denied on September 13, 2010.

No. A-10-650: **Dunn v. Melcher**. Petition of appellant for further review denied on November 24, 2010.

No. A-10-663: **Harris v. Department of Corr. Servs**. Petition of appellant for further review denied on September 15, 2010.

No. A-10-683: **Onuachi v. Meylan Enterprises**. Petition of appellant for further review denied on January 19, 2011.

No. A-10-689: **In re Interest of Nevaeh M**. Petition of appellant for further review denied on April 21, 2011.

No. A-10-694: **State v. Purvis**. Petition of appellant for further review denied on February 24, 2011.

No. A-10-695: **State v. Kiick**. Petition of appellant for further review denied on December 22, 2010.

No. A-10-714: **In re Interest of Nevaeh W**. Petition of appellant for further review denied on January 19, 2011.

No. A-10-716: **State v. Pestka**. Petition of appellant for further review denied on December 8, 2010.

No. A-10-740: **In re Interest of Amanda C. et al**. Petition of appellee for further review denied on March 23, 2011.

No. A-10-770: **Purdie v. Purdie**. Petition of appellant for further review denied on February 9, 2011.

Nos. A-10-772 through A-10-774: **In re Interest of Frank S. et al**. Petitions of appellant for further review denied on March 9, 2011.

No. A-10-779: **Herren v. Herren**. Petition of appellant for further review denied on October 27, 2010.

No. A-10-781: **Stinson v. Nebraska Furniture Mart**. Petition of appellant for further review denied on April 13, 2011.

No. A-10-802: **State v. Benish**. Petition of appellant for further review denied on March 30, 2011.

No. A-10-815: **State v. Nebraska Diamond Sales Co**. Petition of appellant for further review denied on January 12, 2011.

No. A-10-826: **In re Interest of Nevaeh M**. Petition of appellant for further review denied on December 15, 2010.

No. A-10-836: **State v. Carmona-Marichal**. Petition of appellant for further review denied on February 9, 2011.

No. A-10-875: **In re Interest of Jaiden D**. Petition of appellant for further review denied on April 15, 2011, as untimely filed.

No. A-10-876: **In re Interest of Ashton D**. Petition of appellant for further review denied on April 15, 2011, as untimely filed.

No. A-10-877: **In re Interest of Sean D**. Petition of appellant for further review denied on April 15, 2011, as untimely filed.

No. A-10-895: **State v. Weaver**. Petition of appellant for further review denied on March 16, 2011.

No. A-10-935: **Midstates Development v. Jones**. Petition of appellant for further review denied on November 24, 2010.

No. A-10-944: **State v. Romero**. Petition of appellant for further review denied on March 30, 2011.

No. A-10-972: **State v. Williams**. Petition of appellant for further review denied on April 13, 2011.

No. A-10-1026: **Harris v. Frazier**. Petition of appellant for further review denied on January 12, 2011.

No. A-10-1060: **State v. Tyler**. Petition of appellant for further review denied on January 28, 2011, for failure to comply with § 2-102(F)(3).

Nos. A-10-1076, A-10-1077: **State v. Mohamed**. Petitions of appellant for further review denied on April 13, 2011.

No. A-10-1090: **State v. Smith**. Petition of appellant pro se for further review denied on April 13, 2011.

CASES DETERMINED

IN THE

NEBRASKA COURT OF APPEALS

SHARON K. ROSLONIEC, APPELLEE, V.
RICHARD C. ROSLONIEC, APPELLANT.
773 N.W.2d 174

Filed September 15, 2009. No. A-08-986.

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: Appeal and Error.** The grant of temporary permission to remove children to another jurisdiction complicates matters, makes more problematic the subsequent ruling on permanent removal, and encumbers appellate evaluation of the ultimate decision on permanent removal.
4. **Child Custody.** Trial courts are discouraged from granting temporary permission to remove children to another jurisdiction prior to a ruling on permanent removal and instead are encouraged to promptly conduct a full hearing on permanent removal.
5. ____. 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.
6. **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.
7. **Child Custody.** The threshold question in removal cases is whether the parent wishing to remove the child from the state has a legitimate reason for leaving.
8. ____. Legitimate employment opportunities for a custodial parent may constitute a legitimate reason for leaving the state.

9. ____. 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 the custodial parent.
10. ____. 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.
11. **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.
12. **Child Custody.** Ordinarily, a request for change of custody will not be granted 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.

Appeal from the District Court for Douglas County: GERALD E. MORAN, Judge. Affirmed in part, and in part reversed.

Christopher A. Pfanstiel, of Lewis & Pfanstiel, P.C., L.L.O., for appellant.

John W. Wilke for appellee.

IRWIN, CARLSON, and MOORE, Judges.

CARLSON, Judge.

INTRODUCTION

Richard C. Rosloniec appeals from an order of the district court for Douglas County, which granted Sharon K. Rosloniec's motion for permission to remove the parties' child from Omaha, Nebraska, to Nevada and denied Richard's motion for a change of custody. Because Sharon has failed to show that she had a legitimate reason to move, we reverse the district court's ruling granting removal. We affirm the ruling concerning Richard's request for a change of custody.

BACKGROUND

The parties were married on September 28, 2002, and their marriage was dissolved by a decree entered on October 26, 2005. Sharon was awarded custody of the parties' minor child, Hannah, born in June 2004, subject to Richard's reasonable rights of visitation. On December 12, 2006, Richard filed an

application to modify custody. On March 20, 2007, Sharon filed a motion for permission to remove Hannah from Nebraska. Sharon wanted to move with Hannah to Las Vegas, Nevada, which is where her fiance, Morgan Livingston (Morgan), lived. At a hearing held on October 30, the court allowed Sharon to make an oral motion for permission to temporarily remove Hannah from Nebraska.

On November 6, 2007, a hearing was held on Sharon's motion to temporarily remove Hannah from Nebraska. Both parties presented affidavits. Following the hearing, the trial court granted Sharon's motion.

On June 12, 2008, a hearing was held on Sharon's motion for permanent removal of Hannah from Nebraska and on Richard's motion to modify custody. At the time of the hearing, Sharon and Hannah had been living in Las Vegas for 7 months. Sharon was pregnant with Morgan's baby, and the baby was due to be born in September. Sharon testified that she and Morgan planned to get married before the baby was born. She testified that she and Morgan had been engaged since June 2006.

Sharon testified that she did not have a job in Las Vegas when the court granted her request for temporary removal of Hannah. Sharon began working in Las Vegas a month later. Sharon testified that she was teaching preschool in a child-care center. She testified that she was earning $11 an hour, which was more money than she made in Nebraska. Sharon did not indicate how much she had been earning at her job in Nebraska. However, her affidavit from the temporary removal hearing indicated that she had been making $7.95 an hour as a preschool teacher in Nebraska.

Sharon testified that she would like to complete her college education through a program offered by the State of Nevada for individuals employed at a daycare or school system who want to become teachers. She testified that through the program, Nevada would pay 80 percent of the cost of schooling, the employer would pay 10 percent, and the individual would pay 10 percent. She testified that she must be employed at her current job for a year before she would be eligible to enroll in the program.

Sharon testified that she and Hannah were living with Morgan in "one of the most upscale areas in Las Vegas." No further details were provided, and no evidence was adduced in regard to where Sharon and Hannah had lived in Nebraska. Sharon testified that the school Hannah would attend in Las Vegas when she starts school "is about the best elementary school you can find that's not private" and that it is "higher than the average of the Omaha school systems." Sharon testified that she had no family in Las Vegas.

Sharon testified that when she filed the motion to remove Hannah from Nebraska, her reason for wanting to move to Las Vegas was that was where Morgan lived. She testified that Morgan lived in Las Vegas when they started dating in 2005, he later moved to California, and then he moved back to Las Vegas sometime in 2007.

The trial court entered an order on August 12, 2008, granting Sharon's motion to permanently remove Hannah from Nebraska. The trial court denied Richard's application to modify custody. The trial court gave no explanation for its decision in regard to either ruling.

ASSIGNMENTS OF ERROR

Richard assigns, restated, that the trial court erred in (1) granting Sharon's request for temporary removal of Hannah to Nevada pending trial on Sharon's request for permanent removal, (2) granting Sharon's motion to permanently remove Hannah from Nebraska, and (3) denying Richard's motion to modify custody.

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. *Wild v. Wild*, 15 Neb. App. 717, 737 N.W.2d 882 (2007). 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

Temporary Removal of Hannah From Nebraska.

Richard first assigns that the trial court erred in granting Sharon's motion for temporary removal of Hannah from Nebraska. We agree that the court should not have granted Sharon's motion for temporary removal, but unfortunately, no relief can be provided for this error.

[3,4] In *Jack v. Clinton*, 259 Neb. 198, 609 N.W.2d 328 (2000), the Nebraska Supreme Court specifically addressed the unnecessary and unfortunate complications that arise when a trial court grants a motion for temporary removal of a minor pending resolution of an application for permanent removal. The court noted that in addition to necessarily causing the record to include facts pertaining to the periods prior to and after relocation, an ultimate denial of the application for permanent removal will necessitate ordering the minor, who may have already recently adjusted to one move, to move again and return to the original jurisdiction. See *id.* The Supreme Court held, "The grant of temporary permission to remove children to another jurisdiction complicates matters and makes more problematic the subsequent ruling on permanent removal and encumbers appellate evaluation of the ultimate decision on permanent removal." *Id.* at 210, 609 N.W.2d at 337. As such, the Supreme Court specifically "discourage[d] trial courts from granting temporary permission to remove children to another jurisdiction prior to a ruling on permanent removal and instead encourage[d] them to promptly conduct a full hearing on permanent removal." *Id.* at 210-11, 609 N.W.2d at 337.

Granting Sharon's request for temporary removal of Hannah from Nebraska was directly contrary to the Supreme Court's discouragement on this very issue in *Jack v. Clinton, supra*. Nonetheless, because the order was a temporary order, no relief can now be afforded to Richard for this improper ruling by the trial court.

Permanent Removal of Hannah From Nebraska.

[5,6] Richard next assigns that the trial court erred in granting Sharon's request to permanently remove Hannah from Nebraska. 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. *Wild v. Wild*, 15 Neb. App. 717, 737 N.W.2d 882 (2007). Under Nebraska law, the burden has been placed on the custodial parent to satisfy this test. *Id.*

[7] The threshold question in removal cases is whether the parent wishing to remove the child from the state has a legitimate reason for leaving. See *Farnsworth v. Farnsworth*, 257 Neb. 242, 597 N.W.2d 592 (1999). Richard argues that Sharon failed to demonstrate that she had a legitimate reason for leaving Nebraska. The trial court made no finding concerning whether Sharon had demonstrated a legitimate reason for leaving Nebraska, and Sharon did not specifically assert in her motion to permanently remove Hannah from Nebraska that there existed a legitimate reason to leave Nebraska. Her motion asserted that the request for removal "is to increase the family's standard of living."

It is apparent from the record that Sharon's sole reason for wanting to move to and continue living in Las Vegas is that was where her fiance, Morgan, lived. She testified at trial that her reason for filing the motion to permanently remove Hannah from Nebraska to Nevada was because Morgan lived there.

The present case is similar to *Curtis v. Curtis*, 17 Neb. App. 230, 759 N.W.2d 269 (2008). In *Curtis*, a custodial mother had been living in Nebraska with her boyfriend in a house owned by the boyfriend. The boyfriend decided to sell his house and build a new one in a different state, causing the custodial mother to file an application to remove the parties' child from Nebraska so that she could continue living with her boyfriend. The trial court granted the custodial mother's request for removal, and we reversed the trial court's decision, holding that a custodial parent's desire to continue living with a boyfriend

who was moving out of Nebraska was not a legitimate reason for leaving the state.

Similarly, based on the specific facts of this case, we conclude that Sharon's desire to move to Nevada because her fiance lived there is not a legitimate reason for leaving Nebraska. Although Sharon and Morgan were engaged, they had been engaged since June 2006, and at the hearing on permanent removal, they had no definite plans to get married. Sharon testified that they planned to get married before their baby was due to be born, but no date had been set and no arrangements had been made. The hearing was in June 2008, and the baby was due to be born in September. It is well established in Nebraska case law that remarriage is a commonly found legitimate reason for a move in removal cases, but Sharon's desire to move from Nebraska is not based on remarriage. See *Jack v. Clinton*, 259 Neb. 198, 609 N.W.2d 328 (2000).

As previously stated, Sharon's motion for permanent removal of Hannah from Nebraska alleges that the request for removal is based on her desire to increase the family's standard of living. However, the record fails to demonstrate how the temporary removal had done so. There was no evidence of what Sharon and Hannah's "standard of living" was in Nebraska or how it was better in Nevada. Sharon did not have a job in Las Vegas when she filed the motion to remove Hannah from Nebraska, so a job opportunity was not a basis for her request to remove Hannah. At the time of the hearing on permanent removal, Sharon had a job in Las Vegas as a preschool teacher at a daycare. She testified that she was earning $11 an hour. We know from Sharon's affidavit presented at the temporary removal hearing that she earned $7.95 an hour at her job as a preschool teacher in Nebraska. Thus, Sharon was earning a higher hourly rate of pay in Las Vegas than she had earned in Nebraska. However, she was doing the same type of work that she had done in Nebraska and she failed to present evidence that there were no childcare jobs available in Nebraska that would pay $11 an hour. She also failed to present evidence of the cost-of-living difference between Omaha and Las Vegas. In addition, there is no evidence that her current Las Vegas job improved her career opportunities.

Sharon testified that her job at the daycare gives her the opportunity to finish her college degree in teaching through a program where the State of Nevada would pay 80 percent of her college expenses. Sharon and Hannah's standard of living could potentially increase if Sharon obtains a college degree. However, Sharon was not eligible to enroll in the program until she had been with her employer for 1 year, and she presented no evidence if she would then be automatically admitted into the program or if there were other qualifications that must be met. Further, she failed to show that there were not similar programs or financial aid available in Nebraska, such that she could not afford to complete her degree in Nebraska.

[8,9] Legitimate employment opportunities for a custodial parent may constitute a legitimate reason for leaving the state. *Wild v. Wild*, 15 Neb. App. 717, 737 N.W.2d 882 (2007). Such legitimate employment opportunities may constitute a legitimate reason when there is a reasonable expectation of improvement in the career or occupation of the custodial parent. *Id.* Sharon has not shown that her job in Las Vegas was a legitimate employment opportunity or that the move to Las Vegas had increased her and Hannah's standard of living. We conclude that Sharon has not demonstrated a legitimate reason for removing Hannah from Nebraska.

[10,11] Because Sharon has failed to satisfy the initial threshold of showing a legitimate reason to move, our analysis could end there. However, we further conclude that even if Sharon had proved a legitimate reason for removal, she has failed to carry her burden to demonstrate that allowing removal is in Hannah's best interests. 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. *Wild v. Wild, supra*. 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.*

The trial court did not discuss any of the best interests factors in its order, nor did it make a specific finding in regard to Hannah's best interests. Based on our de novo review of the record, we find that Sharon failed to present evidence to show that Las Vegas provides benefits to Hannah under the factors considered in the best interests analysis.

In conclusion, we determine that Sharon has failed to adduce sufficient evidence to support her motion to permanently remove Hannah from Nebraska. Sharon failed to demonstrate a legitimate reason for removal, and even if she had met this initial threshold, she also failed to demonstrate that it was in Hannah's best interests to continue living with her. Accordingly, the trial court abused its discretion in granting Sharon's motion. We reverse the trial court's order granting Sharon's motion for permission to permanently remove Hannah from Nebraska.

Change in Custody.

[12] Finally, Richard assigns that the trial court erred in denying his motion for a change in custody. Ordinarily, a request for change of custody will not be granted 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. *Wild v. Wild*, 15 Neb. App. 717, 737 N.W.2d 882 (2007). We conclude that Richard has not proved a material change in circumstances showing that Sharon is unfit or that the best interests of Hannah require such action. Therefore, Richard's assignment of error is without merit.

CONCLUSION

We find that the district court abused its discretion in granting Sharon's motion to permanently remove Hannah from Nebraska, because Sharon failed to meet her burden to demonstrate a legitimate reason for such removal. Accordingly, we reverse the district court's order granting Sharon's application for permanent removal of Hannah from Nebraska. The district

court's ruling denying Richard's request for a change of custody is affirmed.

AFFIRMED IN PART, AND IN PART REVERSED.

IRWIN, Judge, concurring.

While I concur with the ultimate result reached by the majority, I write separately because I do not agree with the majority's suggestion that there was no legitimate reason for removal because Sharon was only engaged, and not yet married, to her fiance. I do not believe that there should be a bright-line test where marriage is the primary determining factor in establishing a legitimate reason for removal. The record presented in this case supports a conclusion that there was a legitimate reason for allowing permanent removal—if not prior to the temporary removal order, then certainly after the temporary removal and prior to the trial in this case. Nebraska Supreme Court precedent requires that when determining whether permanent removal is appropriate, trial courts shall consider evidence of the parties' circumstances both prior to the time of the temporary removal and during the temporary removal period. Inasmuch as everyone agrees that Sharon failed to demonstrate that removal would be in Hannah's best interests, I believe the case is more properly resolved on that basis.

1. LEGITIMATE REASON FOR REMOVAL

The district court granted Sharon's motion for permission to remove the parties' minor child, Hannah, from Nebraska to Las Vegas, Nevada. As a part of its decision, the court found that Sharon had a legitimate reason for the removal. In reversing the district court's order, the majority relies primarily on a conclusion that this finding of the district court was erroneous. I disagree with that basis for reversing the district court's order.

At the time Sharon filed her motion to remove Hannah from Nebraska, her stated reason for wanting to move to Las Vegas was that is where her fiance, Morgan, lived. After Sharon filed her motion, the district court granted her request to temporarily move to Las Vegas with Hannah pending the hearing on the permanent removal. Sharon and Hannah moved to Las Vegas in approximately November 2007. The hearing on her request for permanent removal was held in June 2008.

During the temporary removal period, Sharon obtained a job teaching preschool in a childcare center and became interested in an educational opportunity available to Nevada residents. Sharon would be able to complete her college education through a program offered by the State of Nevada for individuals employed at a daycare or school system who want to become teachers. Nevada would pay 80 percent of the cost of the schooling, her employer would pay 10 percent, and she would pay 10 percent. Sharon could enroll in the program after working at her current place of employment for 1 year.

Also during the temporary removal period, Sharon became pregnant with Morgan's child. Sharon was due to give birth in September 2008. She testified at the June 2008 hearing that she and Morgan planned to marry prior to the baby's birth.

Arguably, Sharon's initial reason for requesting the removal—to be closer to her fiance—may not have constituted a legitimate reason for removal. However, because the district court granted Sharon's request for the temporary removal, the evidence at the June 2008 hearing was necessarily composed of facts pertaining to the period prior to the temporary relocation to Las Vegas as well as the results of Sharon and Hannah's experience during their time in Las Vegas. In *Jack v. Clinton*, 259 Neb. 198, 609 N.W.2d 328 (2000), the Nebraska Supreme Court indicated that when a temporary removal is granted, courts must consider both the evidence prior to the move and after the move. There, the court stated: "As a result of the grant of temporary removal, consideration of [the temporary removal period] with respect to the legitimacy of the permanent move and the best interests of the children was unavoidable." *Id.* at 210, 609 N.W.2d at 336.

That said, we must consider Sharon's time in Las Vegas as part of our discussion of whether she proved a legitimate reason for the relocation. At the time of the hearing, Sharon was gainfully employed as a preschool teacher at a daycare center. There is some evidence that Sharon's job in Las Vegas paid her more than her previous job in Nebraska. In addition, there was evidence that Sharon's new job could provide her with an opportunity to obtain her teaching degree. Such an

educational opportunity would eventually improve Sharon's earning capacity.

A reasonable expectation of improvement in the career or occupation of the custodial parent is a legitimate reason to relocate. *Gartner v. Hume*, 12 Neb. App. 741, 686 N.W.2d 58 (2004). The Nebraska Supreme Court has also recognized the pursuit of educational opportunities as a legitimate reason to move to another state. *Id.* See, also, *Kalkowski v. Kalkowski*, 258 Neb. 1035, 607 N.W.2d 517 (2000).

In addition to Sharon's employment and educational opportunities in Las Vegas, the evidence revealed that at the time of the hearing, Sharon was pregnant with Morgan's child. Sharon testified that she and Morgan were planning on marrying prior to the baby's birth in September 2008.

Career advancement and remarriage are commonly found legitimate reasons for a move in removal cases, but they do not compose the exclusive list of legitimate reasons. See *Jack v. Clinton, supra*. Neither should there be some kind of bright-line test where being engaged to be married is automatically insufficient but actually having gone through a marriage ceremony is sufficient. Sharon will soon share a child with Morgan, who resides in Las Vegas. Certainly, this changes the nature of their relationship, even if they are not yet married. It must also be considered in our analysis. Now, we must consider the interests of both Hannah and the new baby.

In light of all of the evidence about Sharon and Hannah's life in Las Vegas during the temporary removal period, Sharon has met her burden of showing a legitimate reason for the removal. Sharon's employment and educational opportunities, coupled with the impending birth of her and Morgan's child, constitute a legitimate reason for Sharon and Hannah to continue to reside in Las Vegas. As such, I disagree with that portion of the majority opinion which relies on a conclusion that there was no legitimate reason for removal as the basis for reversing the district court's order.

2. Best Interests

Although I disagree with that portion of the majority opinion which concludes that Sharon failed to demonstrate that

she had a legitimate reason for the removal, I agree with the portion of the majority opinion which concludes that Sharon failed to demonstrate that it was in Hannah's best interests to continue to reside with her. As such, I agree with the majority's ultimate conclusion to reverse the district court's ruling granting Sharon's request to permanently reside in Las Vegas with Hannah.

RON LIVINGSTON, JR., APPELLANT, V. PACIFIC REALTY COMMERCIAL, L.L.C., DOING BUSINESS AS GRUBB & ELLIS/PACIFIC REALTY, ET AL., APPELLEES.

773 N.W.2d 169

Filed September 15, 2009. No. A-08-1058.

1. **Summary Judgment: Notice.** A party is entitled to notice of a motion for summary judgment and an opportunity to be heard and to offer evidence in opposition to the motion.
2. ____: ____. When an issue is not presented in a summary judgment motion, the opposing party does not have notice to defend against the issue.

Appeal from the District Court for Lancaster County: JODI NELSON, Judge. Reversed and remanded for further proceedings.

Staci Hartman-Nelson for appellant.

Randall L. Goyette and Andrea D. Snowden, of Baylor, Evnen, Curtiss, Grimit & Witt, L.L.P., for appellees.

IRWIN, SIEVERS, and CASSEL, Judges.

IRWIN, Judge.

I. INTRODUCTION

Ron Livingston, Jr., appeals from an order of the district court granting the motion of McGill Restoration, Inc., for summary judgment and dismissing Livingston's claims as to both McGill Restoration and Pacific Realty Commercial, L.L.C. (Pacific Realty). On appeal, Livingston argues that the district court erred in granting summary judgment to Pacific Realty. Because Pacific Realty did not file a motion for summary

judgment and because McGill Restoration's motion for summary judgment did not provide adequate notice to Livingston that Pacific Realty's liability was an issue being raised at the summary judgment hearing, we reverse that part of the district court's order dismissing Livingston's claims against Pacific Realty and remand the matter for further proceedings consistent with this opinion.

II. BACKGROUND

Pacific Realty manages the "Atrium Building" in Lincoln, Nebraska, and hired McGill Restoration to repair concrete on the exterior of the building. Livingston was employed by McGill Restoration and was one of the workers assigned to complete the work at the Atrium Building. Livingston was injured while working at the building when he walked under a "dump chute" at the same time that another employee released debris into the chute.

Livingston filed a claim against McGill Restoration in the Nebraska Workers' Compensation Court. Although it is not clear from the record how Livingston's workers' compensation claim was ultimately decided, Livingston does admit that he received payments from McGill Restoration as a result of his injuries and McGill Restoration provides some indication that Livingston was awarded workers' compensation benefits.

After receiving workers' compensation benefits from McGill Restoration, Livingston filed a complaint in district court, alleging that Pacific Realty was also liable for his injuries because it had a nondelegable duty to ensure the "demolition" work was completed in a safe manner and because Pacific Realty had a nondelegable duty to comply with safety standards and regulations. Livingston joined McGill Restoration as a party to the action pursuant to Neb. Rev. Stat. § 48-118 (Reissue 2004).

In its response to Livingston's complaint, Pacific Realty asserted a cross-claim against McGill Restoration. In the cross-claim, Pacific Realty alleged that its contract with McGill Restoration included an indemnification clause. Pacific Realty alleged that this clause required McGill Restoration to

indemnify Pacific Realty if Pacific Realty was ordered to pay Livingston any damages for his injuries.

McGill Restoration filed a motion for summary judgment. Because the contents of this motion are important to our ultimate resolution of this case, we include the language of the motion in its entirety:

> COMES NOW the Defendant, McGill Restoration, Inc., pursuant to NEB. REV. STAT. § 25-1331, and moves the Court for an order granting it summary judgment and dismissing the Plaintiff's Amended Complaint, and the claims found therein, for the reason that the pleadings and evidence to be submitted show that there is no genuine issue as to any material fact and that defendant is entitled to judgment as a matter of law.
>
> Defendant further moves the Court for an order granting it summary judgment with regard to the cross-claim filed by Defendant Pacific Realty against it for the reason that the pleadings and evidence to be submitted show that there is no genuine issue as to any material fact with regard to this claim, and that therefore Defendant McGill [Restoration] is entitled to judgment as a matter of law as to the cross-claim as well.

In support of its motion, McGill Restoration submitted the deposition of its president. Neither Livingston nor Pacific Realty submitted any evidence in opposition to the motion.

The district court granted McGill Restoration's summary judgment motion in part. The court granted McGill Restoration's motion as to Livingston, finding, "The benefits received pursuant to the Nebraska Worker[s'] Compensation Act are the sole remedy Livingston has against McGill [Restoration] by virtue of this employer/employee relationship." The court overruled McGill Restoration's motion as to Pacific Realty's cross-claim.

Additionally, the court considered Livingston's claims against Pacific Realty and concluded that "the claims against Pacific [Realty] fail as a matter of law." The court dismissed Livingston's claims against both McGill Restoration and Pacific Realty.

Ultimately, the parties stipulated that the cross-claim filed by Pacific Realty against McGill Restoration should be dismissed and the court entered a final order dismissing the case in its entirety.

Livingston appeals here.

III. ASSIGNMENT OF ERROR

Livingston assigns, restated and consolidated, that the district court erred in granting summary judgment to Pacific Realty and dismissing his claims.

IV. STANDARD OF REVIEW

Summary judgment is proper where the facts are uncontroverted and the moving party is entitled to judgment as a matter of law. *In re Estate of Ronan*, 277 Neb. 516, 763 N.W.2d 704 (2009); *Unisys Corp. v. Nebraska Life & Health Ins. Guar. Assn.*, 267 Neb. 158, 673 N.W.2d 15 (2004); *Fontenelle Equip. v. Pattlen Enters.*, 262 Neb. 129, 629 N.W.2d 534 (2001); *Mertz v. Pharmacists Mut. Ins. Co.*, 261 Neb. 704, 625 N.W.2d 197 (2001). In reviewing a summary judgment, an appellate court views the evidence in the light most favorable to the party against whom the judgment was granted, giving that party the benefit of all reasonable inferences deducible from the evidence. *Thone v. Regional West Med. Ctr.*, 275 Neb. 238, 745 N.W.2d 898 (2008).

V. ANALYSIS

[1] As a procedural equivalent to a trial, a summary judgment is an extreme remedy because a summary judgment may dispose of a crucial question in litigation, or the litigation itself, and may thereby deny a trial to the party against whom the motion for summary judgment is directed. *State ex rel. Wagner v. Gilbane Bldg. Co.*, 276 Neb. 686, 757 N.W.2d 194 (2008); *Fossett v. Board of Regents*, 258 Neb. 703, 605 N.W.2d 465 (2000). As a result of the significant effects of a summary judgment, a party is entitled to notice of a motion for summary judgment and an opportunity to be heard and to offer evidence in opposition to the motion.

Neb. Rev. Stat. § 25-1332 (Reissue 2008) provides that a motion for summary judgment "shall be served at least ten

days before the time fixed for the hearing." The Nebraska Supreme Court has previously held that when the notice provisions of the statute are not complied with and the party opposing the motion does not have time to present evidence to defend against the motion, it is error for the trial court to consider the motion. See *Curley v. Curley*, 214 Neb. 780, 336 N.W.2d 103 (1983).

The Nebraska Supreme Court has also held that when a motion to dismiss is converted into a motion for summary judgment, the trial court must provide notice of the change to the opposing party. The court has stated, "[W]hen receiving evidence that converts a motion to dismiss into a motion for summary judgment, the trial court should give the parties notice of the changed status of the motion and a reasonable opportunity to present all material made pertinent to such a motion." *Crane Sales & Serv. Co. v. Seneca Ins. Co.*, 276 Neb. 372, 376, 754 N.W.2d 607, 610 (2008). Accord *Nebraska Coalition for Ed. Equity v. Heineman*, 273 Neb. 531, 731 N.W.2d 164 (2007).

[2] Additionally, the court has held that a trial court may not enter a summary judgment on an issue not presented by the pleadings. See *Slagle v. J.P. Theisen & Sons*, 251 Neb. 904, 560 N.W.2d 758 (1997). When an issue is not presented in a summary judgment motion, the opposing party does not have notice to defend against the issue. See *In re Freeholders Petition*, 210 Neb. 583, 316 N.W.2d 294 (1982) (holding that where one party moves for partial summary judgment on certain issues only, other party should not be expected at hearing on motion for summary judgment to present evidence on issues as to which that motion does not apply).

In *Slagle v. J.P. Theisen & Sons, supra*, the trial court granted summary judgment in favor of the defendants on the issues of liability and the plaintiff's contributory negligence. On appeal, the plaintiff argued that the trial court erred in ruling on the issue of contributory negligence when that issue was not presented by the pleadings. The court stated:

> We have stated unequivocally that a court may not enter a summary judgment on an issue not presented by the pleadings. . . . Neither [of the defendants'] motion[s] for

> summary judgment requested a ruling by the trial court as to [the plaintiff's] alleged contributory negligence. Absent such a reference in these pleadings, the trial court could not and should not have ruled on this issue.

Id. at 909, 560 N.W.2d at 762 (citation omitted).

In this case, McGill Restoration was the only party to file a motion for summary judgment. However, in ruling on McGill Restoration's motion for summary judgment, the district court effectively granted summary judgment to both McGill Restoration and Pacific Realty when it dismissed all of Livingston's claims as to both parties. Upon our review, we conclude that McGill Restoration's motion did not provide adequate notice to Livingston that Pacific Realty's liability was an issue being raised at the summary judgment hearing. Accordingly, we conclude that Livingston did not receive an opportunity to offer evidence to defend his claims against Pacific Realty.

In McGill Restoration's motion for summary judgment, it requested that the court grant it summary judgment as to both Livingston's claims and the cross-claim filed by Pacific Realty. On its face, the motion does not provide any indication that McGill Restoration was requesting summary judgment on behalf of Pacific Realty. Rather, it appears that McGill Restoration was acting only in its own behalf.

Moreover, it is clear from Livingston's petition that Livingston joined McGill Restoration as a party to the case pursuant to § 48-118. Section 48-118 requires an employer to be joined as a party when an employee who has received workers' compensation benefits files a claim against "a third person [who] is liable to the employee . . . for the injury." In other words, Livingston joined McGill Restoration as a party simply because McGill Restoration was entitled to subrogation if Livingston recovered damages from Pacific Realty.

It does not appear that Livingston claims that McGill Restoration should be liable for more damages than it had already provided to Livingston due to Livingston's workers' compensation award. As such, we are somewhat puzzled by the rationale behind McGill Restoration's filing of the motion as to Livingston.

Regardless of why McGill Restoration filed the motion, however, the motion did not provide notice to Livingston that he needed to offer evidence as to Pacific Realty's liability. Livingston's claims against Pacific Realty constitute a separate issue from Livingston's relationship with McGill Restoration.

Pacific Realty's liability was not raised in McGill Restoration's motion for summary judgment, and as such, the district court erred in ruling on that issue.

VI. CONCLUSION

Because McGill Restoration's motion for summary judgment did not provide adequate notice to Livingston that Pacific Realty's liability was an issue being raised at the summary judgment hearing, we reverse that part of the district court's order dismissing Livingston's claims against Pacific Realty and remand the matter for further proceedings consistent with this opinion.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

THE SALVATION ARMY, APPELLANT, V. JAMES KYLE AND TINA KYLE, HUSBAND AND WIFE, AND JAMES EWERS, APPELLEES.

778 N.W.2d 485

Filed September 15, 2009. No. A-08-1190.

1. **Directed Verdict: Appeal and Error.** In reviewing a trial court's ruling on a motion for directed verdict, an appellate court must treat the motion as an admission of the truth of all competent evidence submitted on behalf of the party against whom the motion is directed; such being the case, the party against whom the motion is directed is entitled to have every controverted fact resolved in its favor and to have the benefit of every inference which can reasonably be deduced from the evidence.
2. **Directed Verdict: Evidence.** A directed verdict is proper at the close of all the evidence only when reasonable minds cannot differ and can draw but one conclusion from the evidence, that is, when an issue should be decided as a matter of law.
3. **Property: Easements: Contracts.** Where a wall is entirely upon the property of one party, the right of an adjoining owner to have support therefrom, whether

derived from contract or acquired by prescription, is in the nature of an easement, which is terminated upon the destruction of the building by fire.

4. **Property: Stipulations: Contracts.** The fact that the owner of a building used a wall upon the land of an adjoining proprietor for the support of his building before the same was destroyed by fire is not such notice as charges a purchaser of the property upon which the wall is situated with knowledge of a stipulation in an unrecorded written contract that the owner of such building might renew the use of such wall in case it should be destroyed and rebuilt.
5. **Property: Easements.** An easement for support in a party wall is terminated upon destruction of the building by fire.
6. **Property: Easements: Liability: Notice.** The owners of a party wall do not have a reciprocal easement of support from each other's building, but either of them may remove his own building without liability for the resulting damage to the other, providing he gives proper notice of removal and uses reasonable care and caution to protect the wall and remaining building.
7. **Property.** The removal of a part of a building pursuant to an order of condemnation creates no obligation on the part of the owner of the part of the building removed to provide future protection for an interior division wall which then becomes an exterior wall for the portion of the building remaining.
8. **Property: Negligence.** A landowner has a duty to use his property so as to not unnecessarily and negligently injure his neighbor.

Appeal from the District Court for Adams County: TERRI S. HARDER, Judge. Reversed and remanded for further proceedings.

Brian J. Adams, of Cline, Williams, Wright, Johnson & Oldfather, L.L.P., for appellant.

Roger G. Steele, of Steele Law Office, for appellees James Kyle and Tina Kyle.

Randall L. Goyette and Cynthia R. Lamm, of Baylor, Evnen, Curtiss, Grimit & Witt, L.L.P., for appellee James Ewers.

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

MOORE, Judge.

INTRODUCTION

The Salvation Army filed this action against James Kyle, Tina Kyle, and James Ewers in the district court for Adams County, seeking to recover damages related to the loss of the contents of a thrift store operated by the Salvation Army and the ultimate demolition of the thrift store building in

connection with a fire that occurred in May 2004. The district court directed a verdict against the Salvation Army in connection with its claim for damages for the loss of its building and the cost to demolish the building. The jury returned a verdict in favor of the Salvation Army with respect to its damages for the loss of equipment and inventory contained within the building. The Salvation Army appeals the district court's entry of a directed verdict. Because we find that the district court erred in entering a directed verdict, we reverse, and remand for further proceedings.

BACKGROUND

On May 5, 2004, the date of the fire in question, the Salvation Army owned a two-story building in the city of Hastings, Nebraska (City), from which it operated a thrift store. The Kyles owned a three-story building located immediately to the west of the Salvation Army building; the Kyle building housed a retail antique store on the first floor and four residential apartments on the second floor. Two of the apartments in the Kyle building were occupied by tenants at the time of the fire. The Kyle building, built in 1898, and the Salvation Army building, built in 1900, shared a common wall, the west wall of the Salvation Army building.

Despite having two tenants residing in their building, the Kyles never installed fire sprinklers or operable smoke detectors as required by the Hastings City Code and the National Fire Protection Association's "Life Safety Code."

Ewers was the tenant occupying the southeast apartment in the Kyle building at the time of the fire. The Kyles allowed Ewers to live in the building rent free in exchange for his help in remodeling the apartments. The Kyles also employed Ewers to perform various odd jobs. The evidence shows that Ewers smoked cigarettes and drank alcohol on a regular basis. The Kyles knew that Ewers smoked and that he did so in his apartment, but they did not take any steps to stop him from continuing this practice.

The fire began sometime in the early morning hours of May 5, 2004. According to an investigator with the State Fire Marshal's office, the fire originated in Ewers' apartment as a

result of careless handling of smoking materials by whoever was occupying the apartment on that night. Ewers admitted to being intoxicated on the night of the fire. Because of the extent of damage by the fire, the City ordered that the remains of the Kyle building be demolished.

Although the shared wall between the Kyle building and the Salvation Army building suffered very little fire damage, the Salvation Army building and its contents suffered significant smoke, water, and mold damage because of the fire. The Salvation Army was unable to operate a thrift store at the location of its building at any time after the date of the fire.

On May 17, 2004, the City building inspector observed that the Salvation Army building had sustained damage, and the City ordered that the building be vacated and secured against entry. The City also ordered the Salvation Army to have its building evaluated by a competent structural engineer.

On June 9, 2004, James Belina, an investigative engineer, inspected the Salvation Army building, specifically its west wall, to determine whether it was structurally sound. At the time of Belina's inspection, the Kyle building had been demolished. After his investigation, Belina concluded that it probably was not economical to repair the west wall and that it should be torn down and replaced. Belina's inspection showed that when the Salvation Army building was constructed, holes had been made in the wall of the Kyle building and the roof joists for the Salvation Army building had been slid into the holes. Belina observed that the removal of the floor and roof systems of the Kyle building and its north and south walls left the west wall of the Salvation Army building without needed support. Belina also discovered that the Salvation Army building had experienced a fire at some time in the past and that "sister joists" had been placed on some of the burned floor joists, while other burned joists had not been repaired. Belina noted that the limestone foundation of the Salvation Army building was severely deteriorated due to loose and missing mortar, creating an unstable condition and the potential for total collapse. In his report, Belina concluded:

> In summary, we believe that the condition of the wall was primarily due to demolition of the adjacent building,

> which had resulted in removal of important load-resisting components. The deterioration of the wall due to age was severe and had greatly affected its ability to withstand load.
>
> Renovation and construction of additional support components for the wall would most likely be extremely expensive and would likely exceed the cost of demolition and rebuilding.

On October 6, 2004, the City building inspector observed conditions inside the Salvation Army building, noting that the interior was extremely humid, encouraging mold and mildew growth; that the floor joists on the first floor had sustained damage from a fire years before, which had not been repaired or replaced in certain areas, and that the floor was substantially weaker in those areas than prescribed by current building codes; that the interior surface walls were growing mold and mildew; and that the interior air quality was poor, with a stench of mold and decay. On February 18, 2005, the building inspector observed that the west wall of the Salvation Army building was unrestrained, due to the absence of floor-ceiling framing on the west; that the west wall was exposed to the weather and had no weather-resistive covering; that the west wall had holes remaining from the floor framing which was recessed into the party wall; and that no repair or stabilization had been done to the building.

Based in part upon Belina's report, the City ordered the Salvation Army to demolish its building. The City also required the Salvation Army to ensure that the wall the Salvation Army building shared with its neighbor to the east would remain stable after completion of the demolition.

The Salvation Army eventually retained an excavating company to perform the demolition and stabilization work, which cost $204,150. Demolition had to be performed by hand because the demolition of the Kyle building had damaged and compromised the Salvation Army building's west wall.

The Salvation Army filed the operative complaint on November 2, 2007, seeking to recover the value associated with the loss of the building, the costs incurred in demolishing the building, the costs associated with replacing the inventory

and equipment in the building destroyed because of the fire, and the profits the thrift store lost during the period in which it could do no business because of the fire. The Salvation Army alleged that Ewers had a duty to exercise reasonable care in conducting himself so as to not cause damage to the property of others and that he breached such duty by smoking in his apartment while intoxicated, failing to properly extinguish his cigarette, and/or storing large amounts of flammable materials in and around the Kyle building in the course of his employment by the Kyles. The Salvation Army alleged that the Kyles, as Ewers' employers, were responsible for any negligent acts committed by Ewers during the course of his employment. The Salvation Army further alleged that the Kyles had duties to exercise reasonable care in preventing Ewers, their tenant, from continuing to engage in negligent activities which they knew or should have known were reasonably likely to cause damage to the Salvation Army building and, as property owners, to exercise reasonable care in preventing a fire which originated on their premises from spreading to the Salvation Army building. The Salvation Army alleged that the Kyles breached these duties by (1) allowing Ewers to smoke in his apartment despite their knowledge of his tendency to do so while intoxicated, (2) allowing Ewers to store large amounts of flammable materials in and around the Kyle building, and (3) failing to equip their building with fire detection and suppression apparatus required by City and state codes.

A jury trial was held on October 8 through 10, 2008. At the close of the Salvation Army's case, the district court entered a directed verdict in favor of Ewers and the Kyles with respect to the Salvation Army's request for damages for the loss of its building and the cost of demolishing it and with respect to the allegations relating to Ewers' storage of flammable materials and the Kyles' vicarious liability for that storage of materials. With respect to the damages for the loss of the Salvation Army building and the cost to demolish it, the court found that those losses were not compensable, because the Kyles did not owe the Salvation Army a duty to provide any lateral support and because the Salvation Army did not plead negligent demolition of the Kyle building. The issues of the Kyles' and Ewers'

liability for and damages resulting from the Salvation Army's loss of equipment, inventory, and profits were allowed to go to the jury. The Kyles and Ewers rested without presenting further evidence. The jury returned a verdict in favor of the Salvation Army, finding the Kyles to be 85-percent negligent and Ewers to be 15-percent negligent and awarding $19,529 in damages. The Salvation Army subsequently perfected its appeal to this court.

ASSIGNMENT OF ERROR

The Salvation Army asserts that the district court erred in finding as a matter of law that the Salvation Army could not recover damages for the loss of its building or the cost to demolish the building on its claim against either the Kyles or Ewers.

STANDARD OF REVIEW

[1,2] In reviewing a trial court's ruling on a motion for directed verdict, an appellate court must treat the motion as an admission of the truth of all competent evidence submitted on behalf of the party against whom the motion is directed; such being the case, the party against whom the motion is directed is entitled to have every controverted fact resolved in its favor and to have the benefit of every inference which can reasonably be deduced from the evidence. *State of Florida v. Countrywide Truck Ins. Agency*, 275 Neb. 842, 749 N.W.2d 894 (2008). A directed verdict is proper at the close of all the evidence only when reasonable minds cannot differ and can draw but one conclusion from the evidence, that is, when an issue should be decided as a matter of law. *Lacey v. State*, 278 Neb. 87, 768 N.W.2d 132 (2009).

ANALYSIS

In granting the motion for directed verdict, the district court relied upon *Bowhay v. Richards*, 81 Neb. 764, 116 N.W. 677 (1908), and *First Investment Co. v. State Fire Marshal*, 175 Neb. 66, 120 N.W.2d 549 (1963).

[3,4] In *Bowhay*, the rights of the original adjoining landowners with respect to a party wall were governed by a written contract, but the contract was never recorded. Both buildings

were subsequently destroyed by fire, but a portion of the party wall was left standing. After the fire, the adjoining properties were purchased by new landowners. The plaintiff constructed a new building on his property and, in doing so, rebuilt and used the former party wall. After completion of this building, the defendant, who had purchased the adjoining lot, began construction of a new building on his property and attempted to use the former party wall for support of the ceiling and roof joists of his building. The plaintiff then filed suit, seeking to enjoin the defendant from doing so. On appeal, the Nebraska Supreme Court agreed with the plaintiff's allegation that any easement in the party wall terminated upon destruction of the original buildings by fire, stating that where a wall is entirely upon the property of one party, the right of an adjoining owner to have support therefrom, whether derived from contract or acquired by prescription, is in the nature of an easement, which is terminated upon the destruction of the building by fire. *Bowhay v. Richards, supra*. The court went on to conclude that the fact that the owner of a building used a wall upon the land of an adjoining proprietor for the support of his building before the same was destroyed by fire is not such notice as charges a purchaser of the property upon which the wall is situated with knowledge of a stipulation in an unrecorded written contract that the owner of such building might renew the use of such wall in case it should be destroyed and rebuilt. *Id.*

First Investment Co. v. State Fire Marshal, supra, was a condemnation action brought against a company to condemn a portion of a building owned by the company. In 1914, the property upon which the building sat was divided by deed and remained so at the time of the condemnation action, the two halves of the building being owned by different owners and divided by a party wall. At the time of the condemnation action, the portion of the building owned by the company had become dilapidated through failure to repair and the erosion of time such that it could no longer be used for its intended purpose. The adjoining owners opposed the demolition of the portion of the building owned by the company, alleging that because of the absence of a supporting wall, the demolition would cause irreparable damage to the portion of the building they owned. Accordingly, the

adjoining owners sought an order requiring the construction of a proper supporting wall at the company's cost. The trial court, among other things, ordered the company in demolishing its portion of the building to not disturb the wall then existing between the properties and to build and pay for half the costs of a new tile wall extension.

On appeal, the company alleged that absent agreement between the owners of a divided building, the owner of one part had no obligation to repair or improve his part for the benefit of the other owner or to extend an existing wall unless he was using the extension. The Nebraska Supreme Court determined that an implied easement in the party wall had arisen when the premises was divided and conveyed to separate owners; the court then sought to determine the duration of the implied easement under the facts of the case. The court stated:

> Suppose, for the purpose of discussion, although the record does not support it, the [c]ompany, which acquired its interest in 1959, and its predecessors in interest, could be charged with willfull neglect to repair its portion of the building. To answer this supposition, it should first be conceded that *there is an obligation on each owner to use his own property so as not to injure his neighbor*. However, can it be maintained from this obligation that *the right of support and shelter to which each is entitled, and which may not be taken away by the wrongful act of the other owner*, imposes also the affirmative duty to repair the premises and to maintain the existing condition of things? Unless this is so, the judgment of the trial court herein cannot be sustained. There is no question that if a contract right were involved, one owner would not be permitted to defeat an easement by his failure to repair. [Citation omitted.] This, however, is not the present situation because we are concerned not with a contract right but with an implied easement.

First Investment Co. v. State Fire Marshal, 175 Neb. 66, 72-73, 120 N.W.2d 549, 554 (1963) (emphasis supplied).

[5] The court observed:

> Generally, the easement of support of adjoining buildings by the party wall ordinarily ceases when the wall

> ceases to exist, or is accidentally destroyed, or has been made unfit for its purpose by accident or age, or has become so decayed as to require rebuilding from the foundation. Similarly, when the buildings are accidentally destroyed, the easement ceases.

Id. at 73, 120 N.W.2d at 554. The court went on to note its holding in *Bowhay v. Richards*, 81 Neb. 764, 116 N.W. 677 (1908), that an easement for support in a party wall is terminated upon destruction of the building by fire, stating specifically that "[t]his is the general rule *where the destruction is by accident or casualty*." 175 Neb. at 73, 120 N.W.2d at 554 (emphasis supplied).

[6] In answering the question of whether the company had any duty to preserve its building for the protection of the party wall, the Nebraska Supreme Court concluded that the owners of a party wall do not have a reciprocal easement of support from each other's building, but either of them may remove his own building without liability for the resulting damage to the other, providing he gives proper notice of removal and uses reasonable care and caution to protect the wall and remaining building. *First Investment Co. v. State Fire Marshal, supra*. The court stated that in the case where the action was brought "by the State Fire Marshal for the protection and welfare of society, there should be no question about the right to remove without liability." *Id.* at 78, 120 N.W.2d at 557.

[7] Finally, the court addressed the fact that the portion of the building owned by the company could not be wholly removed without damage to the remaining portion of the building, noting the fact that the party wall was an interior wall and not intended to protect against wind and weather, making future damage probable absent the provision of an exterior wall. The court noted that construction of the tile wall sought by the adjoining owners was solely for the benefit of the adjoining owners and could find no legal reason why the company should be required to contribute to the cost of the tile wall's construction. Accordingly, the court determined that the removal of a part of a building pursuant to an order of condemnation creates no obligation on the part of the owner of the part of the building removed to provide future protection for an

interior division wall which then becomes an exterior wall for the portion of the building remaining. *First Investment Co. v. State Fire Marshal, supra.*

The present case is distinguishable from *Bowhay* and *State Fire Marshal* in several respects. Those cases were premised upon theories of contract law, easements, and the right to support from a common wall. In the present case, the Salvation Army does not allege any contractual duty, easement, or breach of a duty by the Kyles to provide lateral support or protection as a result of the common wall. Rather, the Salvation Army's case against the Kyles is premised upon the Kyles' negligence in allowing a tenant to smoke in the apartment and to store flammable materials in the building, as well as the Kyles' failure to properly equip the building with fire detection and suppression apparatus. Thus, the general rule stated above in *State Fire Marshal* regarding the termination of an easement in a party wall upon the destruction of a building by fire does not apply in the present case.

We agree with the Salvation Army that the issue relating to the damages for the destruction and loss of its building is one of proximate cause which should have been submitted to the jury. In other words, whether the Salvation Army's damages relating to the demolition and loss of its building were proximately caused by the breach of the same duties that allowed recovery against the Kyles and Ewers for the loss of the contents of the Salvation Army building is a question of fact. We also note that the directed verdict entered by the district court ignores the fact that the loss of support was not the sole reason for the demolition of the Salvation Army building. The record shows that the conditions cited by the City leading to the order of demolition of the Salvation Army building included the extremely humid interior of the building, which encouraged mold and mildew growth; the weakened condition of the floor, due to damage from a previous fire; the growth of mold and mildew on the interior surface walls; the poor interior air quality, with a stench of mold and decay; the unrestrained west wall of the Salvation Army building, due to the absence of floor-ceiling framing; the west wall's lack of a weather-resistive covering; and lack of repair or stabilization to the building.

In 1 Am. Jur. 2d *Adjoining Landowners* § 12 at 937-38 (2005), it is stated that

> [t]he principles of the law of negligence ordinarily enter into the determination of the question of the reasonable use of property. A private owner is liable for damages inflicted by the owner's negligence in connection with his or her property, though the injury is inflicted outside and beyond the limits of his or her property.
>
> The proper test of liability of a possessor of land is whether in the management of his or her property he or she has acted as a reasonable person in view of the probability of injury to others. A landowner who engages in activities that may cause injury to persons on adjoining premises owes those persons a duty to take reasonable precautions to avoid injuring them. Indeed, a landowner owes adjoining landowners the duty to take such precautions and use such means to lessen the danger to adjoining property as would a person of ordinary prudence. Liability thus may be imposed on an adjoining landowner or lessee if that individual creates a dangerous condition.
>
> The fact that a building has been damaged or was imperfectly constructed or has been condemned does not affect the adjoining owner's liability for additional damage thereto by his or her negligence. Where a dangerous condition on a person's property causes injury to the adjoining owner due to failure of the former to fulfil his or her duty to correct the danger, a recovery of damages based on negligence will lie. Further, in applying the law of negligence, if an abutting property owner causes a defect on adjoining property, he or she may be held responsible.
>
> It is a general principle that in the absence of negligence there is no liability if there was a legitimate and reasonable use. Whether there was negligence is generally a jury question.

[8] In Nebraska, a landowner has a duty to use his property so as to not unnecessarily and negligently injure his neighbor. *Schomberg v. Kuther*, 153 Neb. 413, 45 N.W.2d 129 (1950);

Lincoln & B. H. R. Co. v. Sutherland, 44 Neb. 526, 62 N.W. 859 (1895).

It has been held that "[s]moke [damage] and water damage to adjacent property are foreseeable consequences of a fire, and plaintiff may recover for such damage[s] if he establishes defendants' breach of duty and proximate cause." *Cuevas v. Quandt's Foodservice Distributors*, 6 A.D.3d 973, 974, 775 N.Y.S.2d 429, 430 (2004). See, also, *Excelsior Ins. Co. v. Auburn Local Development Corp.*, 294 A.D.2d 861, 741 N.Y.S.2d 632 (2002); *Fontana Fabrics, Inc. v. Hodge*, 187 A.D.2d 378, 589 N.Y.S.2d 488 (1992).

We conclude that reasonable minds could differ and that more than one conclusion could be drawn as to whether the damages relating to the demolition and loss of the Salvation Army building were proximately caused by the Kyles' and Ewers' negligence. Accordingly, entry of a directed verdict was improper.

CONCLUSION

The district court erred in entering a directed verdict on the issue of the Salvation Army's damages relating to the demolition and loss of its building.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

VASILE HURBENCA, APPELLANT, V. NEBRASKA DEPARTMENT OF CORRECTIONAL SERVICES ET AL., APPELLEES.

773 N.W.2d 402

Filed September 22, 2009. No. A-08-1149.

1. **Appeal and Error.** Errors argued but not assigned will not be considered on appeal.
2. **Summary Judgment.** Summary judgment is proper if the pleadings and admissible evidence offered at the hearing show that there is no genuine issue as to any material facts 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.
3. **Summary Judgment: Appeal and Error.** In reviewing a summary judgment, the court views the evidence in the light most favorable to the party against whom the

judgment was granted, and the court gives that party the benefit of all reasonable inferences deducible from the evidence.

4. **Statutes: Appeal and Error.** Statutory interpretation is a question of law, which an appellate court resolves independently of the trial court.
5. **Statutes: Legislature: Intent.** The components of a series or collection of statutes pertaining to a certain subject matter which are in pari materia may be conjunctively considered and construed to determine the intent of the Legislature, so that different provisions of the act are consistent, harmonious, and sensible.
6. **Administrative Law: Prisoners: Time: Wages.** Neb. Rev. Stat. §§ 83-183 and 83-183.01 (Reissue 2008) do not require that an inmate be provided with an 8-hour workday as a prerequisite to enforcement of the regulations of the Department of Correctional Services regarding earnings.

Appeal from the District Court for Johnson County: DANIEL E. BRYAN, JR., Judge. Affirmed.

Vasile Hurbenca, pro se.

Jon Bruning, Attorney General, and Ryan C. Gilbride for appellees.

IRWIN, SIEVERS, and CASSEL, Judges.

CASSEL, Judge.

INTRODUCTION

In granting a summary judgment in favor of the appellees, the district court rejected the claim of Vasile Hurbenca, an inmate, that he was wrongfully denied direct access to funds he earned as an inmate. Because Nebraska law does not require that the appellees provide Hurbenca with an 8-hour workday as a prerequisite to enforcement of the prison's regulations regarding earnings, we affirm. See Neb. Rev. Stat. §§ 83-183 and 83-183.01 (Reissue 2008).

BACKGROUND

On December 6, 2007, Hurbenca filed a complaint for declaratory relief in which he alleged that the appellees, the Nebraska Department of Correctional Services (the Department) and various individuals it employed—Robert P. Houston, Frank X. Hopkins, Fred Britten, Kim Beethe, and Matthew Harris—caused the wrongful withholding of Hurbenca's wages earned during his confinement while employed by two private businesses. Hurbenca stated that he had been employed by these

entities from 1995 to 2001. Hurbenca alleged that §§ 83-183 and 83-183.01 prohibited the Department from withholding any amount from an inmate's wages unless the inmate was employed 8 hours a day, but that he had never worked 8 hours a day. Hurbenca further alleged that in 2007, he was wrongfully denied access to funds that were withheld and placed in a "'Private Venture Savings Account,'" which he was informed could be used only for family support.

On October 20, 2008, the district court heard the appellees' motion for summary judgment. The appellees offered into evidence an inmate work contract "for direct employment by a private venture," signed by Hurbenca in 2000. The work contract stated as follows:

> I also agree to the following:
>
> 1. Deductions will be held from my gross monthly wages to be distributed in accordance with [§] 83-183.01 . . . as follows:
>
> a. Payroll deductions as required by law, which may include, but are not limited to, state and federal income taxes and social security assessments.
>
> b. Cost for room and board at $1.50 per hour worked, to the nearest one-quarter hour.
>
> c. Required savings to be obtained by me upon release or parole and/or family support distributions as authorized by me.
>
> d. Contributions to the Victim's Compensation Fund at five percent . . . of gross wages.

Further, the appellees introduced into evidence an affidavit from the Department's controller, Inga L. Hookstra, who is responsible for inmate accounting. Hookstra's affidavit stated that in consideration for employment with a private venture operation, Hurbenca had agreed to have a portion of his wages withheld and placed in a "Private Venture savings account," as opposed to an inmate institutional account. Hookstra's affidavit also stated that the Department's regulations provided for funds from a private venture savings account to be sent to immediate family members, but not to an inmate institutional account, as Hurbenca had requested. Hookstra's affidavit averred that Hurbenca would receive the funds from his

private venture savings account upon his release from prison or when he received parole. The appellees also offered into evidence inmate accounting regulations, which show that the account in which Hurbenca could deposit his earnings from his job, a private venture savings account, permitted only "[t]wo withdrawals per calendar month . . . to send funds for family support" and did not permit withdrawals for any other purpose. Hurbenca's evidence consisted of a statement of his private venture savings account and a statement of his release savings account.

On October 27, 2008, the court granted the appellees' motion for summary judgment. The district court found that § 83-183 "does not mandate an eight hour work day before statutory [wage] deductions are allowed" and that the Department had not violated Hurbenca's statutory rights regarding wage withholding.

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

ASSIGNMENTS OF ERROR

Hurbenca alleges, as reordered and restated, that the district court erred in (1) making its findings of fact, (2) determining that the appellees have not violated his statutory rights regarding wage withholding, (3) finding that § 83-183 does not impose an 8-hour-workday requirement before statutory deductions may be taken from an inmate's pay, (4) granting the appellees' motion for summary judgment, and (5) applying the language of Neb. Rev. Stat. § 81-1826 (Reissue 2008) to the issue of wage withholding.

[1] Hurbenca also argues but does not assign as error that the court failed to correctly apply Neb. Rev. Stat. § 25-1333 (Reissue 2008), which specifies certain findings that the court is to make where summary judgment is not rendered upon the whole case, or for all the relief requested, and a trial is necessary. Errors argued but not assigned will not be considered on appeal. *Vokal v. Nebraska Acct. & Disclosure Comm.*, 276 Neb. 988, 759 N.W.2d 75 (2009). We do not address this matter.

STANDARD OF REVIEW

[2,3] Summary judgment is proper if the pleadings and admissible evidence offered at the hearing show that there is no genuine issue as to any material facts 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. *Jardine v. McVey*, 276 Neb. 1023, 759 N.W.2d 690 (2009). In reviewing a summary judgment, we view the evidence in the light most favorable to the party against whom the judgment was granted, and we give that party the benefit of all reasonable inferences deducible from the evidence. *Id.*

[4] Statutory interpretation is a question of law, which an appellate court resolves independently of the trial court. *Metropolitan Comm. College Area v. City of Omaha*, 277 Neb. 782, 765 N.W.2d 440 (2009).

ANALYSIS

Before turning to the primary question of statutory interpretation posed by this appeal, we first dispose of an assignment of error requiring little discussion.

District Court's Findings of Fact.

Hurbenca assigns that the district court erred in making its findings of fact. Because we review the record itself and not the district court's factual findings in reviewing a motion for summary judgment, see *Jardine v. McVey, supra*, we need not address this assignment of error.

§§ 83-183 and 83-183.01.

Hurbenca's primary argument is that he cannot be subjected to regulations implemented by the Department which prohibit him from withdrawing his funds for personal use.

Section 83-183.01 sets forth the persons subject to the Department's regulations, sets forth reasons for which deductions may be taken, and provides as follows in this regard:

> A person committed to the department, who is earning at least minimum wage and is employed pursuant to sections 81-1827 and 83-183, shall have his or her wages set aside by the chief executive officer of the facility in a separate wage fund. The director shall adopt and

> promulgate rules and regulations which will protect the inmate's rights to due process, provide for hearing as necessary before the Crime Victim's Reparations Committee, and govern the disposition of a confined person's gross monthly wage minus required payroll deductions and payment of necessary work-related incidental expenses for the following purposes:
>
> (1) For the support of families and dependent relatives of the respective inmates;
>
> (2) For the discharge of any legal obligations, including judgments for restitution;
>
> (3) To pay all or a part of the cost of their board, room, clothing, medical, dental, and other correctional services;
>
> (4) To provide for funds payable to the person committed to the department upon his or her release;
>
> (5) For the actual value of state property intentionally or willfully and wantonly destroyed by such person during his or her commitment;
>
> (6) For reasonable costs incurred in returning such person to the facility to which he or she is committed in the event of escape; and
>
> (7) For deposit in the Victim's Compensation Fund.

This section contains no requirement that the Department make such funds available for the personal spending of an incarcerated person during the term of incarceration. Conversely, where this section does not apply, wages are set aside "in a separate fund" which "shall enable such person committed to the department to . . . make necessary purchases from the commissary," among other things. § 83-183(3). Section 83-183.01 contains no such requirement. Thus, if Hurbenca earned at least minimum wage and was employed pursuant to § 83-183 and Neb. Rev. Stat. § 81-1827 (Reissue 2008), the Department could enforce regulations restricting Hurbenca's access to the money he earned.

Hurbenca argues only that the Department's regulations, which restricted his access to his private venture earnings, do not apply, because he was not employed pursuant to § 83-183. Hurbenca insists that § 83-183 requires that the Department

provide him with 8 hours of work per day, which he did not receive. Although there is no evidence in the record as to whether Hurbenca worked an 8-hour day, for purposes of our analysis, we will assume that he did not do so.

In pertinent part, § 83-183 provides:

> (1) To establish good habits of work and responsibility, to foster vocational training, and to reduce the cost of operating the facilities, persons committed to the department shall be employed, eight hours per day, so far as possible in constructive and diversified activities in the production of goods, services, and foodstuffs to maintain the facilities, for state use, and for other purposes authorized by law.

Hurbenca argues that the phrase "so far as possible" modifies only the activities listed afterward, and not the phrase "eight hours per day," and thus, that the "eight hours" language is mandatory. If we analyzed this particular subsection on its own, Hurbenca's assertion may have some merit because the phrase "so far as possible" was in the statute prior to when the language regarding 8 hours was added. The original version of the statute was materially identical to the portion quoted, except that the phrase "eight hours per day" was not in the original statute. See 1969 Neb. Laws, ch. 817, § 14, p. 3080. Thus, it is not apparent from the quoted language whether, in adding the "eight hours" language, the Legislature intended to also have it be modified by the phrase "so far as possible."

[5] However, when we conjunctively consider and construe the provisions of the legislative act that first adopted the "eight hours" language, it is clear that the Legislature did not intend to mandate that the Department provide prisoners with 8 hours per day of employment. The components of a series or collection of statutes pertaining to a certain subject matter which are in pari materia may be conjunctively considered and construed to determine the intent of the Legislature, so that different provisions of the act are consistent, harmonious, and sensible. *Steffen v. Progressive Northern Ins. Co.*, 276 Neb. 378, 754 N.W.2d 730 (2008). The Legislature first added the "eight hours per day" language in 1980 Neb. Laws, L.B. 319, from which we note two important points.

First, the Legislature did not revise § 83-183(2) which, at that time, provided that "[t]he Director of Correctional Services shall make rules and regulations governing the hours, conditions of labor, and the rates of compensation of persons committed to the department." See 1980 Neb. Laws, L.B. 319. At present, the director still has such authority. See § 83-183(2). Because the Legislature left intact the director's ability to regulate the "hours," it would be inconsistent to read the "eight hours" language as specifically mandating 8 hours per day.

Second, in L.B. 319, the Legislature added language to other sections regarding an 8-hour workday, but imposed no requirement that the Department provide an 8-hour workday. For example, § 3 of the legislative act revised Neb. Rev. Stat. § 81-1826 (Cum. Supp. 1978) as follows, in pertinent part: "The Department of Correctional Services shall, as far as possible, provide for the employment, eight hours per day, of confined persons by private businesses . . . ." (Underscored words represent language added by L.B. 319.) The plain language of this revision indicates that the Department was to provide inmates with full-time employment to the greatest extent possible—not that they had to be provided with full-time work. It would be incongruous to hold that the addition of the "eight hours" language to § 83-183(1) was intended to establish a mandate where another section of the same legislative act clearly stated that such employment was to be provided "as far as possible." It would be even more strained to do so where the sentence of § 83-183(1) amended by the act already included the similar words "so far as possible."

In addition, § 5 of L.B. 319, which revised Neb. Rev. Stat. § 81-1829 (Cum. Supp. 1978) to its current form, stated that "[t]he Department of Correctional Services ~~shall~~ may establish and maintain farms to provide food for the institutions under the jurisdiction of the department and also to provide opportunity for all inmates to work eight hours per day." (Strikeouts and underscoring delineate language respectively deleted and added by the act.) In this section, the language about providing the inmates with 8 hours of work per day is stated as a purpose of the provision of farming opportunities—not as a requirement. The fact that the Legislature left control of the

hours which the inmates worked to the Department's director, along with the fact that the other portions of L.B. 319 which referred to 8 hours of work did not make it mandatory, leads us to the conclusion that § 83-183 does not require that an inmate work 8 hours a day. Thus, in the context of § 83-183, the "eight hours" language does not serve to preempt the Department from enforcing its regulations where the inmate failed to work 8 hours per day.

In the interest of completeness, we also examine the Legislative history of L.B. 319. The legislative record provides no specific indication of what was intended by the "eight hours per day" language. However, the entirety of the legislative history shows that in passing this bill, the Legislature had two overarching concerns: (1) that inmates have the opportunity to participate in productive work for purposes of rehabilitation and (2) that inmates not be unfairly disadvantaged. A recommended 8-hour workday balances these concerns. However, a rigid rule requiring inmates to work an 8-hour workday could be unfair in light of these concerns. First, not all inmates may be capable of working 8 hours. Second, if work opportunities were scarce and an 8-hour workday was deemed mandatory, the Department would not have the option of spreading the available work among the inmate population to equitably provide at least some opportunity to as many inmates as possible. Under this rigid, mandatory interpretation, the Department could not accomplish the Legislature's intended goal of providing all inmates with the opportunity to work for rehabilitative purposes.

[6] We hold that §§ 83-183 and 83-183.01 do not require that an inmate be provided with an 8-hour workday as a prerequisite to enforcement of the Department's regulations regarding earnings. We need not address whether the "eight hours" language imposes any requirement on the Department to make efforts to ensure that all inmates have the opportunity to work 8 hours per day. Because Hurbenca adduced no evidence that the Department could have provided but did not provide him the opportunity to work 8 hours a day, there is no remaining question of fact as to whether the requirements of § 83-183 were fulfilled.

Finally, there is no factual dispute as to the effect of the regulations promulgated pursuant to the Department's authority under § 83-183.01. The Department promulgated regulations pursuant to its authority under § 83-183.01, and the regulations restricted Hurbenca's access to his private venture savings account. Hookstra's affidavit averred that this was the case and that the regulations which governed Hurbenca's private venture savings account permitted withdrawals during imprisonment only for the purpose of providing family support. Hurbenca did not adduce any evidence to the contrary. Because Hurbenca asserted only that the regulations conflicted with §§ 83-183 and 83-183.01 and did not otherwise challenge the Department's regulations, no further discussion is necessary.

§ 81-1826.

Finally, we dispose of Hurbenca's assignment that the district court erred in applying § 81-1826 (Reissue 2008) to the issue of wage withholding. Although § 81-1826 does not directly control the issue, it is in pari materia with the other statutes governing the employment of incarcerated persons and was amended by the same legislative act that added the "eight hours" language to § 83-183(1). Therefore, § 81-1826 may be used as we have done—to help discern the meaning of the other related statutes governing the same subject matter. See *Steffen v. Progressive Northern Ins. Co.*, 276 Neb. 378, 754 N.W.2d 730 (2008). It appears that this is what the district court did, and it did not err in so doing.

CONCLUSION

Because §§ 83-183 and 83-183.01 do not impose an 8-hour workday as a prerequisite to the applicability of the Department's regulations governing the allocation of an inmate's private venture earnings, the Department's regulations restricting Hurbenca's access to his private venture earnings were not thereby inconsistent with statutory law. Because there was no genuine issue of material fact that the regulations prohibited Hurbenca from transferring such funds deposited in a private venture savings account into his inmate institutional account, we affirm the district court's judgment.

AFFIRMED.

JERAD WILSON, APPELLANT, V. BEVERLY NETH, DIRECTOR, STATE OF NEBRASKA, DEPARTMENT OF MOTOR VEHICLES, APPELLEE.

773 N.W.2d 183

Filed September 22, 2009. No. A-08-1268.

1. **Administrative Law: Motor Vehicles: Judgments: Appeal and Error.** Decisions of the director of the Department of Motor Vehicles, pursuant to Nebraska's administrative revocation statutes, are appealed under the Administrative Procedure Act.
2. **Administrative Law: Final Orders: Appeal and Error.** A judgment or 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. **Administrative Law: Judgments: Appeal and Error.** 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.** The meaning and interpretation of statutes and regulations are questions of law for which an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below.
5. **Administrative Law: Drunk Driving: Licenses and Permits: Revocation: Jurisdiction.** Nebraska law grants the director of the Department of Motor Vehicles jurisdiction to administratively revoke the license of a person found to be driving under the influence of alcohol.
6. **Administrative Law: Motor Vehicles: Licenses and Permits: Revocation: Police Officers and Sheriffs: Jurisdiction.** In an administrative license revocation proceeding, the sworn report of the arresting officer must, at a minimum, contain the information specified in the applicable statute in order to confer jurisdiction.
7. **Administrative Law: Drunk Driving: Licenses and Permits: Revocation: Blood, Breath, and Urine Tests.** Neb. Rev. Stat. § 60-498.01(3) (Reissue 2004) requires a sworn report in an administrative license revocation proceeding to state that the person was arrested as described in Neb. Rev. Stat. § 60-6,197(2) (Reissue 2004), the reasons for such arrest, that the person was requested to submit to the required test, that the person submitted to a test, the type of test to which the person submitted, and that such test revealed the presence of alcohol in a concentration specified in Neb. Rev. Stat. § 60-6,196 (Reissue 2004).
8. **Administrative Law: Drunk Driving: Licenses and Permits: Revocation: Jurisdiction.** The test used to determine whether an omission from a sworn report in an administrative license revocation proceeding becomes a jurisdictional defect, as opposed to a technical one, is whether, notwithstanding the omission, the sworn report conveys the information required by the applicable statute.
9. **Trial: Waiver: Appeal and Error.** Failure to make a timely objection waives the right to assert prejudicial error on appeal.

10. **Administrative Law: Appeal and Error.** In an appeal under the Administrative Procedure Act, an appellate court will not consider an issue on appeal that was not presented to or passed upon by the administrative agency.

Appeal from the District Court for Box Butte County: LEO DOBROVOLNY, Judge. Affirmed.

Bell Island, of Island, Huff & Nichols, P.C., L.L.O., for appellant.

Jon Bruning, Attorney General, Milissa Johnson-Wiles, and Andee G. Penn for appellee.

IRWIN, CARLSON, and MOORE, Judges.

MOORE, Judge.

INTRODUCTION

After a June 2008 hearing, Beverly Neth, the director of the Nebraska Department of Motor Vehicles (Department), revoked Jerad Wilson's driving privileges for 1 year pursuant to Neb. Rev. Stat. § 60-498.01 (Reissue 2004). Wilson appealed to the district court for Box Butte County, which affirmed the Department's revocation order. Wilson appeals from the district court's affirmance of the revocation of his license by the Department, challenging the sufficiency of the sworn report to confer jurisdiction and the authority of the hearing officer to receive evidence. Pursuant to Neb. Ct. R. App. P. § 2-111(B)(1), this case was ordered submitted without oral argument. For the reasons that follow, we affirm the district court's order.

BACKGROUND

On May 4, 2008, two officers with the Alliance Police Department found Wilson passed out behind the steering wheel of his vehicle, which was parked in the middle of a roadway. After an officer woke him, Wilson admitted to drinking too much. Wilson smelled of alcohol and had bloodshot eyes and a flushed face, and his speech and movements were slow. Wilson showed impairment on field sobriety tests, and a preliminary breath test showed .184 of a gram of alcohol per 210 liters of breath. Wilson was arrested, and a chemical

blood test was performed at the hospital which revealed a blood alcohol content of .169 of a gram of alcohol per 100 milliliters of blood.

A "Notice/Sworn Report/Temporary License" form (sworn report) was completed, signed by the two arresting officers in the presence of a notary, and received by the Department. The sworn report was received as an exhibit at the hearing. The sworn report shows the reasons for arrest were as follows: "Vehicle parked in middle of the road, driver passed out behind the wheel, driver addmitted [sic] to drinking too much, could not perform field sobriety tests as instructed, PBT result of .184." The portion of the sworn report that Wilson challenges as defective states: "The individual was directed to submit to a chemical test, and he or she: *(Check appropriate box.)*" Underneath that statement is a box next to each choice of "**Refused** to submit to the test," "**Submitted** to a **breath** test that indicated a BAC of **0.08** or more," and "**Submitted** to a **blood** test that indicated a BAC of **0.08** or more." Under each of the last two choices are spaces to insert the result of the test and the name of the testing operator. On Wilson's sworn report, the box next to "**Submitted** to a **blood** test" is not checked; however, the test information is completed under that heading, showing, "Result: .169 gram of alcohol per 100 ml of blood." In addition, the "blood tested by" blank is filled in with a name and the "date blood test results received" blank was completed.

Wilson filed a petition requesting an administrative hearing before the Department and received a notice that the hearing would be held on June 12, 2008, before Judy Vitamvas. Thomas M. Wakeley actually presided over the hearing. Following the hearing, Wakeley recommended to the Department's director that Wilson's driver's license should be administratively revoked. The director adopted Wakeley's recommendation and ordered that Wilson's driver's license be revoked for the statutory period. Wilson appealed to the district court, which affirmed the revocation order. Wilson timely filed this appeal.

ASSIGNMENTS OF ERROR

Wilson asserts that the district court erred in failing to reverse the revocation because (1) the sworn report fails to show what chemical test Wilson submitted to and (2) the hearing officer was not properly appointed.

STANDARD OF REVIEW

[1-4] Decisions of the director of the Department, pursuant to Nebraska's administrative revocation statutes, are appealed under the Administrative Procedure Act (APA). Neb. Rev. Stat. § 60-498.04 (Reissue 2004). A judgment or final order rendered by a district court in a judicial review pursuant to the APA may be reversed, vacated, or modified by an appellate court for errors appearing on the record. *Betterman v. Department of Motor Vehicles*, 273 Neb. 178, 728 N.W.2d 570 (2007). When reviewing an order of a district court under the APA 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*. The meaning and interpretation of statutes and regulations are questions of law for which an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below. *Id*.

ANALYSIS

Is Sworn Report Sufficient to Confer Jurisdiction?

[5-8] Wilson argues that the failure of the officer to check the box demonstrating the type of test the motorist submitted to renders the sworn report insufficient to confer jurisdiction for the revocation. Nebraska law grants the director of the Department jurisdiction to administratively revoke the license of a person found to be driving under the influence of alcohol. § 60-498.01. The sworn report of the arresting officer must, at a minimum, contain the information specified in the applicable statute in order to confer jurisdiction. *Hahn v. Neth*, 270 Neb. 164, 699 N.W.2d 32 (2005). As Wilson correctly points out, § 60-498.01(3) requires a sworn report to state that the person was arrested as described in Neb. Rev. Stat. § 60-6,197(2) (Reissue 2004), the reasons for such arrest, that the person

was requested to submit to the required test, that the person submitted to a test, the type of test to which the person submitted, and that such test revealed the presence of alcohol in a concentration specified in Neb. Rev. Stat. § 60-6,196 (Reissue 2004). The test used to determine whether an omission from a sworn report becomes a jurisdictional defect, as opposed to a technical one, is whether, notwithstanding the omission, the sworn report conveys the information required by the applicable statute. See, *Betterman v. Department of Motor Vehicles, supra*; *Hahn v. Neth, supra*.

Wilson argues that *Hahn* is factually similar and provides authority for a reversal in the instant case. In *Hahn*, the description of the sworn report form indicates that it was different from the form used in the present case. In *Hahn*, the officer checked a box noting that the driver "'submitted to a chemical test which indicated an alcohol concentration of **0.08** or more,'" but failed to check a box stating that the driver "'was requested to submit to the required test.'" 270 Neb. at 167, 699 N.W.2d at 36. The officer filled out a portion of the form noting that the test results were "'0.148'" and that the "'Instrument Type'" was "'5000,'" but neglected to indicate whether the chemical test was of the driver's blood or breath. *Id.* Because the sworn report form did not indicate that the driver "'was requested'" to submit to the required test or "'the type of test'" to which he submitted, which information was statutorily required, the Nebraska Supreme Court in *Hahn*, 270 Neb. at 171, 699 N.W.2d at 38, concluded that the director did not acquire jurisdiction to administratively revoke Hahn's operator's license.

In the present case, the form does not contain a box next to the statement that "[t]he individual was directed to submit to a chemical test"; rather, it contains this statement as a positive assertion. Therefore, this "defect" from *Hahn* is not present in this case. The present form goes on to include the three options described above—refused to submit, submitted to a breath test, or submitted to a blood test. Despite the officer's failure to check the box next to "**Submitted** to a **blood** test," the information contained under this heading clearly shows that a blood test was performed and that the results of the blood

test revealed a blood alcohol concentration above the statutory amount; the form thus conveys the information required by § 60-498.01(3).

These facts are also distinguishable from those of *Hahn* because in *Hahn*, it was not discernible from other information provided in the sworn report whether the chemical test was of the blood or breath. In the present case, it is clear that a chemical blood test was performed, as the sworn report states the result of the blood test, the name of the person who tested the blood, and the date on which the blood test results were received.

The district court found that the sworn report in this case contained all of the requisite recitations and that the Department properly obtained jurisdiction. The district court in the present case found that viewing the form as a whole, the information that was filled in provided a legitimate inference that Wilson submitted to a blood test and that a blood test was performed. The court concluded that the failure to check the box was a technical defect, not a jurisdictional one.

Recognizing that we review jurisdictional questions independently, we conclude that the district court did not err in its determination. The sworn report, when viewed as a whole, contained the required recitations that Wilson was directed to submit to a chemical test, that he did so, and that the result of his blood test was .169 of a gram of alcohol per 100 milliliters of blood. As such, this assignment of error is without merit.

Hearing Officer.

Wilson next argues that a hearing officer who is not appointed by the director is not authorized to receive evidence. In this case, the notice of hearing indicated that the appeal would be heard before Vitamvas. However, the hearing officer who actually heard the appeal was Wakeley. Wilson argues that the regulations require a hearing officer to be appointed by the director in writing and that Vitamvas, not Wakeley, was appointed. Wilson argues that since Wakeley was not properly appointed, he had no authority to receive evidence or make a recommendation to the director. In the absence of a properly

appointed hearing officer, Wilson argues, the Department is without jurisdiction to revoke his license.

[9,10] Wilson's argument fails for several reasons. Wilson did not object to Wakeley's presiding as the hearing officer at the time of the administrative hearing or otherwise raise the issue of whether the Department lacked jurisdiction because Wakeley was not properly appointed as the hearing officer. Generally, failure to make a timely objection waives the right to assert prejudicial error on appeal. See *Hass v. Neth*, 265 Neb. 321, 657 N.W.2d 11 (2003). Further, in an appeal under the APA, an appellate court will not consider an issue on appeal that was not presented to or passed upon by the administrative agency. *Id.*

Nevertheless, Wilson did raise the issue of the hearing officer's appointment before the district court, and the district court addressed it. The district court rejected the argument, finding that there was no evidence to show that Wakeley was not an appointed hearing officer as provided in the Nebraska Administrative Code.

To the extent that the district court treated this argument as a jurisdictional one which can be raised at any time, see *Betterman v. Department of Motor Vehicles*, 273 Neb. 178, 728 N.W.2d 570 (2007), we find no error in the district court's resolution of the issue. Wilson presented no evidence that Wakeley was not properly appointed and no authority which states that the appointment of the hearing officer must be made a part of the record in order to confer jurisdiction on the Department. The Nebraska Administrative Code provides that a hearing officer is an individual appointed by the director to preside at an administrative hearing. 247 Neb. Admin. Code, ch. 1, § 002.04 (2005). Hearing officers shall be appointed by the director in writing, and such appointment shall be of public record in the director's office. 247 Neb. Admin. Code, ch. 1, § 003.01 (2005). There is no evidence that Wakeley was not appointed pursuant to these regulations. Also, as the district court noted, the Nebraska Administrative Code does not require that the hearing be conducted by the hearing officer named in the notice of hearing. See 247 Neb. Admin. Code, ch. 1, § 001 et seq. (2005).

We find this assignment of error to be without merit.

CONCLUSION

Accordingly, we conclude that the district court did not clearly err when it determined that the Department had jurisdiction to administratively revoke Wilson's driver's license, and we therefore affirm.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. NICHOLAS R. GRIZZLE, APPELLANT.

774 N.W.2d 634

Filed September 29, 2009. No. A-09-327.

1. **Pleadings.** Issues regarding the grant or denial of a plea in bar are questions of law.
2. **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.
3. **Double Jeopardy.** The Double Jeopardy Clauses of both the federal and the Nebraska Constitutions protect against three distinct abuses: (1) a second prosecution for the same offense after acquittal, (2) a second prosecution for the same offense after conviction, and (3) multiple punishments for the same offense.
4. **Constitutional Law: Double Jeopardy.** The protection provided by Nebraska's double jeopardy clause is coextensive with that provided by the U.S. Constitution.
5. **Double Jeopardy: Statutes: Sentences: Proof.** Where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one is whether each provision requires proof of a fact which the other does not.
6. **Double Jeopardy.** While the Double Jeopardy Clause may protect a defendant against cumulative punishments for convictions on the same offense, the clause does not prohibit the State from prosecuting the defendant for such multiple offenses in a single prosecution.
7. **Claims: Time.** A claim is not ripe for adjudication when it rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all.
8. **Courts: Judgments.** In the absence of an actual case or controversy requiring judicial resolution, it is not the function of the courts to render a judgment that is merely advisory.

Appeal from the District Court for Cass County: RANDALL L. REHMEIER, Judge. Affirmed.

Julie E. Bear, of Reinsch, Slattery & Bear, P.C., L.L.O., for appellant.

Jon Bruning, Attorney General, and James D. Smith for appellee.

SIEVERS, CARLSON, and CASSEL, Judges.

CASSEL, Judge.

INTRODUCTION

Nicholas R. Grizzle pled guilty to refusal to submit to a chemical test and then filed a plea in bar alleging a double jeopardy violation because the same information charged him both with refusal to submit and with driving while under the influence of alcohol (DUI), third offense, which the State alleged should be enhanced for punishment as a Class IIIA felony based on his refusal to submit. The district court overruled Grizzle's plea in bar, and Grizzle appeals. We affirm, because the offenses are not the same for double jeopardy purposes and double jeopardy does not prohibit the State from prosecuting multiple offenses in a single prosecution. Because Grizzle has not been convicted of DUI, his argument pertaining to multiple punishments is unripe.

BACKGROUND

Based upon a May 2008 arrest, the State charged Grizzle with three offenses: (1) DUI, third offense, enhanced for punishment by refusal to submit; (2) refusal to submit to a chemical test; and (3) procuring alcohol for a minor.

On January 12, 2009, Grizzle pled guilty to refusal to submit to a chemical test, and the court accepted the plea. On January 27, Grizzle filed a plea in bar, alleging that the State was subjecting him to multiple punishments for the identical offense as well as a second prosecution for the same offense after conviction, by using evidence of his refusal to submit to both enhance the penalty for the DUI and prove that he refused a chemical test.

On March 6, 2009, the court sentenced Grizzle on the refusal to submit conviction. The court then heard arguments

on Grizzle's plea in bar. On March 20, the court overruled the plea in bar.

Grizzle timely appeals.

ASSIGNMENT OF ERROR

Grizzle alleges that the district court erred in denying his plea in bar by finding that the Double Jeopardy Clause does not bar the State from prosecuting him for a DUI that was "aggravated" to a felony based upon the allegation that he refused to submit to a chemical test, after Grizzle had been found guilty of the separate charge of refusal to submit to a chemical test.

STANDARD OF REVIEW

[1,2] Issues regarding the grant or denial of a plea in bar are questions of law. *State v. Jackson*, 274 Neb. 724, 742 N.W.2d 751 (2007). 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

[3,4] The Double Jeopardy Clauses of both the federal and the Nebraska Constitutions protect against three distinct abuses: (1) a second prosecution for the same offense after acquittal, (2) a second prosecution for the same offense after conviction, and (3) multiple punishments for the same offense. *State v. Dragoo*, 277 Neb. 858, 765 N.W.2d 666 (2009). The protection provided by Nebraska's double jeopardy clause is coextensive with that provided by the U.S. Constitution. *State v. Dragoo, supra*. Grizzle argues that he has been subjected to both multiple prosecutions and multiple punishments for the same offense.

Multiple Prosecutions.

[5] First, we consider Grizzle's argument that he is being subjected to multiple prosecutions for the same offense. In doing so, we first focus on whether DUI is the same offense as refusal to submit. Under Neb. Rev. Stat. § 29-1817 (Reissue 2008), an accused may "offer a plea in bar to the indictment that he has before had judgment of acquittal, or been convicted,

or been pardoned for the same offense." Under *Blockburger v. United States*, 284 U.S. 299, 304, 52 S. Ct. 180, 76 L. Ed. 306 (1932), "where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not." If not, they are the same offense and double jeopardy bars additional punishment and successive prosecution. *State v. Dragoo, supra*.

In *State v. Stabler*, 209 Neb. 298, 306 N.W.2d 925 (1981), the defendant was charged with refusal to submit to a chemical test and third-offense DUI based upon the same incident. Following his conviction on the refusal charge, the defendant filed a plea in bar, alleging that the conviction on the refusal charge barred the prosecution for DUI. The district court overruled the plea in bar and subsequently convicted the defendant of third-offense DUI. The defendant appealed, arguing that the Double Jeopardy Clause barred his subsequent DUI conviction. The Nebraska Supreme Court affirmed the defendant's convictions, concluding that the convictions did not constitute the same offense because they required different elements of proof.

Since *Stabler*, the DUI and refusal to submit statutes have undergone changes and have been relocated to different chapters, but the statutes remain separately codified offenses. In *State v. Dragoo, supra*, in determining whether fourth-offense DUI was the same offense for double jeopardy purposes as DUI causing serious bodily injury, the Nebraska Supreme Court compared the elements of DUI, as defined by Neb. Rev. Stat. § 60-6,196 (Reissue 2004), in its *Blockburger* analysis. We will do the same.

The DUI statute, § 60-6,196, requires proof that the defendant was operating or in the actual physical control of a motor vehicle (1) while under the influence of alcoholic liquor, (2) when having a concentration of .08 of 1 gram or more by weight of alcohol per 100 milliliters of his or her blood, or (3) when having a concentration of .08 of 1 gram or more by weight of alcohol per 210 liters of his or her breath. The refusal statute, Neb. Rev. Stat. § 60-6,197 (Reissue 2004), requires

proof that the defendant (1) was arrested for any offense arising out of acts alleged to have been committed while operating or in the actual physical control of a motor vehicle while under the influence of alcoholic liquor, (2) was directed by a peace officer to submit to a chemical test for a determination of the concentration of alcohol and was advised that refusal to submit is a separate crime, and (3) refused to submit to the chemical test. Because each crime contains an element that the other does not, they are not the same offense for double jeopardy purposes.

Even if the offenses were the same offense, we conclude that the State would not be barred from prosecuting the DUI charge based upon Grizzle's guilty plea to refusal to submit. The U.S. Supreme Court and the Nebraska Supreme Court have rejected claims where a defendant pleads guilty to one or more charges and then challenges continued prosecution of other charges on double jeopardy grounds. See, *Ohio v. Johnson*, 467 U.S. 493, 104 S. Ct. 2536, 81 L. Ed. 2d 425 (1984); *State v. Humbert*, 272 Neb. 428, 722 N.W.2d 71 (2006).

In *Ohio v. Johnson, supra*, the defendant was indicted on charges of murder, involuntary manslaughter, aggravated robbery, and grand theft. The defendant pled guilty to involuntary manslaughter and grand theft, the trial court accepted the guilty pleas over the State's objection, and the court sentenced the defendant to a term of imprisonment. The defendant then moved to dismiss the remaining charges on the ground that further prosecution of those charges was barred by the Double Jeopardy Clause. The U.S. Supreme Court disagreed, reasoning:

> The acceptance of a guilty plea to lesser included offenses while charges on the greater offenses remain pending, moreover, has none of the implications of an "implied acquittal" which results from a verdict convicting a defendant on lesser included offenses rendered by a jury charged to consider both greater and lesser included offenses. [Citations omitted.] There simply has been none of the governmental overreaching that double jeopardy is supposed to prevent. On the other hand, ending prosecution now would deny the State its right to one full

> and fair opportunity to convict those who have violated its laws.

Ohio v. Johnson, 467 U.S. at 501-02.

[6] The Court further stated, "While the Double Jeopardy Clause may protect a defendant against cumulative punishments for convictions on the same offense, the Clause does not prohibit the State from prosecuting [the defendant] for such multiple offenses in a single prosecution." *Ohio v. Johnson*, 467 U.S. at 500. Even though the trial court had accepted the defendant's pleas to the less serious charges, the Supreme Court stated that the defendant "should not be entitled to use the Double Jeopardy Clause as a sword to prevent the State from completing its prosecution on the remaining charges." *Ohio v. Johnson*, 467 U.S. at 502.

In *State v. Humbert, supra*, the defendant was charged with four felonies—first degree false imprisonment, second degree assault (domestic violence), terroristic threats, and use of a weapon to commit a felony—and two misdemeanors—second degree false imprisonment and third degree assault (domestic violence). He pled no contest to the misdemeanors and then filed a plea in bar alleging that second degree false imprisonment is a lesser-included offense of first degree false imprisonment, third degree assault (domestic violence) is a lesser-included offense of second degree assault (domestic violence), and prosecution of the charges of first degree false imprisonment and second degree assault (domestic violence) was therefore barred by the Double Jeopardy Clauses of the federal and Nebraska Constitutions. The Nebraska Supreme Court observed:

> The State is not seeking a subsequent prosecution of [the defendant] for a greater offense after he had previously been tried for the lesser-included offense. There has been no trial on any of the charges. [The defendant] has pleaded no contest to the above-described misdemeanors, but he has not been sentenced and he has not been subjected to a trial on the felony charges.

State v. Humbert, 272 Neb. 428, 433, 722 N.W.2d 71, 75-76 (2006).

The court analogized the situation with that in *Ohio v. Johnson*, 467 U.S. 493, 104 S. Ct. 2536, 81 L. Ed. 2d 425

(1984), and stated, "The State has not yet had an opportunity to prosecute [the defendant] on all of the charges." *State v. Humbert*, 272 Neb. at 433, 722 N.W.2d at 76.

Grizzle points out that this court found a double jeopardy violation in *State v. Dragoo*, 17 Neb. App. 267, 758 N.W.2d 60 (2008), *affirmed* 277 Neb. 858, 765 N.W.2d 666 (2009)—which conclusion was subsequently affirmed by the Nebraska Supreme Court—even though prosecution of the two offenses "occurred in the same proceeding." Brief for appellant at 13 (emphasis omitted). In that case, however, the defendant pled not guilty to both charges and was tried by a jury on both charges. On the other hand, in the instant case, Grizzle pled guilty to and has been convicted of one charge, but he has not been tried on the more serious charge of DUI. Just as in *Johnson* and *Humbert*, we conclude that the State's continued prosecution of the "untried charges" is not barred.

Multiple Punishments.

Grizzle also argues that he has been subjected to multiple punishments for the same offense. We decline to consider this claim, because Grizzle has not yet been convicted of the DUI charge. The Court in *Ohio v. Johnson, supra*, noted that in the event of a guilty verdict on the more serious charges of which the defendant had not yet been tried, the trial court would then have to consider the issue of cumulative punishments, but that that stage had not been reached.

[7] A claim is not ripe for adjudication when it rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all. *State v. Hansen*, 259 Neb. 764, 612 N.W.2d 477 (2000). In the context of a motion to quash, we stated:

> [U]ntil a defendant's guilt or innocence of the underlying DUI has been determined, the admissibility of prior DUI convictions for enhancement purposes is not yet ripe for determination by the court. Consequently, a motion to quash which raises the issue of the admissibility of a defendant's prior DUI convictions, for enhancement purposes, should not be filed until after a determination of the defendant's guilt on the underlying offense.

State v. Head, 14 Neb. App. 684, 689, 712 N.W.2d 822, 826 (2006).

[8] The issue about which Grizzle argues comes from the penalty provisions for sentencing for either DUI or refusal to submit to a chemical test, which are contained in Neb. Rev. Stat. § 60-6,197.03 (Supp. 2007). See Neb. Rev. Stat. § 60-6,197.02 (Cum. Supp. 2008). Under § 60-6,197.03(6), as applicable here, a person is guilty of a Class IIIA felony if the person had had two prior convictions and, as part of the current violation, refused to submit to a test required under § 60-6,197. Thus, a refusal to submit can be used to enhance the DUI penalty. But, because Grizzle has not been convicted of DUI, we do not reach this issue, as such a determination would merely be an advisory opinion. In the absence of an actual case or controversy requiring judicial resolution, it is not the function of the courts to render a judgment that is merely advisory. *State v. Head, supra*.

Because Grizzle has not been convicted of DUI, his claim of being subjected to multiple punishments—which is contingent upon being convicted of third-offense DUI—is not ripe for adjudication. As the Supreme Court stated in *State v. Humbert*, 272 Neb. 428, 433, 722 N.W.2d 71, 76 (2006), the defendant "can assert his double jeopardy claims as to cumulative punishments based on convictions for greater and lesser offenses when and if that issue is presented."

CONCLUSION

We conclude that DUI and refusal to submit are not the same offense for double jeopardy purposes and that the State is not barred from prosecuting multiple offenses in a single prosecution. Grizzle's claim that the penalty provision for third-offense DUI subjected him to multiple punishments is not ripe for appellate review. Accordingly, we affirm the denial of Grizzle's plea in bar.

AFFIRMED.

TRISHA K. MCCORMICK, APPELLANT, V.
SAMUEL M. ALLMOND, APPELLEE.
773 N.W.2d 409

Filed October 6, 2009. No. A-08-1285.

1. **Pretrial Procedure: Appeal and Error.** On appellate review, decisions regarding discovery are generally reviewed under an abuse of discretion standard.
2. **Trial: Appeal and Error.** The standard of review of a trial court's determination of a request for sanctions is whether the trial court abused its discretion.
3. **Rules of the Supreme Court: Trial.** At a hearing to determine whether to award sanctions pursuant to Neb. Ct. R. Disc. § 6-337(c), the trial court may consider the evidence established and produced at that hearing only.
4. **Rules of the Supreme Court: Pretrial Procedure: Costs: Proof.** The party making the motion for sanctions has the burden to prove the truth of the matter that was previously denied and that reasonable expenses were incurred in doing so. The burden then shifts to the nonmoving party to prove that one of the four exceptions stated in Neb. Ct. R. Disc. § 6-337(c) applies.
5. **Judgments: Appeal and Error.** Where the record adequately demonstrates that the decision of the trial court is correct, although such correctness is based on a ground or reason different from that assigned by the trial court, an appellate court will affirm.
6. **Rules of the Supreme Court: Pretrial Procedure.** Pursuant to Neb. Ct. R. Disc. § 6-336(a), each matter of which an admission is requested shall be separately set forth by the party making the request.

Appeal from the District Court for Sarpy County, DAVID K. ARTERBURN, Judge, on appeal thereto from the County Court for Sarpy County, TODD J. HUTTON, Judge. Judgment of District Court affirmed.

Van A. Schroeder, of Bertolini, Schroeder & Blount, for appellant.

Kevin J. McCoy, of Smith, Gardner, Slusky, Lazer, Pohren & Rogers, L.L.P., for appellee.

SIEVERS, CARLSON, and CASSEL, Judges.

CASSEL, Judge.

INTRODUCTION

In a suit based on an intentional assault, Trisha K. McCormick served Samuel M. Allmond with requests for admission, many of which Allmond denied. After a bench trial, McCormick secured a monetary judgment. The county court denied McCormick's

posttrial motion for fees and costs incurred in proving matters which Allmond had denied, and the district court affirmed the decision. Because McCormick's requests were both compound and unnecessarily confusing, we conclude that Allmond had a good reason for the failure to admit. We therefore affirm.

BACKGROUND

On April 16, 2005, in an incident best characterized as "road rage," Allmond intentionally hit McCormick in the face with his hand while McCormick was stopped at an intersection and sitting in the driver's seat of her vehicle. As a result, McCormick developed temporomandibular joint disorder. McCormick sought medical treatment and ultimately had surgery to treat the disorder.

On May 30, 2006, McCormick filed a complaint in county court alleging that she suffered temporomandibular joint disorder, contusions, headaches, swelling, and malocclusion as a result of the incident. After a bench trial on the merits of the case, the county court awarded McCormick a judgment in the amount of $50,000 for "total damages sustained plus costs." The court did not allocate the award to any specific category of damages but stated that where the treatment provider indicated that the symptoms were "strictly viral [or] diabetes related," such losses were not recoverable.

After trial, McCormick filed a motion pursuant to Neb. Ct. R. Disc. § 6-337(c) for "fees and costs" resulting from Allmond's failure to "admit the fairness and reasonableness of certain medical expenses and the necessity of the treatment behind such expense." The evidence adduced on McCormick's posttrial motion shows that in January 2007, during the discovery phase of the case and prior to trial, McCormick sent Allmond 31 requests for admission. This included 16 requests for admission regarding medical treatment, which were phrased as follows: "Admit (or deny) that as a direct and proximate result of the blow you inflicted upon . . . McCormick, on April 16, 2005, she was charged by [medical provider] for necessary [medical services] the fair and reasonable sum of $ . . . [pursuant to attached invoices]." In response, Allmond denied all such requests.

At the hearing on the motion for sanctions, McCormick offered into evidence the requests for admission, Allmond's response to the requests, and an affidavit by McCormick's counsel setting forth the expenses incurred in proving the matters to which Allmond did not admit. McCormick also requested that the court take judicial notice of her trial testimony and the trial testimony of a number of medical and medical billing witnesses. The county court denied McCormick's motion on the ground contained in § 6-337(c)(3) because the court found that Allmond had "reasonable grounds upon which he believed he may prevail on the merits at trial."

McCormick appealed to the district court, which affirmed the county court's order. The district court's order also stated that the ground set forth in § 6-337(c)(4), that "'[t]here was other good reason for the failure to admit,'" was an additional ground for affirming the order.

McCormick timely appeals.

ASSIGNMENTS OF ERROR

McCormick assigns, restated, that the district court erred in (1) failing to reverse the county court's decision to deny her motion for expenses and fees pursuant to § 6-337(c), (2) failing to reverse the county court's decision on the ground that the county court used evidence not contained in the record in making its decision, (3) adopting the findings and conclusions of the county court, and (4) finding that there were other good reasons for failure to admit pursuant to § 6-337(c)(4).

STANDARD OF REVIEW

[1,2] On appellate review, decisions regarding discovery are generally reviewed under an abuse of discretion standard. *Malchow v. Doyle*, 275 Neb. 530, 748 N.W.2d 28 (2008). The standard of review of a trial court's determination of a request for sanctions is whether the trial court abused its discretion. *Id.*

ANALYSIS

Evidentiary Record.

McCormick argues that the county court improperly considered evidence presented at trial in the hearing for discovery

sanctions. McCormick points to the introductory phrase of a sentence in the county court's order which states, "*As the parties*[*'*] *evidence placed both causation and necessity of care in issue*, pursuant to [§ 6-337(c)(3)] the court finds that [Allmond] had reasonable grounds upon which he believed he may prevail on the merits at trial." (Emphasis supplied.) McCormick argues that the introductory phrase refers to the evidence adduced at trial and not to the evidence introduced at the hearing on the posttrial motion. At the hearing on the posttrial motion, the only evidence offered and received was composed of transcriptions of McCormick's witnesses' trial testimony (included in the record after the court took judicial notice of such at McCormick's request), the exhibits introduced during her witnesses' testimony, and the requests and the responses to such requests.

[3] Pursuant to *Kaminski v. Bass*, 252 Neb. 760, 768, 567 N.W.2d 118, 124 (1997), in determining whether to award sanctions pursuant to § 6-337(c), the trial court may consider the "evidence established and produced *at that hearing*" only.

The court's statement regarding "the parties[*'*] evidence" does not establish that the court improperly considered evidence outside the scope of the hearing on sanctions. The sentence immediately preceding the one which we quoted states that "the discovery answers in evidence placed at issue material facts upon which the parties based their theories of recovery." The most logical conclusion is that in subsequently referring to "evidence" that "placed both causation and necessity of care in issue," the court was referring to the discovery answers which were properly admitted into evidence. The conclusion that the county court did not utilize improper evidence in reaching its decision is further supported by the fact that the court's order did not make a direct reference to any material outside the scope of the evidence adduced at the hearing for sanctions.

Costs.

[4] The remainder of McCormick's argument is that the county court abused its discretion in failing to award her the

costs she incurred in proving the truthfulness of requests for admission that Allmond had denied. We briefly set forth the applicable law. Section 6-337(c) provides as follows regarding the recovery of such costs:

> Expenses on Failure to Admit. If a party fails to admit the genuineness of any document or the truth of any matter as requested under Rule 36, and if the party requesting the admissions thereafter proves the genuineness of the document or the truth of the matter, he or she may, within 30 days of so proving, apply to the court for an order requiring the other party to pay him or her the reasonable expenses incurred in making that proof, including reasonable attorney fees. The court shall make the order unless it finds that:
>
> (1) The request was held objectionable pursuant to Rule 36(a), or
>
> (2) The admission sought was of no substantial importance, or
>
> (3) The party failing to admit had reasonable ground to believe that he or she might prevail on the matter, or
>
> (4) There was other good reason for the failure to admit.

The party making the motion for sanctions has the burden to prove the truth of the matter that was previously denied and that reasonable expenses were incurred in doing so. The burden then shifts to the nonmoving party to prove that one of the four exceptions stated in § 6-337(c) applies. See *Salazar v. Scotts Bluff Cty.*, 266 Neb. 444, 665 N.W.2d 659 (2003).

We assume without deciding that McCormick sustained her burden of proof and that the burden then shifted to Allmond regarding one or more of the exceptions.

[5] The question then becomes whether Allmond proved one or more of the exceptions contained in § 6-337(c), and we particularly focus on § 6-337(c)(4). It does not matter that this is a different ground from the one stated by the county court. Where the record adequately demonstrates that the decision of the trial court is correct, although such correctness is based on a ground or reason different from that assigned by the trial court, an appellate court will affirm. *Harvey v. Nebraska*

Life & Health Ins. Guar. Assn., 277 Neb. 757, 765 N.W.2d 206 (2009).

[6] The county court's denial of McCormick's motion for costs was not an abuse of discretion because "[t]here was other good reason for the failure to admit" pursuant to § 6-337(c)(4). The "good reason" is found in the form of the requests for admission. The requests were confusing due to their overly complicated syntax and their compound structure. A request for admission should be straightforward and simple. Pursuant to Neb. Ct. R. Disc. § 6-336(a), "[e]ach matter of which an admission is requested shall be separately set forth by the party making the request . . . ." Further, the request itself is supposed to be easy to answer.

A treatise on federal practice, which is in part based on federal precedent regarding the corresponding federal discovery rule, provides support for our conclusion. Nebraska courts will look to federal decisions interpreting corresponding federal rules for guidance in interpreting similar Nebraska civil pleading rules. *Blinn v. Beatrice Community Hosp. & Health Ctr.*, 270 Neb. 809, 708 N.W.2d 235 (2006). Based on federal decisions, the treatise explains how requests for admissions are to be drafted, stating:

> The requesting party bears the burden of drafting the request clearly and specifically so that the responding party can easily agree or disagree. When a request for admission is properly drafted, the answering party should have little or no difficulty responding. In response to an unambiguous, succinct, but specific request for admission the responding party should simply be able to agree or disagree with the request, that is, to admit or deny the request, to explain succinctly why it is not possible to answer, or to offer any other necessary qualification.

7 James Wm. Moore et al., Moore's Federal Practice ¶ 36.10[6] at 36-24 to 36-25 (3d ed. 2009). See, also, 8A Charles Alan Wright et al., Federal Practice and Procedure § 2258 (2d ed. 1994).

First, McCormick admits that she was actually requesting admissions on multiple subject matters, which means the requests at issue were compound. In our review of the

requests, it appears that McCormick was using a single request to seek admissions of at least four separate matters. McCormick requested that Allmond admit (1) that the blow inflicted by Allmond was the proximate cause of McCormick's injuries, (2) that the injuries necessitated medical treatment, (3) that McCormick incurred particular medical expenses, and (4) that the amount of the expenses was fair and reasonable. Clearly, each of these matters is a separate topic and, pursuant to § 6-336(a), should have been the subject of a separate request.

Second, the compound nature of the requests is disguised by the use of complicated syntax which melds all of the requests into a single sentence. In part, McCormick added the adjectives "necessary," "fair," and "reasonable" to describe the medical expenses without directly requesting an admission that the medical expenses were as such. We do not condone the practice of adding adjectives to a request in such a manner that an admission to one item would also become an admission to additional unrelated items. A request for admission should necessitate only a simple response—not one where the entire request must be dissected into separate, unrelated parts and answered as such. Because McCormick's requests were compound and unnecessarily complicated, we conclude that "[t]here was other good reason for the failure to admit" pursuant to § 6-337(c)(4).

We reject McCormick's contention that pursuant to § 6-336(a), good faith required that Allmond deny only a portion of the request and admit to the remainder. While this principle may require a partial admission in some instances, it does not control the outcome in the instant case. As we have previously noted, another portion of § 6-336(a) requires that each discovery request pertain to only one subject matter. These two provisions read together indicate that a party has the duty to provide a partial denial only where the entire request pertains to a particular subject matter. For example, this would be true in a situation where McCormick requested that Allmond admit that McCormick's medical expenses were $500 but McCormick only incurred $400 in medical expenses. Therefore, this argument lacks merit.

CONCLUSION

Because the requests for admission at issue were compound and unnecessarily complicated, we affirm the district court's judgment affirming the county court's decision denying McCormick's motion for the costs she incurred in proving the matters contained therein.

AFFIRMED.

IN RE INTEREST OF ETHAN M., A CHILD UNDER 18 YEARS OF AGE. STATE OF NEBRASKA, APPELLEE, V. THERESA S., APPELLEE, AND DANIEL M., APPELLANT.

774 N.W.2d 766

Filed October 13, 2009. No. A-09-282.

1. **Judgments: Appeal and Error.** When reviewing questions of law, an appellate court has an obligation to resolve the questions independently of the conclusion reached by the trial court.
2. **Juvenile Courts: Jurisdiction.** A county court or separate juvenile court which already has jurisdiction over the child whose paternity or custody is to be determined has jurisdiction over such paternity or custody determination.
3. **Child Custody.** Pursuant to Neb. Rev. Stat. § 25-2740(1)(b) (Reissue 2008), a custody determination is defined as a proceeding to determine custody of a child under Neb. Rev. Stat. § 42-364 (Reissue 2008).
4. ____. 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.
5. ____. Pursuant to Neb. Rev. Stat. § 42-364(6) (Reissue 2008), a custody modification action shall be commenced by filing a complaint to modify.
6. **Juvenile Courts: Final Orders.** Orders determining where a juvenile will be placed are dispositional in nature.
7. **Juvenile Courts: Jurisdiction.** The juvenile court's jurisdiction over any individual adjudged to be within the provisions of Neb. Rev. Stat. § 43-247 (Reissue 2008) shall continue until the individual reaches the age of majority or the court otherwise discharges the individual from its jurisdiction.
8. **Juvenile Courts: Jurisdiction: Statutes.** The juvenile court is a court of limited jurisdiction. As a statutorily created court of limited and special jurisdiction, a juvenile court has only such authority as has been conferred on it by statute.
9. **Juvenile Courts: Jurisdiction: Parental Rights: Proof.** When a juvenile court does not have jurisdiction, it has no power to order a parent to comply with a rehabilitation plan, nor does the juvenile court have any power over the parent or child at the disposition hearing unless jurisdiction is alleged and proven by new facts at a new adjudication-disposition hearing.

10. **Appeal and Error: Words and Phrases.** Plain error exists where there is an 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.

Appeal from the County Court for Sherman County: GARY G. WASHBURN, Judge. Reversed and remanded for further proceedings.

Jerom E. Janulewicz, of Mayer, Burns, Koenig & Janulewicz, for appellant.

Mark L. Eurek, Sherman County Attorney, and Monika E. Anderson, Special Assistant Attorney General, for appellee State of Nebraska.

Jason S. White for appellee Theresa S.

William J. Erickson, guardian ad litem.

SIEVERS, CARLSON, and CASSEL, Judges.

CASSEL, Judge.

INTRODUCTION

Previously, in *In re Interest of Ethan M.*, 15 Neb. App. 148, 723 N.W.2d 363 (2006), we decided that reasonable efforts had to be made to reunite Ethan M. with his father, Daniel M., who has primary physical custody of Ethan pursuant to a divorce decree. Ethan was never returned to his father and is still placed with his mother, Theresa S. In the instant case, the county court entered an order adopting a case plan which purported to terminate almost all of Ethan's parenting time with Daniel; placed care, custody, and control of Ethan with Theresa; and dismissed the juvenile case. Because the order does not permanently modify child custody and is a dispositional order, the dismissal of this case will render the remainder of the court's final order unenforceable. Because the only remaining enforceable order regarding child custody is the divorce decree placing physical custody of Ethan with Daniel and neither the court nor the Department of Health and Human Services (DHHS) intended this outcome, we find that the county court committed

plain error in entering such an order and remand this cause for further proceedings consistent with this decision.

BACKGROUND

Ethan is the child of Daniel and Theresa. When they divorced, Daniel received primary physical custody of Ethan pursuant to a divorce decree. While Ethan was in Daniel's custody, Daniel lived with and later married Amanda H., who had custody of her two children. According to our previous opinion, while Amanda and Daniel lived together but before they married, Amanda's two children suffered serious bodily injuries. Both of Amanda's children and Ethan were removed from the home and adjudicated to be children within the meaning of Neb. Rev. Stat. § 43-247(3)(a) (Reissue 2004). However, in this time period, Ethan sustained no physical injuries and was not abused or neglected.

The county court found that DHHS did not have to make reasonable efforts to reunify the family pursuant to Neb. Rev. Stat. § 43-283.01(4) (Reissue 2004) because a parent had "subjected the juvenile to aggravated circumstances, including, but not limited to . . . chronic abuse." Based upon this finding, the court placed Ethan with his mother, who resided in California. This was the matter before us in *In re Interest of Ethan M., supra*, where we reversed the county court's finding regarding reasonable efforts as to Ethan because (1) Amanda did not fulfill the statutory definition of "parent" as to Ethan, since she was not married to Daniel when the petition for adjudication was filed, and (2) Daniel had not harmed his own children. We ordered that "Ethan should be placed in a situation in Nebraska that is conducive to reunification with Daniel," but did not order that Ethan be immediately returned to Daniel's custody because Daniel was then married to Amanda, who had admitted to abusing one of her own children. *Id.* at 158, 723 N.W.2d at 371.

Ethan subsequently returned to Nebraska and resided with Theresa and her current husband. Upon Ethan's return, DHHS arranged for supervised in-person visitation between Daniel and Ethan. The visits were to occur weekly. This visitation began in June 2007. In August, after Ethan was hospitalized

for mental health issues, the visitation became therapeutic visitation, which meant that it was supervised by a mental health professional. In September, the visitation ceased because DHHS was unable to find a mental health professional who could provide supervision. In-person visitation has not resumed. The only other interaction which Ethan has with his father consists of telephonic visitation which DHHS arranged to occur on Tuesdays and Thursdays. Ethan often ends these telephone calls quickly or refuses to speak with his father. However, this form of visitation was ongoing at the time of trial.

Ethan has been diagnosed with mental health problems requiring extensive treatment, including anxiety disorder and attention deficit hyperactivity disorder. Psychological reports did not reach any clear conclusion about the source of Ethan's problems. However, in totality, evidence adduced from mental health professionals suggests that Ethan's symptoms are consistent with either (1) Daniel's abusing either Ethan or Ethan's stepsiblings, which abuse may have been real, greatly enhanced by Ethan's reports, or imagined, or (2) neglect and numerous changes. Additionally, the general consensus of the mental health professionals who have seen Ethan is that he is imaginative and does not always tell the truth.

After Ethan returned from California, he repeatedly expressed that he hated his father, was fearful of him, and believed that he abused children. According to a licensed mental health professional who worked extensively with Ethan, Ethan expressed severe anxiety regarding visits with his father. Further, Theresa may have been making statements to Ethan to encourage him to express his dislike for his father. The record reflects that Ethan did not have such extensive problems in his relationship with his father after he was removed from his father's care but prior to moving to California. At that time, Ethan had regular visitation with Daniel and was not fearful of Daniel. The records of visitation reflect that there were no serious problems, but that Ethan would often become very upset when things did not go his way.

Daniel's living situation has changed because he separated from Amanda. Daniel was convicted of stalking Amanda and charged with violating a protection order. Theresa also has

certain problems in that she has a longstanding diagnosis of bipolar disorder.

Ultimately, DHHS submitted a case plan to the county court dated January 15, 2009, which recommended that "the care, custody, and control of . . . Ethan be moved to Theresa," that telephonic visitation continue, that "Ethan's therapist work[] with Ethan on having contact with his father again sometime in the future when Ethan is ready," and that the case be dismissed. At a January 22 proceeding, the court heard Daniel's objection to the plan, his motion for a change in Ethan's placement, and his motion to require DHHS to make reasonable efforts to reunify him with Ethan.

On February 20, 2009, the court adopted the DHHS case plan. The court found that "the evidence failed to establish that the plan was contrary to the best interest[s] of the juvenile." The court determined that reasonable efforts to reunify were no longer necessary as to Daniel. In the same vein, the court found that the permanency plan had changed from reunification with the father to placement with the mother; ordered that "the care, custody[,] and control of Ethan . . . be placed with Theresa"; and dismissed the case.

Daniel timely appeals.

ASSIGNMENTS OF ERROR

Daniel alleges, restated, that the county court erred in (1) finding that reasonable efforts were made toward reunification; (2) finding that a lack of progress was made toward reunification; (3) finding that Daniel failed to fulfill his burden to prove that the DHHS case plan was not in Ethan's best interests; (4) approving and adopting the DHHS case plan, placing custody of Ethan with his mother, and dismissing the juvenile case; and (5) entering a decision contrary to our previous opinion in this matter.

STANDARD OF REVIEW

[1] When reviewing questions of law, an appellate court has an obligation to resolve the questions independently of the conclusion reached by the trial court. *Harvey v. Nebraska Life & Health Ins. Guar. Assn.*, 277 Neb. 757, 765 N.W.2d 206 (2009).

ANALYSIS

Briefly summarized, Daniel's assignments of error are all related to the fact that the county court's order purported to place custody of Ethan with Theresa and practically eliminate his parenting time, but did not require DHHS to make any further efforts to reunify him with Ethan. Further, the parties premise their arguments on a belief that the county court's order modified the previous custody determination. Thus, in order to reach Daniel's assigned errors, we are required to first determine the effect of the county court's final order. Ultimately, we do not reach Daniel's assigned errors because we find plain error in the final order.

Final Order Does Not Modify Child Custody.

First, because the parties seem to have interpreted the county court's order as a permanent determination of child custody, we must determine whether the order has such effect. Daniel's understanding of the situation is that "custody has been placed with [the] mother" and that the court's order "provides no mechanism to re-evaluate at any time in the future the re-establishment of visitation between Ethan and [Daniel]." Brief for appellant at 19, 16. The brief submitted by DHHS, the county attorney, the guardian ad litem, and Theresa explicitly states that the county court's order was a "custody determination." Brief for appellees at 12. However, we conclude that this interpretation is not correct. In this instance, because custody had already been determined pursuant to a divorce decree, a custody determination would consist of a custody modification order. Because we conclude that no custody modification proceeding occurred, the court could not enter an order modifying child custody.

[2,3] We begin by noting that a county court sitting as a juvenile court has the power to conduct a child custody modification proceeding because it has been granted subject matter jurisdiction to do so. Pursuant to 2008 Neb. Laws, L.B. 280, the Legislature modified the jurisdiction of juvenile courts and county courts sitting as juvenile courts so that these courts could exercise jurisdiction over custody matters when the court already has jurisdiction over the juvenile for another purpose.

See Neb. Rev. Stat. §§ 24-517, 25-2740, and 43-247 (Reissue 2008). In this regard, § 25-2740(3) provides that "a county court or separate juvenile court which already has jurisdiction over the child whose paternity or custody is to be determined has jurisdiction over such paternity or custody determination." Pursuant to § 25-2740(1)(b), a custody determination is defined as a proceeding "to determine custody of a child under [Neb. Rev. Stat. §] 42-364 [(Reissue 2008)]." Neb. Rev. Stat. § 42-364 (Reissue 2008) pertains to custody actions including those involving "[m]odification proceedings." Prior to the passage of L.B. 280, juvenile courts and county courts sitting as juvenile courts did not have subject matter jurisdiction over such proceedings.

In the instant case, the county court could have exercised this jurisdiction to modify custody because Ethan was already within the court's jurisdiction as a child found to be within the meaning of § 43-247(3)(a) and a modification is a "custody determination" pursuant to § 42-364.

However, we conclude that the county court did not exercise such jurisdiction. We conclude that in passing L.B. 280, the Legislature's explicit intent was to vest the juvenile courts and the county courts with jurisdiction to make a custody determination pursuant to § 42-364 under the same standards applicable to a custody modification proceeding heard in district court. First, L.B. 280 incorporates other statutes which normally govern the applicable procedure in all other custody proceedings. Section 25-2740(1)(b) and (3), as amended by L.B. 280, provides for juvenile courts to have jurisdiction over "proceedings to establish the paternity of a child under sections 43-1411 to 43-1418 or proceedings to determine custody of a child under section 42-364." Section 42-364 generally sets forth the procedure and applicable standards for the determination of custody in paternity actions, dissolution proceedings, and the modification of custody orders. See, § 42-364 (specifying that it governs actions "under Chapter 42," which are dissolution proceedings); *State on behalf of Pathammavong v. Pathammavong*, 268 Neb. 1, 679 N.W.2d 749 (2004) (applying § 42-364 to custody determination in paternity action). Second, L.B. 280 does not amend § 42-364, provide a procedure

separate from § 42-364, or purport to modify any other rule governing the determination of custody in dissolution proceedings, paternity actions, or modification proceedings. It simply provides for jurisdiction.

For the sake of completeness, we have reviewed the legislative history of L.B. 280, which shows that in passing L.B. 280, the Legislature did not intend to modify procedure, but, rather, intended to expand the jurisdiction of juvenile and county courts. Senator Arnie Stuthman, in introducing this bill on the floor of the Legislature, explained the purpose of L.B. 280 as follows:

> LB 280 would give juvenile courts the jurisdiction to enter permanent custody orders for children that are involved in a juvenile case. In 2003 the Nebraska Supreme Court handed down a decision, Ponseigo v. Mary W., [267 Neb. 72, 672 N.W.2d 36 (2003),] that has been interpreted by the courts to mean that the district court has no jurisdiction to decide final custody of children when there is an accompanying juvenile action. Juvenile courts currently have no statutory authority to determine custody. Under the current statute and case law, the district courts and juvenile courts are unable to address the necessary amendments regarding physical placement or physical custody, and child support determinations to divorce, modification cases, or paternity custody actions when the parents were never married, that may be necessary to achieve permanency for children who have been made ward[s] of the state. . . . Some children, therefore, remain in limbo in juvenile court because custody cannot be established in juvenile court. Giving juvenile courts authority to enter final custody orders in cases in which the juvenile court is already involved would provide a timelier placement for children in state custody.

Floor Debate, L.B. 280, 100th Leg., 2d Sess. 30-31 (Feb. 6, 2008). From Senator Stuthman's statement regarding *Ponseigo v. Mary W.*, 267 Neb. 72, 672 N.W.2d 36 (2003), it is readily apparent that the primary purpose of L.B. 280 was to remedy the problem that the district court, which normally determines custody, could not do so when the child was under the jurisdiction

of the juvenile court. In *Ponseigo v. Mary W.*, the Nebraska Supreme Court determined that the district court did not have jurisdiction to award grandparent visitation where the juvenile court had jurisdiction over the minor pursuant to § 43-247(3) (Reissue 1998). This decision was in part based on the court's determination that a juvenile court has exclusive jurisdiction over a juvenile adjudicated to be within § 43-247(3). Thus, it seems that Senator Stuthman wanted to ensure that there was a court which could fulfill the role normally played by the district court in custody determinations—not to change the nature of custody determination proceedings. Because none of the additional legislative history indicates any legislative intent to materially modify the procedure in a custody determination, it appears that the Legislature simply intended to transplant custody proceedings from district court to juvenile and county courts under particular circumstances during certain juvenile proceedings—not to modify the procedure applicable to a custody proceeding.

[4] Thus, in the instant case, in order to modify custody, the county court was supposed to conduct a custody modification proceeding in the manner that a custody modification proceeding is normally conducted in district court. However, in substance, there was no proceeding that resembled a custody modification proceeding. First and most importantly, the county court applied an incorrect standard of proof. 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. *Heistand v. Heistand*, 267 Neb. 300, 673 N.W.2d 541 (2004). In the instant case, the court modified custody based upon its finding that "the evidence failed to establish that [DHHS'] plan [which changed custody] was contrary to the best interests of the juvenile." This is the correct standard of proof for the approval of a DHHS case plan pursuant to Neb. Rev. Stat. § 43-285(2) (Reissue 2008), but it is not the standard of proof in a custody modification action. Under the standard the court applied, Theresa received custody because Daniel was unable to disprove that it was in Ethan's best interests. Under the custody modification standard, the

moving party, whether it was the State or Theresa, would have to prove both that there was a material change in circumstances and that it was in Ethan's best interests that custody be granted to Theresa.

[5] Second, the court did not even purport to follow certain requirements contained in § 42-364 which apply to modification actions. Pursuant to § 42-364(6), a custody modification action "shall be commenced by filing a complaint to modify." No such complaint was filed. Theresa filed a "motion for custody" which she withdrew and is not contained in the record. Additionally, the court failed to enter a parenting plan or calculate child support. In an action "involving child support, child custody, parenting time, visitation, or other access," § 42-364(1) requires that the final order incorporate a parenting plan and a child support order. Neither of these items was incorporated into the final order or discussed on the record.

For these reasons, we conclude that the county court did not conduct any proceeding which remotely resembled a child custody proceeding. We hold that where the only issue placed in front of the county court is whether a case plan is in the child's best interests, permanent child custody cannot be modified merely through the adoption of the case plan. However, we also emphasize that a case plan could be used to place a child with a noncustodial parent as a dispositional order under the continuing supervision of the juvenile court.

Effect of Order.

[6] Because the county court's order does not modify custody, we must determine its precise effect. Since the county court's order places "custody" of Ethan with Theresa, it is best characterized as a dispositional order. Orders determining where a juvenile will be placed are dispositional in nature. *In re Interest of Taylor W.*, 276 Neb. 679, 757 N.W.2d 1 (2008). Additionally, a dispositional order can include a court-ordered plan for parental rehabilitation, see *In re Interest of Ty M. & Devon M.*, 265 Neb. 150, 655 N.W.2d 672 (2003), or services for the child, see *In re Interest of Emily C.*, 15 Neb. App. 847, 738 N.W.2d 858 (2007). In light of the fact that this is a dispositional order and also dismissed the juvenile case, we must determine its effect on Ethan's placement.

[7] By dismissing the case, the county court terminated its jurisdiction over the juvenile case. Section 43-247 (Reissue 2004) provides that "the juvenile court's jurisdiction over any individual adjudged to be within the provisions of this section shall continue until the individual reaches the age of majority or the court otherwise discharges the individual from its jurisdiction." Thus, the county court had the power to dismiss Ethan's case and, by doing so, ended the court's jurisdiction over the child.

[8,9] Once the county court's jurisdiction ends, it lacks the power to enforce its previous dispositional orders. The juvenile court is a court of limited jurisdiction. As a statutorily created court of limited and special jurisdiction, a juvenile court has only such authority as has been conferred on it by statute. *In re Interest of Dustin S.*, 276 Neb. 635, 756 N.W.2d 277 (2008). The Nebraska Supreme Court has previously explained what happens when a juvenile court lacks jurisdiction in the context of an invalid adjudication. See *In re Interest of D.M.B.*, 240 Neb. 349, 481 N.W.2d 905 (1992). In *In re Interest of D.M.B.*, the Supreme Court explained that when a juvenile court does not have jurisdiction, it has "no power . . . to order a parent to comply with a rehabilitation plan, nor does the juvenile court have any power over the parent or child at the disposition hearing unless jurisdiction is alleged and proven by new facts at a new adjudication-disposition hearing." 240 Neb. at 352, 481 N.W.2d at 909. Although the context of the instant case is different, the concept is the same. Where a juvenile court lacks jurisdiction, it lacks the power to require the parties to comply with its dispositional orders.

Although this premise has not previously been made explicit in the context of a juvenile court's terminating its jurisdiction, it has been applied implicitly. When this court and the Nebraska Supreme Court have reviewed juvenile courts' decisions whether to terminate jurisdiction, we have equated the termination of jurisdiction with the termination of court-ordered services and out-of-home placement. The most pertinent example is *In re Interest of L.P. and R.P.*, 240 Neb. 112, 480 N.W.2d 421 (1992), where in reversing the juvenile court's decision to terminate jurisdiction over

juveniles adjudicated to be within § 43-247(3)(a) (Reissue 1988), the Nebraska Supreme Court considered that the children would be returned to a potentially abusive parent if the juvenile court's jurisdiction were terminated. Additionally, in *In re Interest of Emily C.*, 15 Neb. App. 847, 738 N.W.2d 858 (2007), this court affirmed the juvenile court's decision to retain jurisdiction over a juvenile adjudicated to be within § 43-247(3)(b) (Reissue 2004) for truancy because the juvenile continued to need an out-of-home placement to deal with truancy-related issues. Finally, in *In re Interest of Vincent P.*, 15 Neb. App. 437, 445, 730 N.W.2d 403, 409 (2007), in affirming a county court's decision not to terminate jurisdiction over a juvenile adjudicated to be within § 43-247(3)(b) (Cum. Supp. 2002) for sexually assaulting a child, we considered the fact that the juvenile "would benefit from continued therapy and supervision."

Therefore, it is clear that the termination of the county court's jurisdiction over Ethan's juvenile case will render the court powerless to enforce its dispositional orders, including the court's order placing Ethan with Theresa. Because the county court did not permanently modify custody, the placement will become ineffective once the order becomes final. The sole remaining order controlling child custody is the divorce decree, which places primary physical custody of Ethan with Daniel. From the face of the county court's order, it is clear that this is far from the court's intended result.

[10] We conclude that the county court's final order was plainly erroneous. Plain error exists where there is an 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. *Worth v. Kolbeck*, 273 Neb. 163, 728 N.W.2d 282 (2007). The order's stated purpose is to place "care, custody[,] and control of Ethan . . . with his mother, Theresa" as part of Ethan's permanency plan. Instead, the outcome is that custody of Ethan will be placed with Daniel. We therefore reverse the county court's termination of its jurisdiction over Ethan's juvenile case and remand

the cause for further dispositional proceedings consistent with this opinion.

CONCLUSION

Because the county court's final order has the opposite of its intended effect, it constitutes plain error. Because the juvenile court dismissed Ethan's juvenile case but did not enter any order having a permanent effect on Ethan's custody, the court lacks the power to enforce its placement of Ethan with Theresa. The only remaining effective order governing child custody is a divorce decree which places physical custody of Ethan with Daniel. This is not the placement intended by the county court. We therefore reverse the order entered by the county court dismissing Ethan's juvenile case and remand the cause for further proceedings consistent with this opinion.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

RONALD FRY, APPELLANT, V.
JANET R. FRY, APPELLEE.
775 N.W.2d 438

Filed October 27, 2009. No. A-09-011.

1. **Divorce: Judgments: Appeal and Error.** The meaning of a decree presents a question of law, in connection with which an appellate court reaches a conclusion independent of the determination reached by the court below.
2. **Divorce: Pensions: Appeal and Error.** Whether a subsequently entered qualified domestic relations order is consistent with the terms of the decree is to be determined as a matter of law.
3. **Divorce: Final Orders: Time.** A decree dissolving a marriage becomes final and operative 30 days after the decree is entered.
4. **Courts: Judgments.** A district court has the inherent power to determine the status of its judgments.
5. **Divorce: Pensions.** A qualified domestic relations order is, generally speaking, simply an enforcement device of the decree of dissolution.
6. **Divorce: Final Orders: Intent.** Once a decree for dissolution becomes final, its meaning is determined as a matter of law from the four corners of the decree itself.
7. **Divorce: Final Orders: Pensions.** Where the terms of a final decree are unambiguous, a qualified domestic relations order enforcing that decree must dispose of assets in the manner required by the decree.

8. **Judgments: Interest: Time.** Under Neb. Rev. Stat. § 45-103.01 (Reissue 2004), interest as provided in Neb. Rev. Stat. § 45-103 (Reissue 2004) shall accrue on decrees and judgments for the payment of money from the date of entry of judgment until satisfaction of judgment.
9. **Equity: Judgments: Interest.** The language of Neb. Rev. Stat. § 45-103.01 (Reissue 2004) is mandatory, and a court of equity does not have discretion to withhold interest on decrees or judgments for the payment of money.
10. **Judgments.** A decree or judgment for the payment of money is one which is immediately due and collectible where its nonpayment is a breach of duty on a judgment debtor.
11. **Courts.** Vertical stare decisis compels lower courts to follow strictly the decisions rendered by higher courts within the same judicial system.

Appeal from the District Court for Douglas County: THOMAS A. OTEPKA, Judge. Affirmed.

David A. Domina and Mark D. Raffety, of Domina Law Group, P.C., L.L.O., for appellant.

Susan A. Anderson, of Anderson & Bressman Law Firm, P.C., L.L.O., for appellee.

SIEVERS, CARLSON, and CASSEL, Judges.

CASSEL, Judge.

INTRODUCTION

Over 2 years after entry of an unappealed divorce decree, the parties filed motions seeking to compel the entry of a qualified domestic relations order (QDRO) to comply with the decree. After various orders and motions to amend, the district court entered the operative QDRO, which awarded an amount referenced in the decree but also included postjudgment interest. We conclude that the court had jurisdiction to enter the QDRO, that it correctly construed the decree, and that it did not err in ordering postjudgment interest.

BACKGROUND

The district court dissolved the marriage of Ronald Fry and Janet R. Fry in a July 17, 2006, decree of dissolution. Pertinent to this appeal is the following provision:

> 14. Profit[-]Sharing Plan. [Ronald] enjoys an American Bar Association AKC Profit[-]sharing plan with an accumulated value of $635,243 as of January 1, 2005. All of

> the accumulation has occurred during the course of the marriage. There are tax consequences for withdrawals from the plan by either party, but either party will determine by their own choices how and when the taxable events will occur. [Ronald] is awarded the profit[-]sharing plan. [Janet] is awarded a portion of the plan which is $182,599.00. Counsel shall prepare a [QDRO] to facilitate transfer of the funds.

On September 11, 2008, Ronald filed a motion to reopen the case and a motion to compel entry of the QDRO. Ronald attached a proposed QDRO which assigned to Janet $182,599 of Ronald's "total [a]ccrued [b]enefit as of the [a]ssignment [d]ate (July 14, 2006)." Four days later, Janet filed a motion to compel the entry of a QDRO, a copy of which she attached to her motion. Her proposed QDRO stated that her portion of the plan "shall be proportionately divided among the investments in the same manner as [Ronald's] account was allocated as of January 1, 2005[,] and allocated in a manner which assures that [Ronald] and [Janet] each receive an equal tax basis in their respective portion of said account."

On October 17, 2008, the court held a hearing and received exhibits. On October 30, the court entered an order on the motions. The court determined that the language of paragraph 14 of the decree was clear and unambiguous. The court found that the QDRO proposed by Ronald comported with the decree. Also on October 30, the court entered a QDRO. It awarded interest at the rate of 6.849 percent from July 17, 2006, until the amount was transferred to Janet.

On November 6, 2008, Ronald filed a motion to alter or amend the order, because the QDRO the court signed and attached was that proposed by Janet. Ronald alleged that ordering him to pay postjudgment interest was contrary to law and that it was unclear on what amount the interest was to be paid. On November 20, Janet filed a motion to amend the QDRO in which she stated that on November 13, she was advised that the exact amount of interest and the fund from which the amount should be withdrawn must be specified "as the Stable Asset Return Fund." She attached an amended QDRO to comply with "ABA Retirement Funds requirements."

After holding a hearing on November 25, 2008, the court entered an order on the motions on December 8. The court adopted the QDRO that Janet attached to her motion to amend because it directed that the specific sum contained in the decree, plus interest, be paid to her out of Ronald's profit-sharing plan. The court overruled Ronald's motion to alter or amend. On December 15, the court entered a second amended QDRO, which awarded Janet $182,599, together with interest thereon at the rate of 6.849 percent from July 17, 2006, until December 8, 2008, for a total of $212,576.50 ($182,599 + $29,977.50 in interest).

Ronald timely appeals.

ASSIGNMENTS OF ERROR

Ronald assigns three errors. First, he alleges that the district court lacked subject matter jurisdiction to issue an order construing the meaning of the decree more than 1 year after it was entered and without being asked to do so in a declaratory judgment action or under Neb. Rev. Stat. § 25-2001 (Reissue 2008). Second, he contends that the court misconstrued the decree as a matter of law in deciding to treat the division of retirement funds as a monetary judgment. Finally, Ronald claims that the court erred in treating the division of profit-sharing funds between the parties as a judgment against Ronald bearing postjudgment interest because Ronald could not satisfy the judgment by making a payment or taking any unilateral action to satisfy the profit-sharing funds awarded to Janet.

STANDARD OF REVIEW

[1] The meaning of a decree presents a question of law, in connection with which an appellate court reaches a conclusion independent of the determination reached by the court below. See *Strunk v. Chromy-Strunk*, 270 Neb. 917, 708 N.W.2d 821 (2006).

[2] Whether a subsequently entered QDRO is consistent with the terms of the decree is to be determined as a matter of law. See *Blaine v. Blaine*, 275 Neb. 87, 744 N.W.2d 444 (2008).

ANALYSIS

Jurisdiction.

[3] A decree dissolving a marriage becomes final and operative 30 days after the decree is entered. Neb. Rev. Stat. § 42-372.01 (Reissue 2008). See, also, Neb. Rev. Stat. § 42-372 (Reissue 2008). Neither party appealed from the decree, and Ronald asserts that the district court lacked jurisdiction to issue an order construing the dissolution decree more than 1 year after entry of the decree. He contends that only a declaratory judgment action under Neb. Rev. Stat. § 25-21,149 et seq. (Reissue 2008) or a timely proceeding under Neb. Rev. Stat. § 25-2001 et seq. (Reissue 2008) could have empowered the court to adjudicate what the original decree meant.

[4,5] A district court has the inherent power to determine the status of its judgments. *Jensen v. Jensen*, 275 Neb. 921, 750 N.W.2d 335 (2008). A QDRO is, generally speaking, simply an enforcement device of the decree of dissolution. *Blaine v. Blaine, supra*. Accordingly, we conclude that the court had jurisdiction to enter the QDRO disposing of Ronald's profit-sharing plan as set forth in the decree.

Construing Decree.

[6,7] Ronald next argues that the district court erred in construing the decree. It is well settled that once a decree for dissolution becomes final, its meaning is determined as a matter of law from the four corners of the decree itself. *Blaine v. Blaine, supra*. The district court found paragraph 14 of the decree to be unambiguous, and we agree. Where the terms of a final decree are unambiguous, a QDRO enforcing that decree must dispose of assets in the manner required by the decree. *Blaine v. Blaine, supra*. In particular, the QDRO should reflect the value assigned and awarded in the decree. *Id.* The paragraph plainly awarded Ronald the profit-sharing plan and awarded Janet $182,599 from the plan. The QDRO entered by the court did just that, and we find no error. Next, we address the court's inclusion of interest in the QDRO.

Interest.

Ronald's final challenge concerns the court's award of post-judgment interest. The second amended QDRO awarded Janet $212,576.50, which amount included $29,977.50 in interest at 6.849 percent accumulated from July 17, 2006, until December 8, 2008.

[8-10] Under Neb. Rev. Stat. § 45-103.01 (Reissue 2004), "Interest as provided in section 45-103 shall accrue on decrees and judgments for the payment of money from the date of entry of judgment until satisfaction of judgment." The language of § 45-103.01 is mandatory, and a court of equity does not have discretion to withhold interest on decrees or judgments for the payment of money. *Bowers v. Lens*, 264 Neb. 465, 648 N.W.2d 294 (2002). A decree or judgment for the payment of money is one which is immediately due and collectible where its non-payment is a breach of duty on a judgment debtor. *Welch v. Welch*, 246 Neb. 435, 519 N.W.2d 262 (1994). Interest does not accrue until the debt becomes due. *Id.*

In *Cumming v. Cumming*, 193 Neb. 601, 228 N.W.2d 296 (1975), the Nebraska Supreme Court reasoned that although any or all of a $37,000 equalization payment may be paid at any time, none was required to be paid until the petitioner received the distribution of her share from her father's estate. The court therefore determined that interest on the unpaid balance of the $37,000 judgment would accrue from the date of the decree of distribution assigning her share of her father's estate. Subsequently, in *Kullbom v. Kullbom*, 215 Neb. 148, 337 N.W.2d 731 (1983), the Nebraska Supreme Court appeared to change course. In *Kullbom*, a decree ordered appellee to pay $37,566.75 of his pension and profit-sharing trusts to appellant as part of the property division, but he was not required to make any part of the payment until he received a distribution from the trusts. The district court did not award any interest on appellant's share of the trusts. On appeal, the *Kullbom* court cited and discussed *Cumming*, but the majority then determined that interest on any unpaid balance of the $37,566.75 shall accrue from the date of the divorce decree, "which was when the [d]istrict [c]ourt should have assigned to appellant her share of appellee's pension

and profit-sharing trusts." *Kullbom*, 215 Neb. at 150, 337 N.W.2d at 732.

[11] Vertical stare decisis compels lower courts to follow strictly the decisions rendered by higher courts within the same judicial system. *State v. Hausmann*, 277 Neb. 819, 765 N.W.2d 219 (2009). Based upon *Kullbom*, the district court did not err in awarding interest from July 17, 2006—the date of the divorce decree—because that is when Janet was assigned her share of Ronald's profit-sharing plan.

Before closing, we emphasize that the difficulties posed by this appeal could have been eliminated by care and precision in the drafting of the decree and, where the trial court determined use of a QDRO was appropriate, by prompt entry of the necessary order. We have noted numerous recent instances of cases involving substantial delay in the entry of a QDRO. See, *Schwartz v. Schwartz*, 275 Neb. 492, 747 N.W.2d 400 (2008); *Blaine v. Blaine*, 275 Neb. 87, 744 N.W.2d 444 (2008); *Klimek v. Klimek, post* p. 82, 775 N.W.2d 444 (2009); *Incontro v. Incontro*, No. A-01-1068, 2003 WL 1962884 (Neb. App. Apr. 29, 2003) (not designated for permanent publication). Manifestly, the failure to promptly follow through with appropriate orders has resulted in unnecessary delay and considerable expense. The statutory requirements for a QDRO are not complex. See, I.R.C. § 414(p) (2000); 29 U.S.C. § 1056(d)(3) (2006). The Internal Revenue Service has issued publications intended to assist attorneys in drafting a QDRO. See I.R.S. Notice 97-11, 1997-1 C.B. 379.

We suggest that the ultimate responsibility for assuring that a proper decree is entered, and for entry of a QDRO if the court determines that the situation so requires, rests upon the trial judge. While the judge may call upon the assistance of counsel, the decree and the QDRO are orders of a court and not mere agreements of the parties. Consequently, the responsibility for the entry of a necessary QDRO is the trial court's. Ideally, the QDRO should be entered simultaneously with the decree, if not actually made a part thereof. In this way, the parties know exactly how the pension or retirement accounts will be divided, as will we, in the event of an appeal. To that end, trial courts should seriously consider requiring submission of proposed

QDRO's at the time of trial or along with a decree that the court directs counsel to prepare. While a decree making a division of retirement accounts and providing for a later QDRO is final because the QDRO is merely a tool for enforcement of the decree, see *Blaine v. Blaine, supra*, the delay in entry of a QDRO invites complications and potentially additional expense and litigation, all of which can, and should, be avoided. To that end, we encourage trial courts to implement procedures to ensure that their responsibility to enter QDRO's is fulfilled at the same time as the decree is entered, bearing in mind that in practice, the drafting of a QDRO may require approval by the retirement plan administrator, which counsel can secure prior to submitting the QDRO to the court.

CONCLUSION

Even though more than 2 years passed following entry of an unappealed decree, we conclude that the district court had jurisdiction to enter the QDRO in accordance with the terms of the decree, because a QDRO is merely an enforcement device. Based upon *Kullbom v. Kullbom*, 215 Neb. 148, 337 N.W.2d 731 (1983), we conclude that the court did not err in awarding judgment interest on Janet's share of the profit-sharing plan accruing from the date of the divorce decree.

AFFIRMED.

STACEY L. KLIMEK, APPELLEE AND CROSS-APPELLANT, V. DANIEL D. KLIMEK, APPELLANT AND CROSS-APPELLEE.

775 N.W.2d 444

Filed October 27, 2009. No. A-09-023.

1. **Divorce: Child Custody: Child Support: Property Division: Alimony: Attorney Fees: Appeal and Error.** An appellate court's review in an action for dissolution of marriage is de novo on the record to determine whether there has been an abuse of discretion by the trial judge. This standard of review applies to the trial court's determinations regarding custody, child support, division of property, alimony, and attorney fees.
2. **Judges: Words and Phrases.** A judicial abuse of discretion requires that the reasons or rulings of a trial judge be clearly untenable, unfairly depriving a litigant of a substantial right and a just result.

3. **Divorce: Child Custody.** When custody of a minor child is an issue in a proceeding to dissolve the marriage of the child's parents, custody is determined by parental fitness and the child's best interests.
4. **Child Custody.** The court may place custody of minor children with both parents on a joint legal or physical custody basis, or both, when both parents agree to such or if the court specifically finds that joint custody is in the best interests of the minor children regardless of parental agreement or consent.
5. ____. When making custody determinations under Neb. Rev. Stat. § 42-364(3) (Reissue 2008), if both parties do not agree, the court can award joint custody only if it holds a hearing and makes the required finding that joint custody is in the best interests of the children.
6. **Divorce: Property Division.** The purpose of a property division is to distribute the marital assets equitably between the parties.
7. ____: ____. The equitable division of property is a three-step process: (1) The first step is to classify the parties' property as marital or nonmarital, (2) the second step is to value the marital assets and liabilities of the parties, and (3) the third step is to calculate and divide the net marital estate between the parties in accordance with the principles contained in the statute governing division of marital property.
8. **Divorce: Pensions.** A qualified domestic relations order is, generally speaking, simply an enforcement device of the decree of dissolution.
9. **Divorce: Property Division.** Although the division of property is not subject to a precise mathematical formula, the general rule is to award a spouse one-third to one-half of the marital estate, the polestar being fairness and reasonableness as determined by the facts of each case.
10. **Divorce: Property Division: Pensions.** Only that portion of a pension which is earned during the marriage is part of the marital estate.
11. **Divorce: Property Division: Pensions: Words and Phrases.** Simplified, the coverture formula provides that the numerator of the fraction used to determine the marital portion is essentially the number of months of credible service of the employed spouse while married and therefore is the pension contribution while married and that the denominator is the total number of months that the spouse has been or will be employed which resulted in the pension the employee will receive; this denominator number includes and will include the time the employed spouse worked before, during, and after the marriage.
12. **Appeal and Error.** Plain error may be asserted for the first time on appeal or be noted by an appellate court on its own motion.
13. **Appeal and Error: Words and Phrases.** Plain error exists where there is an 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.
14. **Divorce: Alimony: Property Division.** When dissolution of a marriage is decreed, the court may order payment of such alimony by one party to the other and division of property as may be reasonable, having regard for the circumstances of the parties, duration of the marriage, a history of the contributions to the marriage by each party, including contributions to the care and education of the children,

and interruption of personal careers or educational opportunities, and the ability of the supported party to engage in gainful employment without interfering with the interests of any minor children in the custody of such party.

15. **Alimony.** In considering the specific statutory criteria concerning an award of alimony, a court's polestar must be fairness and reasonableness as determined by the facts of each case; a court is also to consider the income and earning capacity of each party, as well as the general equities of each situation.
16. ____. Alimony should not be used to equalize the incomes of the parties or to punish one of the parties.

Appeal from the District Court for Sarpy County: WILLIAM B. ZASTERA, Judge. Affirmed as modified, and cause remanded for further proceedings.

Anne M. Breitkreutz and Michael R. Peterson, of Hotz, Weaver, Flood, Breitkreutz & Grant, for appellant.

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

SIEVERS, CARLSON, and CASSEL, Judges.

SIEVERS, Judge.

Stacey L. Klimek filed for dissolution of her 15-year marriage to Daniel D. Klimek in the district court for Sarpy County. The district court awarded Stacey sole custody of the parties' two children, divided the marital estate, and dissolved the parties' marriage. Daniel appealed the decree of dissolution to this court. For the reasons set forth herein, we modify the decree and remand the cause for further proceedings.

FACTUAL AND PROCEDURAL BACKGROUND

Stacey and Daniel were married on July 10, 1993, and resided in Lincoln and York, Nebraska, until 1999, when they moved to Gretna, Nebraska. The parties lived in Gretna from 1999 until the time of separation. Stacey and Daniel have one son, born in April 2001, and in September 2007, they adopted a daughter, born in September 2006. Stacey has been employed in various positions with the Department of Health and Human Services during the course of the marriage. At the time of separation, Stacey was training protection and safety workers. Daniel is employed as a sergeant for the Nebraska State Patrol.

In February 2008, Daniel moved out of the marital residence. Stacey filed a complaint for dissolution on February 13 in the district court for Sarpy County. In such, Stacey alleged that the marriage was irretrievably broken and sought a decree of dissolution of marriage; an equitable distribution of property; custody and control of the minor children, subject to visitation by Daniel; and child support, alimony, attorney fees, and court costs. Daniel answered, and temporary orders were issued, but such are not pertinent to this appeal.

Trial was held on August 18, 2008. The court issued its tentative findings to the parties on September 16. On December 2, Daniel filed a motion to reconsider and notice of hearing, seeking custody of the minor children because of events that took place during November that caused Daniel to be concerned about Stacey's ability to protect the children. A hearing was held on December 5, at which the court determined that the motion to reconsider was not properly brought before the court because the court had not yet issued its decree.

The court issued its decree of dissolution on December 9, 2008. The court awarded Stacey sole legal and physical custody of the minor children, subject to Daniel's regular and holiday visitation as set out in the parenting plan. The parenting plan was adopted and incorporated into the decree. The court ordered Daniel to pay $1,076 per month in child support, to pay 60 percent of the childcare and preschool expenses, to provide health insurance for the children, and to pay the first $480 of medical expenses.

The court also ordered a distribution of property. The parties were awarded any personal property or bank accounts in their own names. Stacey was awarded the 2004 Dodge Caravan, and Daniel was awarded the 1997 Dodge 1500 truck. The court ordered that the marital home in Gretna be sold and all proceeds split equally and that pending the sale, each party was responsible for one-half of the mortgage payment. Stacey was ordered to pay the following debts: the Chase account, the BP account, and the First Investors Financial Services account. These accounts totaled $24,184.99 at the time of separation. Daniel was ordered to pay the following debts: the Capital One account, the Bank of America account, and the

Ambassador account. These accounts had a total balance of $33,646.77 at the time of separation. In paragraph 20 of the decree, the court awarded Stacey, as a property settlement and not as alimony, a portion of Daniel's State Patrol retirement plan, which we will discuss further in our analysis, but the court apparently treated Stacey's retirement plan as nonmarital property. On January 6, 2009, Daniel filed notice of his intent to appeal to this court.

ASSIGNMENTS OF ERROR

Daniel assigns as error the following: (1) The trial court abused its discretion in awarding Stacey sole legal and physical custody, and (2) the trial court erred in its division of the marital estate by awarding Stacey one-half of Daniel's retirement fund but failing to divide Stacey's retirement fund in the same manner. On her cross-appeal, Stacey assigns as error that the district court failed to award alimony.

STANDARD OF REVIEW

[1,2] An appellate court's review in an action for dissolution of marriage is de novo on the record to determine whether there has been an abuse of discretion by the trial judge. *Gress v. Gress*, 271 Neb. 122, 710 N.W.2d 318 (2006). This standard of review applies to the trial court's determinations regarding custody, child support, division of property, alimony, and attorney fees. *Id.* A judicial abuse of discretion requires that the reasons or rulings of a trial judge be clearly untenable, unfairly depriving a litigant of a substantial right and a just result. *Dormann v. Dormann*, 8 Neb. App. 1049, 606 N.W.2d 837 (2000).

ANALYSIS

Custody of Minor Children.

Daniel argues that the trial court abused its discretion in awarding Stacey sole legal and physical custody of the minor children. Daniel sought sole custody in his cross-complaint, but testified at trial and argues in his brief to this court that the best interests of the children require joint legal and physical custody, as was provided in the trial court's March 31, 2008, temporary order.

[3] When custody of a minor child is an issue in a proceeding to dissolve the marriage of the child's parents, custody is determined by parental fitness and the child's best interests. *Maska v. Maska*, 274 Neb. 629, 742 N.W.2d 492 (2007). In the parenting plan adopted and incorporated into the decree of dissolution by the court, the parties acknowledge that both parents are fit. Such was testified to by both Stacey and Daniel at trial as well, and neither challenges the fitness of the other upon appeal. When both parents are found to be fit, the inquiry for the court is the best interests of the children. *Id.*

> The best interests of the child require:
>
> (1) A parenting arrangement and parenting plan or other court-ordered arrangement which provides for a child's safety, emotional growth, health, stability, and physical care and regular and continuous school attendance and progress for school-age children;
>
> . . . .
>
> (3) That the child's families and those serving in parenting roles remain appropriately active and involved in parenting with safe, appropriate, continuing quality contact between children and their families when they have shown the ability to act in the best interests of the child and have shared in the responsibilities of raising the child.

Neb. Rev. Stat. § 43-2923 (Reissue 2008).

[4,5] Under Neb. Rev. Stat. § 42-364(3) (Reissue 2008), the court may place custody of minor children with both parents on a joint legal or physical custody basis, or both, when both parents agree to such or if the court specifically finds that joint custody is in the best interests of the minor children regardless of parental agreement or consent. When making custody determinations under § 42-364(3), if both parties do not agree, the court can award joint custody only if it holds a hearing and makes the required finding that joint custody is in the best interests of the children. See *Kay v. Ludwig*, 12 Neb. App. 868, 686 N.W.2d 619 (2004). The parties did not agree to joint legal custody—each parent sought sole custody. Furthermore, Stacey disagreed with Daniel's assessment that the court-ordered temporary joint custody arrangement had been working well. The

trial court did not find that joint legal custody was in the minor children's best interests.

There was evidence adduced at trial that the joint custody arrangement was not in the minor children's best interests. Stacey testified that the parties' son had been confused about the joint custody arrangement and felt as if he did not have a home. There was also considerable testimony from both Stacey and Daniel that they had a hard time communicating with one another, and communication is an essential requirement for joint custody to be successful. Therefore, we find that the district court did not abuse its discretion in failing to find that joint custody was in the best interests of the minor children.

We also find that the district court did not abuse its discretion in granting sole legal and physical custody to Stacey. Throughout the marriage, Stacey had been the primary caregiver for the children, and Daniel admitted that he had spent much of his time outside the home, either working or trying to avoid fighting with Stacey in front of the children. Both Stacey and Daniel testified that each was capable of parenting the children, and the evidence adduced at trial showed that either Stacey or Daniel would be able to provide for the safety, emotional growth, health, stability, and physical care of the children. However, Stacey had taken on most of the parenting responsibilities. Stacey and Daniel both testified that the children are well-adjusted, and while Stacey admitted to struggling sometimes with disciplining their son, that certainly does not indicate Stacey lacks the requisite parenting skills to adequately care for her children. After our de novo review, we find that Daniel's first assignment of error lacks merit.

Division of Marital Estate.

Daniel also argues that the trial court erred in its division of the marital estate by awarding Stacey one-half of Daniel's retirement plan but failing to divide Stacey's retirement fund in the same manner.

[6,7] The purpose of a property division is to distribute the marital assets equitably between the parties. Neb. Rev. Stat. § 42-365 (Reissue 2008); *Malin v. Loynachan*, 15 Neb. App.

706, 736 N.W.2d 390 (2007). The equitable division of property is a three-step process: (1) The first step is to classify the parties' property as marital or nonmarital, (2) the second step is to value the marital assets and liabilities of the parties, and (3) the third step is to calculate and divide the net marital estate between the parties in accordance with the principles contained in the statute governing division of marital property. See *Sitz v. Sitz*, 275 Neb. 832, 749 N.W.2d 470 (2008). We note, however, that the court did not include a balance sheet, which is typically helpful in demonstrating that the three-step process has been followed and that the division ordered comports with the applicable law. We have constructed our own table to illustrate the division of property and debts ordered by the trial court:

	Stacey	**Daniel**
Joint checking account	$ 1,000.00	$ 1,000.00
Tax refund	2,762.00	
Capital One		(11,844.79)
Bank of America		(20,601.98)
Ambassador		(1,200.00)
Chase	(4,022.22)	
BP	(4,845.69)	
First Investors	(15,317.08)	
Stacey's retirement	54,953.72	
Daniel's retirement	52,072.98	52,072.99
Stacey's car	7,500.00	
Daniel's car		5,000.00
Mortgage	(70,579.91)	(70,579.90)
Value of house	80,750.00	80,750.00
	$104,273.80	$34,596.32

The value of the marital residence, which was not factually determined by the court, was estimated at $167,000 to $169,000 by Daniel and $155,000 by Stacey. No formal appraisal was offered in evidence. In our table, we average the parties' valuations for purposes of division of the marital estate, remembering that the disposition of the residence was that it was to be immediately sold and the net proceeds divided equally.

In our table, we have also allocated 50 percent of the "Total Accumulated Contributions Plus Interest" in Daniel's State

Patrol retirement account as of June 26, 2008, although we later find that the trial court's treatment of this retirement plan requires modification. But, for ease of illustration, we have allocated 50 percent of the "cash" in such plan to each party. Therefore, we arrive at a total marital estate of $138,870. The trial court's division of the marital estate results in 24.9 percent to Daniel and 75.1 percent to Stacey. This division does not comport with the normal division of one-third to one-half to the spouses. See *Thiltges v. Thiltges*, 247 Neb. 371, 527 N.W.2d 853 (1995) (division of property is not subject to precise mathematical formula, but general rule is to award spouse one-third to one-half of marital estate). There is nothing in the evidence to justify such a marked departure from the norm, which is largely caused by the failure to include Stacey's retirement account in the marital estate—to which Daniel assigns error.

However, before specifically addressing that assigned error, we discuss Daniel's retirement plan—a matter of concern to us preargument which resulted in an order alerting the parties of our concern. In that order, we required the filing of a supplemental transcript containing any qualified domestic relations order (QDRO) entered under paragraph 20 postdecree—which has not occurred. Our basic preargument concern, which was discussed with counsel at oral argument, was whether paragraph 20 of the decree was adequate and sufficient to divide Daniel's State Patrol retirement plan. Paragraph 20, wherein the trial court dealt with such award to Stacey, as a property settlement and not as alimony, provides:

> [Stacey] is awarded as a property settlement and not as alimony from [Daniel's] pension through the State of Nebraska, Nebraska State Patrol, a sum equal to 50% of [Daniel's] gross retirement benefits based on the value of [his] pension earnings as of the date of separation or an amount to be determined by the coverture method as of the date of retirement of [Daniel]. Said award shall be pursuant to a separate [QDRO] to be entered herein.

[8] A QDRO is, generally speaking, simply an enforcement device of the decree of dissolution. *Blaine v. Blaine*, 275 Neb. 87, 744 N.W.2d 444 (2008).

Some details about Stacey's State of Nebraska retirement plan help illuminate our concerns about the treatment of Daniel's State Patrol plan. Stacey's retirement account with the State of Nebraska is a defined contribution plan—which can be viewed as a "pot of money" that is readily divisible. And she is "100% vested," meaning that all of the money in such account is hers, or more accurately for our purposes, marital property. The evidence shows that all of such was accumulated during the marriage, and thus it is marital property to be divided. See *Davidson v. Davidson*, 254 Neb. 656, 578 N.W.2d 848 (1998) (as general rule, all property accumulated and acquired by either spouse during marriage is part of marital estate, unless it falls within exception to general rule). While we do not detail the exceptions referenced in *Davidson, supra*, none of such are applicable, and the trial court erred in excluding Stacey's State of Nebraska retirement plan from the marital estate.

However, in contrast to Stacey's plan, Daniel's State Patrol retirement account is a defined benefit plan—which can be either a "pot of money" payable in a lump sum upon retirement or termination of employment (the refund option) or an amount payable as a monthly annuity upon his retirement from the State Patrol according to the formula set forth in the State-issued "Account Statement" (the annuity option). In short, Stacey's plan is an "apple" and Daniel's plan is an "orange," resulting in material differences in benefits, and thus treatment, in a dissolution.

According to Daniel's testimony in response to questioning by the trial court, the State Patrol plan uses the "Rule 75," meaning that after 25 years of service, he is eligible to retire at age 50 and draw the annuity option. Under the applicable statute, Daniel's annuity can commence as early as age 50, but if he elects the return of contributions plus interest, then he will not get the annuity. See Neb. Rev. Stat. § 81-2031 (Reissue 2008). Given that the annuity can be as much as 75 percent of his three highest 12-month periods of compensation, it is apparent that Daniel's monthly annuity payments will quickly, and greatly, exceed the amount of the contributions and interest that could be withdrawn—a fact that has significant implication

for Daniel, but also for Stacey. The election to receive either a refund of contributions plus accrued interest or the monthly annuity is made by "the officer." See § 81-2031(2). At the time of trial, Daniel was only 40 years old and had nearly 18 years of service. Thus, assuming he continues with the State Patrol, he will be able to retire at age 50—at 75 percent of his salary—ignoring Stacey's rights for the moment. The value of Daniel's contributions and the accrued interest thereupon totaled $104,145.97 as of June 26, 2008, and on that date, he had 17.42 years of service.

[9] As said, our table shows that Daniel would receive only 24.9 percent of the total marital estate under the trial court's decree. Although the division of property is not subject to a precise mathematical formula, the general rule is to award a spouse one-third to one-half of the marital estate, the polestar being fairness and reasonableness as determined by the facts of each case. *Meints v. Meints*, 258 Neb. 1017, 608 N.W.2d 564 (2000). Clearly, the district court's distribution would be untenable because there is nothing in the record to justify such an unequal division of property, nor is there anything to justify substantial departure from an essentially equal division.

That said, we find problems with paragraph 20 even though neither party assigns error to any aspect of the division of Daniel's State Patrol retirement plan in paragraph 20. The trial court awarded Stacey "50% of [Daniel's] gross retirement benefits based on the value of [his] pension earnings as of the date of separation." This award does not comport with the evidence, because while the parties separated in February 2008, the only value for Daniel's "contributions plus interest" was as of June 26, 2008. Although we suspect the court's intent was to award Stacey 50 percent of the contributed cash and interest as of June 26, 2008, the proper descriptor is "accumulated contributions plus interest" as used in the State-issued account statement.

[10,11] Moreover, the court's use of the term "pension earnings" implies periodic payments, given that "pension" is defined as "a fixed amount, other than wages, paid at regular intervals to a person . . . in consideration of his past services." Webster's Encyclopedic Unabridged Dictionary of the English

Language 1067 (1989). And, there is no evidence of the value of Daniel's "pension earnings" which the State-issued account statement references as "annuity for your lifetime" or "[m]onthly [b]enefit,"—the annuity option. There is no evidence, as of the date of separation or as of any other date, of the value of such annuity option. There is only evidence of what Daniel has contributed to the plan plus accrued interest as of June 26, 2008—but that is not the same as the "value of his pension," which would involve reducing his presently earned pension entitlement to present value—which was not done. But, because he is still working and earning benefits, the amount of Daniel's monthly annuity cannot be determined because of the three variables involved in determining such: total years of service, age at which Daniel would begin receiving benefits, and "Final Average compensation," defined as Daniel's three highest 12-month periods of compensation. That said, Stacey would not be entitled to 50 percent of the monthly annuity payments, because the amount of that payment is dependent on the number of Daniel's premarital employment years, as well as his postdivorce years of service, and the amount of his post-divorce rate of pay, remembering the above-definition of "Final Average compensation," which will most likely be calculated on the basis of Daniel's postdivorce earnings. Daniel has 3 years of premarital service with the State Patrol that would be excluded from Stacey's share of the annuity payments. See *Webster v. Webster*, 271 Neb. 788, 716 N.W.2d 47 (2006) (only that portion of pension which is earned during marriage is part of marital estate). Thus, there are premarital years of service and postdivorce years of service that must be included in the calculation of the marital portion of the annuity option using the "'coverture fraction,'" a method of dividing a spouse's retirement plan approved in *Koziol v. Koziol*, 10 Neb. App. 675, 696, 636 N.W.2d 890, 908 (2001). See, also, *Webster, supra*. In *Koziol*, we explained:

> Simplified, the coverture formula provides that the numerator of the fraction used to determine the marital portion is essentially the number of months of credible service of the employed spouse while married and therefore is the pension contribution *while married* and that the

> denominator is the total number of months that the spouse has [been] or will be employed which resulted in the pension the employee will receive. This denominator number includes and will include the time the employed spouse worked before, during, and after the marriage.

10 Neb. App. at 696, 636 N.W.2d at 908.

The district court's paragraph 20 references use of the coverture fraction method with respect to the annuity option available under Daniel's plan. Because of the variables earlier mentioned, and which are part of the formula, the marital portion (i.e., percentage) of the annuity payments cannot be determined in advance of when Daniel is no longer employed by the State Patrol because the denominator cannot be determined until sometime in the future. However, the numerator for the calculation can be determined because the number of months that Daniel worked for the State Patrol while married is fixed. He was working for the State Patrol when the parties married on July 10, 1993, and thus his marital contribution to his plan continued until December 9, 2008, when the parties were divorced. Thus the numerator is 185 (months), and such should be determined and included in the portion of the decree mandating the entry of a QDRO.

Although there is a definite amount for the "accumulated contributions plus interest" that we conclude the trial court intended to award to Stacey, paragraph 20 reflects the reality that there is a choice—refund or annuity. The choice between the two options is Daniel's to make. Thus, how and when Stacey receives a benefit from the State Patrol plan will ultimately be determined by Daniel when he selects either the refund or annuity option.

[12,13] Plain error may be asserted for the first time on appeal or be noted by an appellate court on its own motion. *Worth v. Kolbeck*, 273 Neb. 163, 728 N.W.2d 282 (2007). Plain error exists where there is an 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. *Id.*

We conclude that the trial court's treatment of Daniel's retirement account in paragraph 20 of the decree constitutes plain error. We so find because paragraph 20 does not accurately reflect the undisputed evidence about the amount of the "refund" option, and it ignores the fact that there will be delay, even in Stacey's receipt of the refund option, and equity demands that she should be compensated for such delay by an award of interest on her portion of the refund option—should that be selected. Moreover, paragraph 20 does not provide sufficiently definite terms for the entry of a QDRO that will properly divide Daniel's State Patrol retirement plan, including the fact that it is Daniel who elects between the State Patrol plan's two options and the fact that the record establishes the numerator to be used in the coverture fraction. Finally, the trial court's paragraph 20 is defective in that it does not, as it should, award Stacey a specific percentage of the marital portion of the annuity option that will be determined by coverture fraction method. That said, it can be inferred that the trial court intended that she receive 50 percent of the marital portion of the annuity, given the trial court's direction that she receive 50 percent of what is properly designated as the refund option. Accordingly, for clarity, we find that Stacey shall receive 50 percent of the marital portion of the annuity option. Accordingly, we modify that paragraph of the decree so that it provides as follows:

> Stacey is awarded, as property settlement and not as alimony, from Daniel's State Patrol retirement plan, the sum of $52,072.98, being 50 percent of Daniel's "accumulated contributions plus interest" as of June 26, 2008, together with such further interest credited to such amount by the plan until paid to her if Daniel, upon his separation from service with the State Patrol, elects the option of "refund" of contributions plus accrued interest.
>
> In the alternative, if Daniel elects the "annuity-monthly benefit" option upon his separation from service with the State Patrol, then Stacey shall receive a monthly annuity amounting to 50 percent of the marital portion of the annuity, such to be determined by the coverture fraction method, with the numerator being 185 (months), calculated as of

> the date of Daniel's separation from service with the State Patrol, and the denominator of the coverture fraction shall include the total number of months of Daniel's premarital, marital, and postdivorce employment with the State Patrol. Said award and division of Daniel's State Patrol retirement plan shall be pursuant to a separate qualified domestic relations order that should be entered contemporaneously with the spreading of the mandate upon remand, but in any event, within 30 days thereafter.

As found above, the trial court erred in not including Stacey's retirement plan in the marital estate. Stacey's plan is simply a defined contribution plan and does not have an annuity or pension option, and thus its division is much less complicated than the division of Daniel's plan. There should be an equal division of Stacey's plan, as with Daniel's. Stacey's retirement account is readily divisible via a QDRO. As of July 1, 2008, Stacey's account balance was $54,953.72, and she is 100 percent vested in both her contributions and her employer's. The decree should be modified to add the following paragraph:

> Daniel is awarded, as property division and not as alimony, the sum of $27,477 from Stacey's State of Nebraska retirement plan, which sum shall be separated from Stacey's account and awarded to Daniel in his name alone by a qualified domestic relations order that should be entered contemporaneously with the spreading of the mandate upon remand, but in any event, within 30 days thereafter.

This modification brings the property division within the general rule to award one-third to one-half per spouse. We note that on this same day, we have released our opinion in *Fry v. Fry, ante* p. 75, 775 N.W.2d 438 (2009), in which we commented upon difficulties encountered by the parties (and the courts) by delayed entry of QDRO's. Thus, in this opinion, we have, in effect, "followed our own advice" and specifically required prompt entry of the QDRO's necessary to deal with Stacey's and Daniel's retirement plans.

The parties have two joint Roth IRA accounts, one with a balance of $1,668.96 and the other with a balance of about $1,500. Stacey testified that she intended to use these accounts

for their minor children and that each account had the name of one of the children included, as well as Stacey's and Daniel's names. Stacey requested that she be awarded these accounts to maintain on the children's behalf, but the trial court did not address these accounts in its decree. The evidence is that the parties intended these accounts for the use of the children. Thus, we do not include them in the marital estate for purposes of the equitable distribution of property. However, to clarify this matter, we award the accounts to Stacey.

Cross-Appeal.

[14] Stacey argues that the district court erred by failing to award her alimony. Section 42-365 provides in part:

> When dissolution of a marriage is decreed, the court may order payment of such alimony by one party to the other and division of property as may be reasonable, having regard for the circumstances of the parties, duration of the marriage, a history of the contributions to the marriage by each party, including contributions to the care and education of the children, and interruption of personal careers or educational opportunities, and the ability of the supported party to engage in gainful employment without interfering with the interests of any minor children in the custody of such party.

[15,16] In considering the specific statutory criteria concerning an award of alimony, a court's polestar must be fairness and reasonableness as determined by the facts of each case. *Bauerle v. Bauerle*, 263 Neb. 881, 644 N.W.2d 128 (2002). A court is also to consider the income and earning capacity of each party, as well as the general equities of each situation. *Millatmal v. Millatmal*, 272 Neb. 452, 723 N.W.2d 79 (2006). Alimony should not be used to equalize the incomes of the parties or to punish one of the parties. *Claborn v. Claborn*, 267 Neb. 201, 673 N.W.2d 533 (2004).

Stacey argues that she was entitled to alimony because she was unable to attend graduate school during her marriage to Daniel. Stacey claims that Daniel wanted to start a family and discouraged her from attending graduate school, so she was not able to obtain postgraduate education, the lack of which

she asserts has caused her to be passed over for promotions. However, Stacey and Daniel were married for 8 years before their son was born, and Stacey would have had an opportunity during that time to begin a graduate program, well before she and Daniel started a family. Furthermore, Stacey provided no documentation to the court of what type of promotion or pay raise could have potentially resulted from her additional education. Stacey's pay stub showed that she would earn considerably more in 2008 than she had in prior years. Stacey's projected gross earnings for 2008 are $38,292, and Daniel's 2008 projected earnings are $58,587 plus any overtime or holiday pay, which for the first 6 months of 2008, amounted to $4,294. All pertinent factors considered, we find that the district court did not abuse its discretion in determining that this was not an appropriate case for an award of alimony. Stacey's assignment of error in this cross-appeal lacks merit.

CONCLUSION

We have modified the language of paragraph 20 to facilitate the entry of the required QDRO, because the paragraph was ambiguous and did not use the proper terminology, nor did it specify who had the power to make the selection between options in the State Patrol plan at the time of Daniel's end of service with the State Patrol. We have found that the trial court erred in failing to include Stacey's retirement account in the marital estate, and we have modified the decree to provide for a division thereof by a QDRO. We have clarified that the Roth IRA's are awarded to Stacey. We have found that the trial court did not err in denying Stacey alimony. In all other respects, we affirm the trial court's decree.

AFFIRMED AS MODIFIED, AND CAUSE REMANDED FOR FURTHER PROCEEDINGS.

REBECCA L. DRESSER AND KRISTA A. ROSENCRANS, APPELLANTS, V. THAYER COUNTY, NEBRASKA, AND STATE OF NEBRASKA, APPELLEES.

774 N.W.2d 640

Filed October 6, 2009. No. A-09-068.

This opinion has been ordered permanently published by order of the Court of Appeals dated October 23, 2009.

1. **Political Subdivisions Tort Claims Act: Liability.** No political subdivision of the State of Nebraska shall be liable for the torts of its officers, agents, or employees, and no suit shall be maintained against such political subdivision or its officers, agents, or employees on any tort claim except to the extent, and only to the extent, provided by the Political Subdivisions Tort Claims Act.
2. **Political Subdivisions: Legislature: Intent.** The Nebraska Legislature intended political subdivisions to have discretion in the installation of traffic control devices.
3. **Political Subdivisions Tort Claims Act: Liability.** The installation of traffic control devices involves balancing the competing needs of pedestrian safety, engineering concerns, commerce, and traffic flow with limited financial resources. These decisions are normally the type of economic, political, and social policy judgments that the discretionary function exception of the Political Subdivisions Tort Claims Act was designed to shield.
4. **Tort Claims Act: Liability.** The State of Nebraska shall not be liable for the torts of its officers, agents, or employees, and no suit shall be maintained against the State, any state agency, or any employee of the state on any tort claim, except to the extent provided by the State Tort Claims Act.

Appeal from the District Court for Thayer County: VICKY L. JOHNSON, Judge. Affirmed.

Corey L. Stull and Derek A. Aldridge, of Perry, Guthery, Haase & Gessford, P.C., L.L.O., for appellants.

Charles W. Campbell, of Angle, Murphy & Campbell, P.C., L.L.O., for appellee Thayer County.

Jon Bruning, Attorney General, and Douglas L. Kluender for appellee State of Nebraska.

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

IRWIN, Judge.

I. INTRODUCTION

Rebecca L. Dresser and Krista A. Rosencrans (collectively Appellants) appeal an order of the district court for Thayer County, Nebraska, granting summary judgment in favor of defendants, Thayer County and the State of Nebraska, in this negligence action brought seeking compensation for injuries sustained when Rosencrans was injured in a collision between a train and a motor vehicle in which Rosencrans was a passenger. The district court found that both defendants enjoyed immunity from the allegations of Appellants and also that the sole proximate cause of Rosencrans' injuries was the negligence of the driver of the motor vehicle. We affirm.

II. BACKGROUND

The accident giving rise to this lawsuit occurred in March 2005. On that date, Rosencrans was a passenger in a vehicle being driven by her friend, Chandra McDonald. It was a clear, sunny day, and the road surface was dry. McDonald approached an intersection where train tracks crossed a county road, approached a stop sign before the tracks, and then proceeded through the intersection. Rosencrans observed an approaching train and screamed at McDonald, and McDonald shifted her vehicle into reverse but was unable to move the vehicle off the tracks before the train collided with the vehicle. Rosencrans suffered serious injuries as a result of the accident.

On November 29, 2006, and September 24, 2007, Appellants filed separate complaints against each defendant. Appellants made similar allegations of negligence against defendants, including that they each were negligent in the maintenance of the railroad crossing. On February 19, 2008, the district court entered an order consolidating the two cases, by stipulation of the parties. In March 2008, both defendants moved for summary judgment.

The district court conducted hearings on the motions for summary judgment in April and May 2008. On September 30, the court entered an order granting summary judgment to both defendants. The court found that there were no genuine issues of material fact. The court found that the doctrine of sovereign

immunity applied and that the actions of both defendants were discretionary actions for which suit could not be maintained. The court also found that the sole proximate cause of the accident was McDonald's failure to stop, perceive, and yield to an oncoming train that was visible on a clear, sunny day. For those reasons, the court granted the motions for summary judgment. Appellants brought this appeal.

III. ASSIGNMENTS OF ERROR

Appellants have assigned as error that the court erred in finding that defendants were immune from suit, in finding that the sole proximate cause of the accident was the negligence of McDonald, and in granting summary judgment to defendants.

IV. ANALYSIS

1. Standard of Review

Summary judgment is proper if the pleadings and admissible evidence offered at the hearing show that there is no genuine issue as to any material facts 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. *Harvey v. Nebraska Life & Health Ins. Guar. Assn.*, 277 Neb. 757, 765 N.W.2d 206 (2009). In reviewing a summary judgment, an appellate court views the evidence in the light most favorable to the party against whom the judgment was granted, giving that party the benefit of all reasonable inferences deducible from the evidence. *Id.*

2. Immunity

Appellants first assert that the district court erred in finding that defendants were immune from suit. We conclude that the responsibilities of both defendants with regard to maintenance of railroad crossing devices involves discretionary functions, and thus, we find no merit to Appellants' assertions to the contrary.

(a) Discretionary Function of County

[1] Neb. Rev. Stat. § 13-902 (Reissue 2007) provides that no political subdivision of the State of Nebraska shall be liable for the torts of its officers, agents, or employees and that no

suit shall be maintained against such political subdivision or its officers, agents, or employees on any tort claim except to the extent, and only to the extent, provided by the Political Subdivisions Tort Claims Act. Neb. Rev. Stat. § 13-908 (Reissue 2007) provides a general waiver of immunity for political subdivisions, subject to the limitations of Neb. Rev. Stat. § 13-910 (Cum. Supp. 2004). Section 13-910(2) provides an exception to political subdivision liability for any claim based upon the exercise or performance of or the failure to exercise or perform a discretionary function or duty on the part of the political subdivision or an employee of the political subdivision, whether or not the discretion be abused.

[2] Neb. Rev. Stat. § 60-6,121 (Reissue 2004) indicates that the Nebraska Legislature intended political subdivisions to have discretion in the installation of traffic control devices. That section specifically provides that local authorities shall place and maintain such traffic control devices upon highways under their jurisdiction *as they deem necessary* to carry out the provisions of the Nebraska Rules of the Road or to regulate, warn, or guide traffic. See *McCormick v. City of Norfolk*, 263 Neb. 693, 641 N.W.2d 638 (2002). See, also, *Allen v. County of Lancaster*, 218 Neb. 163, 352 N.W.2d 883 (1984) (holding that when official must make judgmental decision within regulatory framework, acts are discretionary). Further, Neb. Rev. Stat. §§ 74-1337 and 74-1338 (Reissue 2003) provide that the county and the railroad *may* agree upon changes to railroad crossings, *may* agree upon relocation of the highway, and *may* file an application with the Department of Roads to determine whether changes should be made.

[3] The installation of traffic control devices involves balancing the competing needs of pedestrian safety, engineering concerns, commerce, and traffic flow with limited financial resources. *McCormick v. City of Norfolk, supra*. These decisions are normally the type of economic, political, and social policy judgments that the discretionary function exception was designed to shield. *Id.* The Nebraska Supreme Court has recognized that the result of applying the sovereign immunity doctrine is that some tort claims against governmental agencies may go unremedied. *Id.* Nonetheless, every intersection

has some inherent danger and there are, potentially, unlimited theories of recovery that could be raised against governmental entities concerning the installation of traffic control devices, and the provisions of § 13-910 signify that this is the type of public policy decision the Legislature intended to preclude courts from reviewing. See *McCormick v. City of Norfolk, supra*.

To the extent the County bears responsibility for the installation and maintenance of the railroad crossing at issue, its functions are discretionary functions to which sovereign immunity applies. The district court did not err in so finding, and we find no merit to Appellants' assertions to the contrary.

(b) Discretionary Function of State

[4] Neb. Rev. Stat. § 81-8,209 (Reissue 2008) provides that the State shall not be liable for the torts of its officers, agents, or employees, and no suit shall be maintained against the State, any state agency, or any employee of the state on any tort claim, except to the extent provided by the State Tort Claims Act. Neb. Rev. Stat. § 81-8,215 (Reissue 2008) provides a general waiver of immunity for the State, subject to the limitations of Neb. Rev. Stat. § 81-8,219 (Cum. Supp. 2004). Section 81-8,219(1) provides an exception to state tort liability for any claim based upon an act or omission of an employee of the state or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a state agency or an employee of the state, whether or not the discretion is abused.

Neb. Rev. Stat. § 74-1332 (Reissue 2003) provides that the Department of Roads has jurisdiction over all railroad crossings outside of incorporated villages, towns, and cities, both public and private, across, over, or under all railroads in the state, with some exceptions not relevant to the present case, and shall adopt and promulgate such rules and regulations for the construction, repair, and maintenance of the crossings *as the Department of Roads deems adequate and sufficient* for the protection and necessity of the public.

To the extent the State is given responsibility for installing and maintaining railroad crossings, the relevant statutory

provision makes it a discretionary function to determine what is adequate and sufficient. As noted above, the Nebraska Supreme Court has recognized that sovereign immunity cases may result in some claims going unremedied, but the balancing of various competing needs necessary for traffic control installation and maintenance is precisely the kind of discretionary function to which sovereign immunity traditionally applies. We find no error by the district court in its conclusion that the State is immune from Appellants' claims, and we find no merit to Appellants' claims to the contrary.

3. Proximate Cause

In light of our conclusion that the district court did not commit error in finding that defendants are immune from the claims brought by Appellants, we need not further address Appellants' assignment of error that the court erred in finding that the sole proximate cause of the accident was McDonald's failure to observe the oncoming train and take appropriate action.

V. CONCLUSION

The district court committed no error in finding that defendants are immune from the claims brought by Appellants. As such, we affirm.

Affirmed.

State of Nebraska, appellee, v. Roy Rodriguez, appellant.

774 N.W.2d 775

Filed November 3, 2009. No. A-09-314.

1. **Rules of Evidence: Appeal and Error.** Where the Nebraska Evidence Rules commit the evidentiary question at issue to the discretion of the trial court, the admissibility of evidence is reviewed for an abuse of discretion.
2. **Jury Instructions: Judgments: Appeal and Error.** Whether jury instructions given by a trial court are correct is a question of law. When dispositive issues on appeal present questions of law, an appellate court has an obligation to reach an independent conclusion irrespective of the decision of the court below.
3. **Drunk Driving: Blood, Breath, and Urine Tests: Proof.** There are four foundational elements the State must establish for admissibility of a breath test in a

prosecution for driving under the influence: (1) that the testing device was working properly at the time of the testing, (2) that the person administering the test was qualified and held a valid permit, (3) that the test was properly conducted under the methods stated by the Department of Health and Human Services Regulation and Licensure, and (4) that all other statutes were satisfied.

4. **Evidence: Blood, Breath, and Urine Tests.** The failure to perform a blood or breath test using the methods prescribed by the Department of Health and Human Services Regulation and Licensure makes the test result inadmissible.
5. **Drunk Driving: Evidence: Blood, Breath, and Urine Tests.** Deficiencies in the techniques used to test the blood or breath alcohol level in driving under the influence cases generally are of no foundational consequence, but affect only the weight and credibility of the testimony.
6. **Jury Instructions: Pleadings: Evidence.** Whether requested to do so or not, a trial court has the duty to instruct the jury on issues presented by the pleadings and the evidence.

Appeal from the District Court for Lancaster County, ROBERT R. OTTE, Judge, on appeal thereto from the County Court for Lancaster County, LAURIE YARDLEY, Judge. Judgment of District Court affirmed.

Dennis R. Keefe, Lancaster County Public Defender, and Andrew D. Weeks for appellant.

Jon Bruning, Attorney General, and George R. Love for appellee.

IRWIN, SIEVERS, and CASSEL, Judges.

CASSEL, Judge.

INTRODUCTION

In this appeal from a conviction for driving under the influence of alcohol (DUI), Roy Rodriguez asserts that a Breathalyzer-generated breath test result should not have been admissible because it was not immediately recorded on the prescribed form. We conclude that because this was an error of "technique" but not of "method," the county court did not abuse its discretion in admitting the evidence. For this reason, the county court did not err in instructing the jury on a theory of DUI based on breath test results. We therefore affirm the judgment of the district court, which affirmed the county court's judgment.

BACKGROUND

On November 15, 2007, Rodriguez was involved in an accident with another vehicle while he was trying to pull out of a gas station. After arriving at the scene, Lincoln police officer David A. Lopez noticed that Rodriguez appeared to be under the influence of an alcoholic beverage. Lopez smelled a "moderate odor" on Rodriguez; noted that he had "bloodshot, watery eyes [and] slurred speech"; and observed that he swayed and stumbled while walking. Lopez then administered a number of sobriety tests in which Rodriguez performed poorly. Subsequently, Lopez transported Rodriguez to a detoxification facility where Lopez administered an Intoxilyzer Model 5000 breath test—a test which Lopez had a valid permit to administer. The test record card printed by the breath test machine showed that Rodriguez had a breath alcohol level of ".114." The test record card indicated the date of the test, the testing machine's serial number, Rodriguez' name, Lopez' name, the test result, and additional information. However, Lopez failed to record the test result on "Attachment 15," which is entitled the "INTOXILYZER MODEL 5000 Checklist Technique."

Rodriguez was subsequently charged in county court with third-offense DUI and with driving while his license was suspended. Rodriguez moved to suppress the evidence of the breath test result on the ground that it was not recorded on Attachment 15. The county court overruled this motion. At a jury trial, Lopez testified that he had checked off and completed all the steps contained in Attachment 15 while administering the breath test with the exception that he had failed to record the test result in the appropriate blank on Attachment 15. At the State's direction and in front of the jury, Lopez filled in the blank on the checklist for the test result with the information from the test record card printed by the breath test machine. Both Attachment 15 and the printed test record card were received into evidence. The test record card received in evidence set forth the test result as ".114," and after Lopez filled in the blank in the presence of the jury, Attachment 15 stated the test result as "0.114." At the conclusion of the evidence, the jury found Rodriguez guilty

of both charges. The county court later sentenced Rodriguez. Rodriguez then appealed to the district court, which affirmed both convictions.

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

ASSIGNMENTS OF ERROR

Rodriguez assigns, reordered and restated, that the district court erred in finding that the county court did not abuse its discretion in (1) receiving Attachment 15 and the breath test record card as exhibits, (2) allowing Lopez to fill in Attachment 15 at the time of trial even though Lopez stated that he had no recollection of the breath test machine's digital readout, and (3) instructing the jury on the "per se" theory of DUI. In this appeal, Rodriguez does not raise any issue relating to the conviction for driving with a suspended license, and thus, we mention it no further.

STANDARD OF REVIEW

[1] Where the Nebraska Evidence Rules commit the evidentiary question at issue to the discretion of the trial court, the admissibility of evidence is reviewed for an abuse of discretion. *State v. Floyd*, 277 Neb. 502, 763 N.W.2d 91 (2009).

[2] Whether jury instructions given by a trial court are correct is a question of law. When dispositive issues on appeal present questions of law, an appellate court has an obligation to reach an independent conclusion irrespective of the decision of the court below. *State v. Fischer*, 272 Neb. 963, 726 N.W.2d 176 (2007).

ANALYSIS

Admissibility of Attachment 15 and Test Card.

Rodriguez argues that Attachment 15 and the test record card from the breath test machine are not admissible as evidence of the breath test result for two reasons. First, he asserts that a digital reading generated on the machine at the time of the test, as opposed to the test card printout, is the actual breath test result. He argues that because Lopez cannot recall and did

not record this digital reading, there is no admissible breath test result.

We find nothing in the statutes or regulations governing breath test results that would support this argument. Rodriguez does not identify, nor can we find, any regulation requiring the testing officer to observe the digital reading on the evidentiary breath testing device as the source of the data to be recorded on the checklist.

The regulations only inferentially address the acts of observing and recording the test result. For evidentiary breath testing devices, the regulations contemplate a printed test record card and declare the completed checklist as the official record of the breath test. However, the regulations do not prescribe how the testing officer is to observe the test result, nor the process of transferring the information to the completed checklist. A "record card" is defined as "the card or tape printed by an evidentiary breath testing device." 177 Neb. Admin. Code, ch. 1, § 001.18 (2004). "The printing of a test record card indicates that the prescribed program of the evidentiary breath testing device has been completed." 177 Neb. Admin. Code, ch. 1, § 002.01D (2004). Section 002.01C declares that the "completed checklist . . . shall be the official record of breath test results." 177 Neb. Admin. Code, ch. 1, § 002.01C (2004). From these regulations, we infer that the officer may observe the result printed on the record card and must record the result on the checklist.

This inference is supported by the different treatment under the regulations afforded to preliminary breath testing devices. Under § 002.01D1, preliminary breath testing devices are not required to produce a printed test record and "the results of a preliminary breath test may be reported as a digital readout or as a pass or fail." 177 Neb. Admin. Code, ch. 1, § 002.01D1 (2004). It follows that because the regulations require the printing of a test record card for an evidentiary breath testing device but not for a preliminary breath testing device, the printed result shown on the record card of the evidentiary breath testing device may be recorded on the checklist as the official record of the breath test result.

The second ground on which Rodriguez asserts that the evidence was inadmissible is that it was not the "official record" of the breath test. We take this as an argument that the State failed to establish sufficient foundation for these exhibits to be admitted into evidence.

[3] There are four foundational elements the State must establish for admissibility of a breath test in a DUI prosecution: (1) that the testing device was working properly at the time of the testing, (2) that the person administering the test was qualified and held a valid permit, (3) that the test was properly conducted under the methods stated by the Department of Health and Human Services Regulation and Licensure, and (4) that all other statutes were satisfied. *State v. Kuhl*, 276 Neb. 497, 755 N.W.2d 389 (2008).

Rodriguez argues only that the State failed to prove the third foundational requirement because, he claims, the test did not comply with the rules as set forth in the Nebraska Administrative Code. More specifically, he argues that the Nebraska Administrative Code requires that in order for the breath test result to be valid, it had to be recorded on Attachment 15 at the time the test was administered, which Lopez did not do.

The regulations provide no support for this argument. No regulation specifies the time at which breath test results must be recorded. Rodriguez relies on § 002.01C, which states: "The completed checklist as found in these rules and regulations shall be the official record of breath test results." But § 002.01C does not speak to the question of timing.

[4,5] The State's response to Rodriguez' argument alleges that Lopez' recordkeeping is merely a question of "'technique'" rather than one of "'method.'" Brief for appellee at 8. The failure to perform a test using the prescribed *methods* makes the test result inadmissible. See *State v. Kubik*, 235 Neb. 612, 456 N.W.2d 487 (1990). In contrast, deficiencies in the *techniques* used to test the blood or breath alcohol level in DUI cases generally are of no foundational consequence, but affect only the weight and credibility of the testimony. See *State v. Trampe*, 12 Neb. App. 139, 668 N.W.2d 281

(2003). See, also, *State v. Green*, 223 Neb. 338, 389 N.W.2d 557 (1986).

Under the Nebraska Administrative Code, a "[m]ethod" is specifically defined as "the name of the principle of analysis" and "[t]he method may be a laboratory method." 177 Neb. Admin. Code, ch. 1, § 001.16 (2004). "Technique" is defined as "a set of written instructions which describe the procedure, equipment, and equipment preventive maintenance necessary to obtain an accurate alcohol content test result." 177 Neb. Admin. Code, ch. 1, § 001.21 (2004). While numerous cases discuss the distinction between method and technique, none have arisen in the precise context before us. See, *State v. Royer*, 276 Neb. 173, 753 N.W.2d 333 (2008) (failure to comply with regulations governing verification of repair records not method); *State v. Kubik, supra* (delay between driving and testing goes to weight but not admissibility of evidence); *State v. Green, supra*.

We conclude that the checklist is a technique because the Nebraska Administrative Code treats it as such and it is unrelated to the actual scientific process in which breath test results are determined. The Nebraska Administrative Code specifically refers to Attachment 15 as a "[c]hecklist technique." 177 Neb. Admin. Code, ch. 1, § 008.01D (2004). Further, Attachment 15 is not the scientific process in which the breath test sample is actually analyzed; it merely provides the officer with "written instructions" which describe the applicable "procedure." See § 001.21. Therefore, we conclude that the county court did not abuse its discretion in admitting Attachment 15 and the breath test record card into evidence and that Lopez' deficiency in filling out Attachment 15 merely goes to the credibility and weight of the breath test result as opposed to its admissibility.

We also reject Rodriguez' argument that the breath test is not valid because at trial, Lopez did not personally remember the result displayed on the machine even though he had the test record card before him. This is not of consequence, because the test record card contains the result actually generated by the breath test equipment.

Writing of Test Result on Attachment 15 at Trial.

Rodriguez argues that Lopez should not have been able to record the breath test result on Attachment 15 at trial for much the same reasons that he argued that both Attachment 15 and the breath test record card were not admissible. We conclude that this was not a prejudicial error. First, the fact that the breath test result was not recorded on Attachment 15 until the time of trial had no effect on the admissibility of the breath test result, as we have discussed above. Second, the time at which the test result was recorded on Attachment 15 was not misrepresented to the jury. It was made clear to the jury that the breath test result was not recorded on Attachment 15 until the time of trial. Because Attachment 15 was completed in the presence of the jurors, they could readily determine what portion of Attachment 15 was completed at that time. Additionally, it was apparent from the face of Attachment 15 which information Lopez had subsequently added. The Attachment 15 that was received into evidence was a copy of an original, and all of Lopez' previous writing appeared in black. However, the result from the breath test record card was printed in blue ink. Thus, Lopez' subsequent recording of the breath test result was not misleading.

Jury Instructions.

[6] Rodriguez asserts that the county court erred in instructing the jury on the "per se" theory of DUI. Briefly summarized, Rodriguez' argument is that the court abused its discretion in instructing the jury that the State could prove the under the influence element of DUI by showing that Rodriguez had a breath alcohol concentration in excess of the legal limit. Rodriguez argues that the evidence was not sufficient to justify this instruction because the breath test result was not admissible. However, we have already determined that the breath test result was admissible. Thus, the evidence warranted giving the instruction. Whether requested to do so or not, a trial court has the duty to instruct the jury on issues presented by the pleadings and the evidence. *State v. Weaver*, 267 Neb. 826, 677 N.W.2d 502 (2004).

CONCLUSION

Because the county court did not abuse its discretion in admitting the breath test result into evidence and did not err in instructing the jury on a theory of DUI based on breath test results, we affirm the district court's judgment affirming Rodriguez' DUI conviction.

AFFIRMED.

MATTIEO A. CONDOLUCI, APPELLANT, V. STATE OF NEBRASKA, APPELLEE.

775 N.W.2d 196

Filed November 3, 2009. No. A-09-638.

1. **Mental Health: Time.** Neb. Rev. Stat. § 71-1207 (Cum. Supp. 2008) of the Sex Offender Commitment Act requires service of a summons upon the subject which fixes a time for the hearing before a mental health board within 7 calendar days after the subject has been taken into emergency protective custody.
2. **Habeas Corpus.** Habeas corpus is a civil remedy constitutionally available in a proceeding to challenge and test the legality of a person's detention, imprisonment, or custodial deprivation of the person's liberty.
3. ____. If a person is imprisoned or detained without any legal authority, upon making the same appear to the judge, by oath or affirmation, it shall be the judge's duty to forthwith allow a writ of habeas corpus, directed to the proper officer, person, or persons who detains such prisoner.
4. ____. The person to whom a writ of habeas corpus is directed makes response to the writ, not to the petition. A respondent, in his answer to the writ, seeks simply to justify his conduct and relieve himself from the imputation of having imprisoned without lawful authority a person entitled to his liberty.

Appeal from the District Court for Sarpy County: WILLIAM B. ZASTERA, Judge. Reversed and remanded for further proceedings.

Mattieo A. Condoluci, pro se.

John W. Reisz, Deputy Sarpy County Attorney, for appellee.

SIEVERS and CASSEL, Judges, and HANNON, Judge, Retired.

SIEVERS, Judge.

According to his application for writ of habeas corpus filed May 20, 2009, in the district court for Sarpy County, Mattieo

A. Condoluci was released on January 5, 2009, from the custody of the Nebraska Department of Correctional Services after serving his sentence for sexually assaulting a child. He was, however, immediately taken into custody by the Sarpy County sheriff and incarcerated in the Sarpy County jail, where he remained as of the time he filed the referenced application. This custody occurred because of a petition filed by the Sarpy County Attorney with the Sarpy County Mental Health Board (the Board), a copy of which Condoluci attached to his application. Such petition alleges that Condoluci is a dangerous sex offender. The prayer of the petition asked the chair of the Board to issue a warrant directing the sheriff to take custody of Condoluci and hold him in the Sarpy County jail pending further order of the Board.

[1] Condoluci's application further alleges that to his knowledge, "no court or chair of the . . . Board found probable cause to believe that [he] is a dangerous sex offender as mandated by Neb. Rev. Stat. § 71-1206(2)." He alleges that he has never received a summons, which is a violation of his due process rights under Neb. Rev. Stat. § 71-1207 (Cum. Supp. 2008). He alleges that his rights under such statute have further been violated because he has not received the hearing that must be scheduled "within seven calendar days after the subject has been taken into emergency protective custody." See § 71-1207. Condoluci alleges that because of the violations of his due process rights as specified in his application, he is being unlawfully detained in the Sarpy County jail. Thus, he requested the court issue an order releasing him from custody and set an expeditious hearing in the matter so that sufficient evidence may be adduced to adjudicate the matter.

On May 28, 2009, the district court, apparently acting sua sponte, entered the following order:

> The Court having considered [Condoluci's] application for a Writ of Habeas Corpus hereby denies the same, without hearing, for the following reasons:
>
> 1. A duly certified Petition before the Board . . . was filed and [Condoluci] was taken into custody pursuant to an Order of Detention signed by the Chairperson of the Board . . . .

> 2. The Court notes a majority of the complaints of the Application deal with procedural defects in his being detained as a dangerous sex offender for which he has an adequate remedy at law and for which Habeas Corpus will not lie.
>
> **IT IS THEREFORE ORDERED, ADJUDGED AND DECREED** by the Court that [Condoluci's] Application for a Writ of Habeas Corpus is denied and the application is dismissed.

Because there was no hearing, there is obviously no bill of exceptions; and although the district court relies on an "Order of Detention signed by the Chairperson of the Board," such is not in our record. Given the district court's recitation that no hearing was held, we are forced to conclude that the district court did not acquire knowledge of the purported "Order of Detention" by a proper evidentiary process. At oral argument upon Condoluci's appeal from the quoted order, the deputy Sarpy County Attorney conceded, after our questioning, that we should remand the cause to the district court because of the lack of a proper evidentiary hearing. While we do remand the cause, we are not unconcerned by the county attorney's failure to promptly seek an order of remand in view of the district court's obvious error in deciding the case in reliance upon a document not in evidence.

Additionally, Condoluci alleges in his application that he has been held in the Sarpy County jail since January 5, 2009, without service of summons. And he alleges that he has been held without the benefit of a hearing before the Board, which must be held within 7 days of when he was taken into emergency protective custody under the Sex Offender Commitment Act. Section 71-1207 of the act does require service of a summons upon the subject which "fix[es] a time for the hearing within seven calendar days after the subject has been taken into emergency protective custody." In short, that which Condoluci asserts in order for his custody to be continued is, in fact, provided for by statute. The district court's order makes no finding as to whether the required hearing has been held.

[2,3] Habeas corpus is a civil remedy constitutionally available in a proceeding to challenge and test the legality of a person's detention, imprisonment, or custodial deprivation of the person's liberty. See, U.S. Const. art. I, § 9; Neb. Const. art. I, § 8; *In re Application of Tail*, 144 Neb. 820, 14 N.W.2d 840 (1944). Our habeas statute, Neb. Rev. Stat. § 29-2801 (Reissue 2008), provides in pertinent part:

> [I]f the person so imprisoned or detained is imprisoned or detained without any legal authority, upon making the same appear to such judge, by oath or affirmation, it shall be his duty forthwith to allow a writ of habeas corpus, which writ shall be issued forthwith by the clerk of the district court, or by the county judge, as the case may require, under the seal of the court whereof the person allowing such writ is a judge, directed to the proper officer, person or persons who detains such prisoner.

[4] Condoluci's application is under oath, and if the allegations thereof are true, then his detention in the Sarpy County jail is quite clearly "without any legal authority." Accordingly, the district court should issue the writ. The Supreme Court explained in *In re Application of Tail*:

> "[The writ of habeas corpus] may be analogized to a proceeding *in rem*, and is instituted for the sole purpose of having the person restrained of his liberty produced before the judge, in order that the cause of his detention may be inquired into and his status fixed. The person to whom the writ is directed makes response to the *writ*, not to the *petition*. . . . The respondent, in his answer to the writ, seeks simply to justify his conduct and relieve himself from the imputation of having imprisoned without lawful authority a person entitled to his liberty. He comes to no issue with the applicant for the writ. He answers the writ."

144 Neb. at 822-23, 14 N.W.2d at 842 (quoting *Simmons v. Georgia Iron & Coal Co.*, 117 Ga. 305, 43 S.E. 780 (1903)).

Therefore, the district court erred in failing, given the facial showing of an illegal detention in the sworn application, to inquire into the cause of Condoluci's detention by having those detaining Condoluci answer the writ.

CONCLUSION

We find the trial court erred in failing to issue the writ of habeas corpus and in dismissing the application for such in reliance upon matters not in evidence. We reverse the dismissal and remand the cause for further proceedings, with directions to the district court to issue the writ of habeas corpus and to hold an evidentiary hearing thereupon in accordance with Neb. Rev. Stat. §§ 29-2802 and 29-2805 (Reissue 2008).

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

SHANNON I. HOPKINS, FORMERLY KNOWN AS SHANNON I. STAUFFER, APPELLEE, V. SHANE ALAN STAUFFER, APPELLANT.

775 N.W.2d 462

Filed November 10, 2009. No. A-09-266.

1. **Modification of Decree: Appeal and Error.** Modification of a dissolution decree is a matter entrusted to the discretion of the trial court, whose order is reviewed de novo on the record, and which will be affirmed absent an abuse of discretion by the trial court.
2. **Statutes: Appeal and Error.** Statutory interpretation is a question of law, which an appellate court resolves independently of the trial court.
3. **Statutes: Presumptions: Legislature: Intent: Appeal and Error.** In construing a statute, appellate courts are guided by the presumption that the Legislature intended a sensible rather than absurd result in enacting the statute.
4. **Statutes: Legislature: Intent.** An appellate court will place a sensible construction upon a statute to effectuate the object of the legislation, as opposed to a literal meaning that would have the effect of defeating the legislative intent.
5. **Statutes: Intent.** In construing a statute, a court must look to the statutory objective to be accomplished, the evils and mischiefs sought to be remedied, and the purpose to be served, and then must place on the statute a reasonable or liberal construction that best achieves the statute's purpose, rather than a construction that defeats the statutory purpose.
6. **Modification of Decree: Child Support.** Neb. Rev. Stat. §§ 43-512.12 through 43-512.18 (Reissue 2008) provide a vehicle for the State to seek a modification of an existing support order to attain support from a parent.
7. **Attorneys at Law.** Neb. Rev. Stat. § 7-105(2) (Reissue 2007) imposes upon an attorney the duty to counsel or maintain no other actions, proceedings, or defenses than those which appear to him or her legal and just, except the defense of a person charged with a public offense.

8. **Statutes: Legislature: Intent: Appeal and Error.** Having settled the meaning of the statute, an appellate court must give effect to the purpose and intent of the Legislature.
9. **Modification of Decree: Child Support.** The change of law making incarceration an involuntary reduction in income under certain conditions rather than a voluntary reduction is a material change of circumstances for purposes of the Nebraska Child Support Guidelines.
10. ____: ____. Under Neb. Rev. Stat. § 43-512.15 (Reissue 2008), as recently amended, a child support obligor's incarceration is now considered an involuntary reduction in income under certain circumstances.

Appeal from the District Court for Dawson County: JAMES E. DOYLE IV, Judge. Reversed and remanded for further proceedings.

Shane Alan Stauffer, pro se.

No appearance for appellee.

SIEVERS, CARLSON, and CASSEL, Judges.

CASSEL, Judge.

INTRODUCTION

Since at least 1985, Nebraska appellate courts have held that incarceration does not constitute a material change in circumstances justifying a reduction in or termination of child support obligations. See *Ohler v. Ohler*, 220 Neb. 272, 369 N.W.2d 615 (1985). This appeal addresses the continued vitality of that rule in light of recent amendments by the Legislature to Neb. Rev. Stat. § 43-512.15 (Reissue 2008). Because we conclude that the Legislature intended its amendments to allow incarcerated individuals to obtain a reduction in child support under certain conditions, we reverse, and remand for further proceedings.

BACKGROUND

In March 1995, Shannon I. Hopkins, formerly known as Shannon I. Stauffer, filed a petition to dissolve her marriage to Shane Alan Stauffer. The court granted Hopkins temporary custody of the parties' three minor children and ordered Stauffer to pay temporary child support of $648 per month. In December, while the dissolution action was pending, Stauffer was charged

with the attempted first degree murder of Hopkins. A decree filed in February 1996 dissolved the parties' marriage and ordered Stauffer to pay monthly child support of $648. At that time, Stauffer was in jail awaiting trial on the criminal charge. Stauffer was subsequently convicted of attempted first degree murder and was sentenced to 20 to 40 years' imprisonment. His mandatory release date is in 2015.

In 1997, Stauffer filed an application to modify his child support obligation, alleging that he lacked the financial ability to meet his obligation because he earned $56.11 a month. The district court dismissed Stauffer's petition for lack of evidence, and we affirmed. See *Stauffer v. Stauffer*, 8 Neb. App. xiii (No. A-97-647, Feb. 9, 1999).

In 2001, Stauffer filed another petition to modify his child support obligation. The district court determined that the petition was barred by the doctrine of res judicata, and we reversed, and remanded for further proceedings. See *Stauffer v. Stauffer*, No. A-02-1033, 2004 WL 1316013 (Neb. App. June 15, 2004) (not designated for permanent publication). Upon remand, the district court held a hearing and then denied Stauffer's petition. This court affirmed, relying on *Ohler v. Ohler, supra*, and *State on behalf of Longnecker v. Longnecker*, 11 Neb. App. 773, 660 N.W.2d 544 (2003). *Stauffer v. Stauffer*, No. A-04-1432, 2005 WL 2495420 (Neb. App. Oct. 11, 2005) (not designated for permanent publication).

On September 16, 2008, Stauffer filed the instant complaint to modify child support. He stated that he was bringing the action pursuant to Neb. Rev. Stat. § 42-364(9) (Reissue 2004) and that he was entitled to modification under § 43-512.15 because his reduction in income should be deemed involuntary due to his incarceration.

During the hearing on Stauffer's complaint, Stauffer testified that he was not incarcerated for a crime related to Neb. Rev. Stat. § 28-706 (Reissue 2008), that he had been and will be incarcerated for more than 1 year, and that he had no past of willfully failing to provide support. When the court asked Hopkins whether Stauffer had been behind in child support, she answered, "Well, yes he has. It's been garnished, but the

amount is pretty much usually there." Hopkins testified that she has received $644 a month in child support for the past 8 years. During the 5 years leading up to 2000, she received no child support; but since 2000, she has received nearly the entire amount of the $648 ordered.

The district court denied Stauffer's complaint. The court recognized that Stauffer's circumstances had not changed since this court's decision in 2005. The district court found Stauffer's contention that the amendment to § 43-512.15 superseded *Ohler v. Ohler*, 220 Neb. 272, 369 N.W.2d 615 (1985), and *State v. Porter*, 259 Neb. 366, 610 N.W.2d 23 (2000), to be without merit. The court stated that the statutory change did "nothing more than require the authorized attorney, when exercising her or his discretion, to exclude incarceration for more than one year from the circumstances which constitute a voluntary reduction of income" and that it "does not constitute a material change in circumstances and . . . does not constitute a sufficient basis, by itself, to support a reduction in child support."

Stauffer timely appeals. No brief has been filed in response to Stauffer's brief. Pursuant to authority granted to this court under Neb. Ct. R. App. P. § 2-111(B)(1) (rev. 2008), this case was ordered submitted without oral argument.

ASSIGNMENTS OF ERROR

Stauffer alleges that the district court abused its discretion in determining (1) that a material change of circumstances had not occurred and (2) that new statutory law did not supersede old case law.

STANDARD OF REVIEW

[1] Modification of a dissolution decree is a matter entrusted to the discretion of the trial court, whose order is reviewed de novo on the record, and which will be affirmed absent an abuse of discretion by the trial court. *Metcalf v. Metcalf*, 278 Neb. 258, 769 N.W.2d 386 (2009).

[2] Statutory interpretation is a question of law, which an appellate court resolves independently of the trial court. *Metropolitan Comm. College Area v. City of Omaha*, 277 Neb. 782, 765 N.W.2d 440 (2009).

ANALYSIS

Interpretation of § 43-512.15.

This appeal centers on the effect of recent amendments to § 43-512.15 on an incarcerated parent's ability to obtain a reduction in his or her child support obligation. In 2007, the Legislature added the following underscored language to § 43-512.15(1)(b):

> The variation from the guidelines is due to a voluntary reduction in net monthly income. For purposes of this section, a person who has been incarcerated for a period of one year or more in a county or city jail or a federal or state correctional facility shall be considered to have an involuntary reduction of income unless (i) the incarceration is a result of a conviction for criminal nonsupport pursuant to section 28-706 or a conviction for a violation of any federal law or law of another state substantially similar to section 28-706 or (ii) the incarcerated individual has a documented record of willfully failing or neglecting to provide proper support which he or she knew or reasonably should have known he or she was legally obligated to provide when he or she had sufficient resources to provide such support[.]

2007 Neb. Laws, L.B. 554, § 42.

[3-5] In construing a statute, appellate courts are guided by the presumption that the Legislature intended a sensible rather than absurd result in enacting the statute. *Foster v. BryanLGH Med. Ctr. East*, 272 Neb. 918, 725 N.W.2d 839 (2007). An appellate court will place a sensible construction upon a statute to effectuate the object of the legislation, as opposed to a literal meaning that would have the effect of defeating the legislative intent. *Id.* In construing a statute, a court must look to the statutory objective to be accomplished, the evils and mischiefs sought to be remedied, and the purpose to be served, and then must place on the statute a reasonable or liberal construction that best achieves the statute's purpose, rather than a construction that defeats the statutory purpose. *Id.*

[6] The first issue presented by this appeal is whether § 43-512.15 has any application to a complaint to modify

support brought by an incarcerated person. The plain language of the text in § 43-512.15(1)(b) states, "For purposes of this section . . . ." The section—which is titled, "Title IV-D child support order; modification; when; procedures"—provides that "[t]he county attorney or authorized attorney, upon referral from the Department of Health and Human Services, shall file a complaint to modify a child support order unless the attorney determines in the exercise of independent professional judgment that" one of a number of enumerated circumstances, including a voluntary reduction in income, is present. § 43-512.15(1). The statutes found in Neb. Rev. Stat. §§ 43-512.12 through 43-512.18 (Reissue 2008) provide a vehicle for the State to seek a modification of an existing support order to attain support from a parent. *Sneckenberg v. Sneckenberg*, 9 Neb. App. 609, 616 N.W.2d 68 (2000). Existing child support orders are subject to review under those statutes where a party has applied for or is receiving services under title IV-D of the Social Security Act. *Sneckenberg, supra*. Here, the complaint was brought by Stauffer, and there is no indication that title IV-D is implicated. We share the dissent's discomfort in applying § 43-512.15 to a modification action brought by an inmate.

However, a determination that incarceration is still considered a voluntary reduction in income when a complaint to modify is brought by a prisoner would lead to absurd results. The district court concluded that the amendment to § 43-512.15 did not supersede *Ohler v. Ohler*, 220 Neb. 272, 369 N.W.2d 615 (1985), because the amendment merely required an authorized attorney to exclude incarceration for more than 1 year from the circumstances which constitute a voluntary reduction of income. If we were to accept the district court's reasoning, however, the language added by the Legislature would be hollow and we would be left with a result which defeats the purpose of the legislation: Even if an authorized attorney filed a complaint on a prisoner's behalf, the prisoner would be entitled to no relief under *Ohler*. The dissent does not address the tension between the statute and the absurd result that would follow if the amendment is deemed not to supersede *Ohler*.

[7] Moreover, prior to the 2008 amendment discussed below, this interpretation would have required the authorized attorney to recommend commencement of a legal proceeding that the attorney would know was doomed to failure, in violation of the statutory duties of an attorney and counselor at law. Neb. Rev. Stat. § 7-105(2) (Reissue 2007) imposes upon an attorney the duty "to counsel or maintain no other actions, proceedings or defenses than those which appear to him [or her] legal and just, except the defense of a person charged with a public offense." The district court's interpretation would mandate that the authorized attorney advocate that the incarcerated person's reduction in income was involuntary even though the attorney knew that a court would hold that the reduction was voluntary. The Legislature could not have intended to provide a hollow remedy and to require authorized attorneys to violate a duty of their office. Again, the dissent ignores the futility of requiring an authorized attorney to bring an action asserting incarceration as an involuntary reduction in income, if a court can merely point to existing case law, such as *Ohler*, which indicates that incarceration is a voluntary reduction. We agree with the dissent that there is no evidence that the Department of Health and Human Services has been involved in the case or that it is a title IV-D case. But the dissent does not explain why incarceration should be considered an involuntary reduction if those circumstances are met, but a voluntary reduction if the action is commenced by the inmate and it is not a title IV-D case.

The legislative history behind the recent amendments to § 43-512.15 supports our conclusion that the Legislature's intent in amending § 43-512.15 was to, in effect, partially overrule decisions of the Nebraska appellate courts which declared that incarceration was considered a voluntary reduction in income for purposes of child support obligations.

The purpose of the 2007 amendment, which originated in 2007 Neb. Laws, L.B. 682, was to "allow for a modification of child support that would reflect the reduced income that is the result of the incarceration of the obligor. Currently, Nebraska courts have found incarceration to be a voluntary reduction of income and, therefore, child support a financial

obligation ineligible for modification." Introducer's Statement of Intent, L.B. 682, Judiciary Committee, 100th Leg., 1st Sess. (Mar. 8, 2007). As the senator introducing the bill explained:

> The change from voluntary to involuntary would allow an incarcerated judgment creditor to modify his court-ordered child support obligation in a way that reflects his or her reduced circumstances that are the direct result of incarceration. . . . I understand that the Nebraska Supreme Court guidelines prohibit lowering a child support order because of the presumption that the reduction in income was due to circumstances under one's control. The position is that the incarcerated person could have foreseen that the loss of freedom would be the result of criminal activity. So I understand the rationale for the court[']s determination that incarceration is voluntary. But we think there are many inconsistencies, and that the justice is probably not being really well served by this. Chief Justice Krivosha, in his dissent in a 1985 case of [*Ohler v. Ohler*, 220 Neb. 272, 369 N.W.2d 615 (1985),] set out some of that thinking. . . . I think we can have an honest discussion here on whether the current child support guidelines impose a nonrehabilitative effect on incarcerated persons when that person faces a huge child support debt and interest penalties upon his or her release.

Judiciary Committee Hearing, L.B. 682, 100th Leg., 1st Sess. 70-71 (Mar. 8, 2007).

In 2008, the Legislature added to § 43-512.15: "(2) The [D]epartment[of Health and Human Services], a county attorney, or an authorized attorney shall not in any case be responsible for reviewing or filing an application to modify child support for individuals incarcerated as described in subdivision (1)(b) of this section." 2008 Neb. Laws, L.B. 1014, § 43 (emphasis omitted). The stated reason for the bill, which originated as 2008 Neb. Laws, L.B. 774, was as follows:

> Incarceration is now considered to be an involuntary reduction in net monthly income for purposes of child support obligations rather than a voluntary reduction in income as it was prior to last year's law change.

> LB 774 provides that the Department of Health and Human Services, its authorized attorney or the county attorney will not in any case be responsible for reviewing or filing an application to modify child support for incarcerated individuals.

Introducer's Statement of Intent, L.B. 774, Judiciary Committee, 100th Leg., 2d Sess. (Jan. 23, 2008).

During testimony on L.B. 774, the introducer of the 2007 bill discussed above stated that following adoption of that bill,

> [c]ounty attorneys were concerned that the law was not clear as to their duties to take affirmative action to commence the proceedings to adjust the child support. And the law itself did not provide that they had that duty, but they felt that they might have that duty under the act. LB774 would make it clear that neither the attorney for the Department of Health and Human Services nor the county attorney has an affirmative duty to file an application to reduce child support. We think that that will clarify the situation that the person[s] requesting the modification of child support would have to take some affirmative action to have that done, probably through their own personal attorney.

Judiciary Committee Hearing, L.B. 774, 100th Leg., 2d Sess. 43 (Jan. 23, 2008).

In representing the Nebraska County Attorneys Association in support of the bill, the Seward County Attorney stated:

> LB 774 puts the responsibility on the party seeking the modification. The incarcerated individual[s get] the benefit and ha[ve] the best access to the information surrounding their incarceration, specifically the time that they are incarcerated, when they are going to be paroled, and if they're going to be on any sort of work release. Also, LB 774 allows for [the Department of] Health and Human Services, the authorized attorney, and the county attorneys to focus their resources on the children whose parents have the ability to support them, otherwise resources and court time [are] actually spent modifying child support downward, without much benefit to the child.

Id. at 47.

[8] We conclude that the Legislature intended for an incarcerated inmate to be able to file his or her own complaint to modify child support and for the incarceration to be considered an involuntary reduction of income when the conditions of § 43-512.15(1)(b) are met. We cannot ignore the evident intent of the legislative act merely because the Legislature could have chosen a better section in which to codify its amendment. Having settled the meaning of the statute, an appellate court must give effect to the purpose and intent of the Legislature. See *Southern Neb. Rural P.P. Dist. v. Nebraska Electric*, 249 Neb. 913, 546 N.W.2d 315 (1996). We therefore reject the district court's interpretation of the statute.

Material Change in Circumstances.

[9] The district court determined that "the amendment . . . does not constitute a material change in circumstances." We disagree. In *Sneckenberg v. Sneckenberg*, 9 Neb. App. 609, 616 N.W.2d 68 (2000), we held that an upward revision of the support required under the child support guidelines was a material change of circumstances that warranted upward modification of a former husband's child support obligation, independently of changes in his income. Similarly, in *Schmitt v. Schmitt*, 239 Neb. 632, 477 N.W.2d 563 (1991), the Nebraska Supreme Court held that the adoption of child support guidelines constituted a material change of circumstances warranting a change in child support obligations, notwithstanding that it resulted from a change of law rather than from actions of the parties. See, also, *Babka v. Babka*, 234 Neb. 674, 452 N.W.2d 286 (1990) (holding that change in federal tax law regarding dependency exemptions constituted material change of circumstances which would justify modification of support order). We conclude that the change of law making incarceration an involuntary reduction in income under certain conditions rather than a voluntary reduction is a material change of circumstances. Even though Stauffer's circumstances have not changed from his last action to modify his support obligation, the change of law constitutes a material change of circumstances. Accordingly, we reverse, and remand for further proceedings.

CONCLUSION

[10] For over 20 years, Nebraska courts have declined to allow an incarcerated parent to obtain a reduction in his or her child support obligation based upon reduced earnings as a result of being incarcerated. Under § 43-512.15, as recently amended, a child support obligor's incarceration is now considered an involuntary reduction in income under certain circumstances. We conclude that the Legislature intended to change the state of the law and that the change of law constitutes a material change of circumstances. We reverse, and remand for further proceedings.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

CARLSON, Judge, dissenting.

I respectfully dissent from the conclusion reached by the majority that the Legislature's intent in amending § 43-512.15 was to effectively overrule prior holdings in Nebraska case law that incarceration was considered a voluntary reduction in income for the purpose of determining child support obligations. The majority concludes that the Legislature clearly intended that an incarcerated inmate be able to file his or her own modification action and that the fact of incarceration be considered an involuntary reduction of income when the provisions of § 43-512.15(1)(b) are met.

In my opinion, the plain language of the statute forecloses such a result. When asked to interpret a statute, a court must determine and give effect to the purpose and intent of the Legislature as ascertained from the entire language of the statute considered in its plain, ordinary, and popular sense. To determine the legislative intent of a statute, a court generally considers the subject matter of the whole act, as well as the particular topic of the statute containing the questioned language. *Harvey v. Nebraska Life & Health Ins. Guar. Assn.*, 277 Neb. 757, 765 N.W.2d 206 (2009).

Neb. Rev. Stat. § 43-512.10 (Reissue 2008) states that "[s]ections 43-512 to 43-512.10 and 43-512.12 to 43-512.18 shall be interpreted so as to facilitate the determination of paternity, child, spousal, and medical support enforcement, and the conduct of reviews under such sections." As summarized,

these sections apply to child support cases in which a party has applied for services under title IV-D of the federal Social Security Act. Section 43-512.12(1) requires the Department of Health and Human Services to determine whether such cases should be referred to a county attorney or authorized attorney for filing a modification action when the present obligation varies from the Supreme Court child support guidelines by more than the percentage amount established by court rule and the variation is due to financial circumstances which have lasted at least 3 months and can reasonably be expected to last for another 6 months.

I think the district court properly concluded that § 43-512.15(1) is inapplicable to Stauffer's case. The subsection applies only to a county attorney in certain cases referred from the Department of Health and Human Services, and the entire statutory scheme refers only to title IV-D cases. No evidence was presented at the hearing on Stauffer's complaint to modify that the Department of Health and Human Services has been involved in this case or that the case is a title IV-D case.

In making determinations of legislative intent, I believe that the majority has read the statutory language independently of its context and has improperly extended the clear statutory language in these statutes to all child support modification actions, regardless of whether these actions come within the clear parameters of the statute. The language of these statutes is clear and unambiguous; it is not necessary to "interpret" the Legislature's meaning.

I would affirm the decision of the district court to deny Stauffer's complaint to modify his child support obligation.

SUSAN KAY ROUSE, APPELLEE, V.
ROY JOSEPH ROUSE, JR., APPELLANT.
775 N.W.2d 457

Filed November 10, 2009. No. A-09-281.

1. **Modification of Decree: Appeal and Error.** Modification of a dissolution decree is a matter entrusted to the discretion of the trial court, whose order is reviewed de novo on the record, and which will be affirmed absent an abuse of discretion by the trial court.
2. **Statutes: Appeal and Error.** Statutory interpretation is a question of law, which an appellate court resolves independently of the trial court.
3. **Modification of Decree: Child Support.** Under Neb. Rev. Stat. § 43-512.15 (Reissue 2008), a person continuously jailed while awaiting trial faces the same reduction in income as a person continuously incarcerated after sentencing.
4. ____: ____. Neb. Rev. Stat. § 43-512.15 (Reissue 2008) allows an incarcerated individual, under certain circumstances, to file a complaint seeking modification of his or her child support obligation upon the basis that his or her incarceration is an involuntary reduction of income.

Appeal from the District Court for Hamilton County: MICHAEL J. OWENS, Judge. Reversed and remanded for further proceedings.

Roy Joseph Rouse, Jr., pro se.

No appearance for appellee.

SIEVERS, CARLSON, and CASSEL, Judges.

CASSEL, Judge.

INTRODUCTION

After amendments to Neb. Rev. Stat. § 43-512.15 (Reissue 2008) became effective, Roy Joseph Rouse, Jr., filed a complaint to modify his child support obligation due to his reduced earnings as a result of his incarceration. The district court denied the complaint, in part because Rouse had a child support arrearage at the time he began serving his prison sentence. For the reasons set forth in *Hopkins v. Stauffer, ante* p. 116, 775 N.W.2d 462 (2009), we conclude that Rouse could personally file a complaint seeking modification of his child support obligation upon the basis that his incarceration was an involuntary reduction of income. Because the record does not

show that Rouse willfully failed to pay child support when he had sufficient resources to do so, we reverse, and remand for further proceedings.

BACKGROUND

On August 6, 2008, Rouse filed a complaint to modify his child support obligation under § 43-512.15. The district court conducted a hearing, and evidence was adduced that under a February 16, 1994, support order, Rouse's current child support obligation is $216 per month. Rouse testified that he earns $1.21 a day and that as of December 2008, approximately $12 a month has been taken out of his earnings for child support. He does not own any real estate or any property other than personal items.

The court received an exhibit showing Rouse's child support payment history since June 2001. Rouse testified that he was current on his child support at the time of his incarceration and that he was "a month ahead." Rouse testified that he was "up-to-date" on child support in November 2001 and that he was put in the county jail in December. Rouse was unclear on the exact date of his incarceration. He "had two sentences on top of each other" and had been continuously incarcerated. Rouse testified that he was sentenced on approximately March 23, but the record is not clear regarding the year. He also testified that he has been in prison since March 2002, that his tentative release date is 2040, and that he was approximately $20,000 in arrears on his child support obligation at the time of trial.

On February 10, 2009, the district court denied Rouse's complaint. The court stated, "The evidence reveals that [Rouse] began serving his present sentence on or about March 26, 2003. On that date, [Rouse] had a child support arrearage of $3,180.68." The court rejected Rouse's claim that his incarceration constituted an involuntary reduction in income for two reasons: (1) The statute provides for a modification complaint to be brought by the prosecutor, and (2) the statute provides that modification is not appropriate if the inmate has a documented record of willfully failing or neglecting to provide proper support.

Rouse timely appeals. No brief has been filed in response to the brief submitted by Rouse. Pursuant to authority granted to this court under Neb. Ct. R. App. P. § 2-111(B)(1) (rev. 2008), this case was ordered submitted without oral argument.

ASSIGNMENTS OF ERROR

Rouse alleges that the district court erred (1) in determining that he had not demonstrated a material change in circumstances necessitating a reduction in his child support obligation, (2) by violating Rouse's equal protection rights when it denied his request to modify his child support obligation while incarcerated, and (3) by relying on the doctrine of unclean hands and ruling that modification was precluded by Rouse's being in arrears on his support obligation.

STANDARD OF REVIEW

[1] Modification of a dissolution decree is a matter entrusted to the discretion of the trial court, whose order is reviewed de novo on the record, and which will be affirmed absent an abuse of discretion by the trial court. *Metcalf v. Metcalf*, 278 Neb. 258, 769 N.W.2d 386 (2009).

[2] Statutory interpretation is a question of law, which an appellate court resolves independently of the trial court. *Metropolitan Comm. College Area v. City of Omaha*, 277 Neb. 782, 765 N.W.2d 440 (2009).

ANALYSIS

The district court observed that § 43-512.15 provides for a modification complaint to be brought by the prosecutor but stated that it was "reluctant to find that modification should initially be at the sole discretion of the county or authorized attorney." The court also cited to *Ohler v. Ohler*, 220 Neb. 272, 369 N.W.2d 615 (1985), and *State on behalf of Longnecker v. Longnecker*, 11 Neb. App. 773, 660 N.W.2d 544 (2003), and stated that "[t]he evidence does not indicate that the statutory changes are in conflict with the cited precedent."

In *Hopkins v. Stauffer, ante* p. 116, 775 N.W.2d 462 (2009), we determined that the Legislature's intent in amending § 43-512.15 was to, in effect, partially overrule decisions of the Nebraska appellate courts which declared that incarceration

was considered a voluntary reduction in income for purposes of child support obligations. We concluded that the Legislature clearly intended for an incarcerated inmate to be able to file his or her own complaint to modify child support and for the incarceration to be considered an involuntary reduction of income when the conditions of § 43-512.15(1)(b) are met. We held that the change of law making incarceration an involuntary reduction in income under certain conditions rather than a voluntary reduction constituted a material change of circumstances. In the case before us, we reverse the order of the district court to the extent that it found otherwise. As set forth more fully in *Hopkins*, we disagree with the dissent's position because it would lead to an absurd result, which the Legislature surely could not have intended.

The district court in the instant case noted that under § 43-512.15, modification is not appropriate if the inmate has a documented record of willfully failing or neglecting to provide proper support. Section 43-512.15(1)(b) provides in pertinent part:

> For purposes of this section, a person who has been incarcerated for a period of one year or more in a county or city jail or a federal or state correctional facility shall be considered to have an involuntary reduction of income unless (i) the incarceration is a result of a conviction for criminal nonsupport pursuant to section 28-706 or a conviction for a violation of any federal law or law of another state substantially similar to section 28-706 or (ii) the incarcerated individual has a documented record of willfully failing or neglecting to provide proper support which he or she knew or reasonably should have known he or she was legally obligated to provide when he or she had sufficient resources to provide such support[.]

[3] Rouse testified that at the time of his incarceration, not only was he current on his child support obligation, but he was a month ahead. The district court, however, found that Rouse had a substantial arrearage at the time his incarceration commenced and that "[n]o evidence was adduced to indicate that such arrearage was anything but willful or neglectful." We find no support in the record before us for the district court's

statement that "[t]he evidence reveals that [Rouse] began serving his present sentence on or about March 26, 2003." Further, nothing in the statute limits the period of incarceration to that occurring after sentencing. A person continuously jailed while awaiting trial faces the same reduction in income as a person continuously incarcerated after sentencing, and the statute specifically references incarceration in jails in addition to incarceration in federal or state correctional facilities. Rouse testified that he was incarcerated in the county jail in December 2001, and the record shows no arrearage in child support until the last day of that month. Because there is no documented record of Rouse's willfully failing or neglecting to provide proper support when he had sufficient resources to provide such support, we reverse, and remand for further proceedings.

CONCLUSION

[4] As we determined in *Hopkins v. Stauffer, ante* p. 116, 775 N.W.2d 462 (2009), § 43-512.15 allows an incarcerated individual, under certain circumstances, to file a complaint seeking modification of his or her child support obligation upon the basis that his or her incarceration is an involuntary reduction of income. Because Rouse has been incarcerated for 1 year or more and he does not have a documented record of willfully failing to pay child support when he had sufficient resources to do so, we reverse, and remand for further proceedings.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

CARLSON, Judge, dissenting.

I respectfully dissent from the conclusion reached by the majority that the Legislature's intent in amending § 43-512.15 was to effectively overrule prior holdings in Nebraska case law that incarceration was considered a voluntary reduction in income for the purpose of determining child support obligations. The majority concludes that the Legislature clearly intended that an incarcerated inmate be able to file his or her own modification action and that the fact of incarceration be considered an involuntary reduction of income when the provisions of § 43-512.15(1)(b) are met.

In my opinion, the plain language of the statute forecloses such a result. When asked to interpret a statute, a court must determine and give effect to the purpose and intent of the Legislature as ascertained from the entire language of the statute considered in its plain, ordinary, and popular sense. To determine the legislative intent of a statute, a court generally considers the subject matter of the whole act, as well as the particular topic of the statute containing the questioned language. *Harvey v. Nebraska Life & Health Ins. Guar. Assn.*, 277 Neb. 757, 765 N.W.2d 206 (2009).

Neb. Rev. Stat. § 43-512.10 (Reissue 2008) states that "[s]ections 43-512 to 43-512.10 and 43-512.12 to 43-512.18 shall be interpreted so as to facilitate the determination of paternity, child, spousal, and medical support enforcement, and the conduct of reviews under such sections." As summarized, these sections apply to child support cases in which a party has applied for services under title IV-D of the federal Social Security Act. Section 43-512.12(1) requires the Department of Health and Human Services to determine whether such cases should be referred to a county attorney or authorized attorney for filing a modification action when the present obligation varies from the Supreme Court child support guidelines by more than the percentage amount established by court rule and the variation is due to financial circumstances which have lasted at least 3 months and can reasonably be expected to last for another 6 months.

I think the district court properly concluded that § 43-512.15(1) is inapplicable to Rouse's case. The subsection applies only to a county attorney in certain cases referred from the Department of Health and Human Services, and the entire statutory scheme refers only to title IV-D cases. No evidence was presented at the hearing on Rouse's complaint to modify that the Department of Health and Human Services has been involved in this case or that the case is a title IV-D case.

In making determinations of legislative intent, I believe that the majority has read the statutory language independently of its context and has improperly extended the clear statutory language in these statutes to all child support modification actions, regardless of whether these actions come within the

clear parameters of the statute. The language of these statutes is clear and unambiguous; it is not necessary to "interpret" the Legislature's meaning.

I would affirm the decision of the district court to deny Rouse's complaint to modify his child support obligation.

VIVIKA A. DEVINEY, APPELLANT, V. UNION PACIFIC RAILROAD COMPANY, A DELAWARE CORPORATION, APPELLEE.

776 N.W.2d 21

Filed November 17, 2009. No. A-08-1259.

1. **Summary Judgment.** A court should grant summary judgment when the pleadings and evidence admitted show that no genuine issue exists regarding any material fact or 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 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.
3. **Federal Acts: Railroads: Claims: Courts: Jurisdiction.** Courts of the United States and courts of the several states have concurrent jurisdiction over claims controlled by the Federal Employers' Liability Act.
4. **Federal Acts: Railroads: Claims: Courts.** In disposing of a claim controlled by the Federal Employers' Liability Act, a state court may use procedural rules applicable to civil actions in the state court unless otherwise directed by the act, but substantive issues concerning a claim under the act are determined by the provisions of the act and interpretative decisions of the federal courts construing the act.
5. **Federal Acts: Railroads: Negligence: Liability.** Under the Federal Employers' Liability Act, railroad companies are liable in damages to any employee who suffers injury during the course of employment when such injury results in whole or in part due to the railroad's negligence.
6. **Federal Acts: Railroads: Negligence: Proximate Cause: Proof.** To recover under the Federal Employers' Liability Act, an employee must prove the employer's negligence and that the alleged negligence is a proximate cause of the employee's injury.
7. **Negligence.** The common-law elements of negligence include duty, breach, foreseeability, and causation.
8. **Employer and Employee: Railroads.** A railroad has a nondelegable duty to provide its employees with a reasonably safe place to work.

9. **Negligence: Summary Judgment.** Only when one would have to infer from no evidence at all that the defendant breached its duty can a court take the question from the jury and enter a judgment as a matter of law for the defendant.
10. **Federal Acts: Railroads: Employer and Employee.** The Federal Employers' Liability Act imposes upon the employer a nondelegable duty to use reasonable care to furnish its employees a safe place to work, and this duty extends beyond its premises and to property which third persons have a primary obligation to maintain. This duty includes a responsibility to inspect the third party's property for hazards and to take precautions to protect the employee from possible defects.
11. **Federal Acts: Railroads: Proof: Notice.** The essential element of reasonable foreseeability in Federal Employers' Liability Act actions requires proof of actual or constructive notice to the employer of the defective condition that caused the injury.
12. **Negligence: Torts: Damages.** For a defendant to be liable for consequential damages, he need not foresee the particular consequences of his negligent acts: Assuming the existence of a threshold tort against the person, then whatever damages flow from it are recoverable.

Appeal from the District Court for Douglas County: W. RUSSELL BOWIE III, Judge. Reversed and remanded for further proceedings.

Richard J. Dinsmore and Jayson D. Nelson, of Law Office of Richard J. Dinsmore, P.C., L.L.C., and Cortney S. LeNeave and Richard L. Carlson, of Hunegs, LeNeave & Kvas, P.A., for appellant.

William M. Lamson, Jr., Anne Marie O'Brien, and Angela J. Miller, of Lamson, Dugan & Murray, L.L.P., for appellee.

SIEVERS, CARLSON, and CASSEL, Judges.

SIEVERS, Judge.

Vivika A. Deviney brought an action under the Federal Employers' Liability Act (FELA) against Union Pacific Railroad Company (Union Pacific) alleging that she contracted "West Nile" virus (WNV) while employed as a conductor by Union Pacific. The district court for Douglas County granted summary judgment in favor of Union Pacific, from which judgment Deviney appeals. We reverse, and remand for further proceedings.

FACTUAL BACKGROUND

Deviney's FELA case seeks to recover damages for severe injuries resulting from her contracting WNV, allegedly while working as a conductor for Union Pacific at Bill, Wyoming, on or about August 3, 2003. As a result of the virus, Deviney suffered 84-percent hearing loss in her right ear and 20-percent hearing loss in her left ear and also suffers from fatigue, vertigo, reduced vision, and left-side weakness.

In early August 2003, Deviney worked a late shift where she and an engineer took a coal train from the trainyard in Bill to the coal mines near Gillette, Wyoming. While en route to the mines, the train had to stop on a double mainline near "East Cadaro Junction." As part of the conductor's job, Deviney was required to get off the train to perform a roll-by inspection of a passing train at that location.

Deviney got off her train to perform the inspection. She described the situation as follows: "You couldn't stand still because the mosquito[e]s were so bad. I had to . . . walk and watch the train as it went by and wave my arms." Deviney estimated that she was bitten on her hands and neck more than once, but less than 25 times, while performing the inspection. Deviney radioed the dispatcher to complain about the mosquitoes, but Deviney states that the dispatcher's only response was to laugh. Near East Cadaro Junction, there was a pond on the mine property that always had water in it. The water came from a silo owned by the mining company. Deviney was wearing long pants, a sweater, and her own insect repellant containing 7 percent "DEET."

Deviney stated that the mosquitoes were also bad inside the Bill trainyard. She stated that there were mosquitoes "squished" on walls inside the tieup room in Bill. Deviney also stated that there was standing water in the Bill trainyard from washing equipment, and a pond on the property.

Deviney's last day of work was August 4, 2003. Within a week, she developed headaches, diarrhea, vomiting, and nausea. She was eventually diagnosed with WNV. She was in a hospital and then a rehabilitation facility from August 13 to October 17.

PROCEDURAL BACKGROUND

Deviney filed a complaint against Union Pacific pursuant to FELA. She alleged that on or about August 3, 2003, she was bitten by mosquitoes while in the course and scope of her employment, resulting in the diagnosis of WNV. She also alleged that she suffered severe and permanent injuries and disability and that such were caused by Union Pacific's negligence in violation of FELA.

Union Pacific filed a motion for summary judgment alleging that there was no genuine issue of material fact and that it was entitled to summary judgment as a matter of law.

In its order, the district court sustained Union Pacific's motion for summary judgment. The district court found there was no specific information from which the railroad could be charged with knowledge about large concentrations of mosquitoes where Deviney claims to have been bitten, at either East Cadaro Junction or the trainyard in Bill. The district court also held:

> [Union Pacific] has made concerted efforts to eradicate mosquito larvae, and has warned its employees about the dangers of WNV. Couple[d] . . . with the almost insurmountable task of preventing just a single mosquito bite and the incredibly small risk of becoming severely ill from WNV even if bitten by an infected mosquito, [that] leads me to the conclusion that the risk of harm to . . . Deviney was not reasonably foreseeable to, or preventable by, [Union Pacific].

Finding that there was no genuine issue of material fact, the district court granted Union Pacific's motion for summary judgment and dismissed Deviney's complaint with prejudice. Deviney's motions to complete the record and to alter or amend judgment were denied. She now appeals.

ASSIGNMENTS OF ERROR

Deviney alleges that the district court erred in (1) holding, as a matter of law, that Union Pacific discharged its duty of providing Deviney with a reasonably safe place to work and (2) holding that Deviney's injuries were not reasonably foreseeable.

STANDARD OF REVIEW

[1,2] A court should grant summary judgment when the pleadings and evidence admitted show that no genuine issue exists regarding any material fact or the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law. *King v. Burlington Northern Santa Fe Ry. Co.*, 277 Neb. 203, 762 N.W.2d 24 (2009). In reviewing a summary judgment, we view the evidence in a light most favorable to the party against whom the judgment is granted and give such party the benefit of all reasonable inferences deducible from the evidence. *Id.*

ANALYSIS

[3,4] Deviney brought her FELA claim in state court. As stated in *Crafton v. Union Pacific RR. Co.*, 7 Neb. App. 793, 797-98, 585 N.W.2d 115, 121 (1998):

> Courts of the United States and courts of the several states have concurrent jurisdiction over claims controlled by FELA. . . . In disposing of a claim controlled by FELA, a state court may use procedural rules applicable to civil actions in the state court unless otherwise directed by the act, but substantive issues concerning a claim under FELA are determined by the provisions of the act and interpretative decisions of the federal courts construing FELA.

(Citations omitted.)

[5-7] "Under FELA, railroad companies are liable in damages to any employee who suffers injury during the course of employment when such injury results in whole or in part due to the railroad's negligence." *McNeel v. Union Pacific RR. Co.*, 276 Neb. 143, 149, 753 N.W.2d 321, 328. "This court has stated that to recover under FELA, an employee must prove the employer's negligence and that the alleged negligence is a proximate cause of the employee's injury." *Id.* The common-law elements of negligence include duty, breach, foreseeability, and causation. See *Crafton v. Union Pacific RR. Co., supra*.

Duty and Breach.

[8,9] Union Pacific's duty is clear: "A railroad has a nondelegable duty to provide its employees with a reasonably

safe place to work." *Pehowic v. Erie Lackawanna Railroad Company*, 430 F.2d 697, 699 (3d Cir. 1970). Thus, in order to recover for negligence under FELA, Deviney must show that Union Pacific breached its duty to provide her with a reasonably safe workplace. And "only when 'one would have to infer from no evidence at all' that the defendant breached its duty can a court take the question from the jury and enter a judgment as a matter of law for the defendant." *Glass v. Birmingham Southern R. R. Co.*, 905 So. 2d 789, 795 (Ala. 2004) (quoting *Moore v. Chesapeake & O. R. Co.*, 340 U.S. 573, 71 S. Ct. 428, 95 L. Ed. 547 (1951)).

In the present case, there is certainly some evidence that Union Pacific breached its duty to provide Deviney with a reasonably safe place to work. Union Pacific knew of the dangers associated with WNV, even publishing an accident prevention bulletin in August 2002 regarding such. Union Pacific also knew that WNV is a "mosquito-borne disease," as such was specifically stated in that bulletin. The general manager of safety for Union Pacific stated in his deposition that he became aware of WNV in 2002 through the news and information provided by the federal government's Centers for Disease Control and Prevention. He also stated that Union Pacific's acting medical director monitors that federal agency. The manager of safety stated that Union Pacific started utilizing larvicide for mosquito control in the Bill area in the late 1990's.

Bernie Boersma, Union Pacific's treatment plant and operations manager in Bill, stated in his affidavit that one of his duties is to treat Union Pacific's property in Bill for insects like mosquitoes. Boersma stated that Union Pacific has an evaporation pond about one-quarter to one-half mile from its Bill trainyard office that holds runoff and that there is a creek south of the office. Information received into evidence states that mosquitoes breed in standing water and that even a small bucket with stagnant water in it for 7 days can become home to up to 1,000 mosquitoes.

Boersma averred that he treats the evaporation pond with larvicide as necessary, stating: "When there is a noticeable problem, I drop a pellet into the water. The appearance of mosquitoes will constitute a noticeable problem to me." Boersma

did not recall whether or not he treated the pond in 2003. Boersma stated that he uses a larvicide to control for mosquitoes in the trainyard. The larvicide's information and instruction sheet was received into evidence. The information makes it clear that the treatment is for larval populations, but that some larvae may hatch and partially develop before dying. The information in evidence about the larvicide states that it "kills mosquitoes before they are old enough to bite." Thus, if Boersma was only treating the pond when he noticed the appearance of mosquitoes, it could be inferred that he was not properly using the larvicide to treat the property for mosquitoes, because proper treatment with the larvicide would have occurred before the mosquitoes hatched.

[10] With respect to East Cadaro Junction, there was a pond on the mine property that always had water in it. The water came from a silo owned by the mining company.

> FELA imposes upon the employer a non-delegable duty to use reasonable care to furnish [its] employees a safe place to work, . . . and this duty extends beyond its premises and to property which third persons have a primary obligation to maintain. . . . This duty includes a responsibility to inspect the third party's property for hazards and to take precautions to protect the employee from possible defects . . . .

Carter v. Union Railroad Company, 438 F.2d 208, 210-11 (3d Cir. 1971) (citations omitted). Thus, Union Pacific's failure to treat for mosquitoes near East Cadaro Junction could be seen, when summary judgment is sought, as a breach of its duty to provide Deviney with a reasonably safe place to work, given that she was required to get off of her train to do a roll-by inspection of a passing train.

Based on the foregoing evidence, and reasonable inferences therefrom, there is certainly some evidence that Union Pacific breached its duty to provide Deviney with a reasonably safe place to work. Thus, we turn to the other elements of a FELA claim for negligence.

Foreseeability.

[11] The district court also found, as a matter of law, that Deviney's injuries were not reasonably foreseeable. "The

essential element of reasonable foreseeability in FELA actions requires proof of actual or constructive notice to the employer of the defective condition that caused the injury." *Grano v. Long Island R. Co.*, 818 F. Supp. 613, 618 (S.D.N.Y. 1993). In *Grano*, employees of a railroad who contracted Lyme disease while working on signal equipment brought FELA claims. The court found the railroad was aware that there were tick problems and that ticks, known carriers of Lyme disease, were found in areas where workers would be. The railroad sprayed, but the spraying was mainly to kill poison ivy and no particular attention was given to ticks. There was no testimony from any of the plaintiffs that they were bitten by ticks. The court also noted that although Lyme disease was discussed as a problem, no comprehensive program was developed to protect employees working in tick-infested areas. The court held that the railroad knew or should have known of the tick infestations and of the risk of infection by ticks which transmit Lyme disease. The court then held that it was foreseeable that the employees would be bitten by ticks and thereafter infected with Lyme disease.

In *Pehowic v. Erie Lackawanna Railroad Company*, 430 F.2d 697 (3d Cir. 1970), a railroad employee was stung by a bee while working, became ill, and was treated for a reaction to the bee sting. The lower court granted the railroad's motion to dismiss, and the employee appealed. The Third Circuit noted the evidence that the employee had, prior to being stung, informed the railroad's dispatcher of the presence of brush and bees in the area adjacent to the railroad track where the employee was working and had requested to leave the area because of the condition. Therefore, the court found that the question of whether the railroad was negligent in failing to mitigate the condition was for the jury. The Third Circuit held that the railroad was chargeable with notice of the existence of the brush and the presence of the bees in large concentrations.

[12] In *Gallick v. Baltimore & Ohio R. Co.*, 372 U.S. 108, 83 S. Ct. 659, 9 L. Ed. 2d 618 (1963), a railroad's right-of-way contained a pool of stagnant water, in and about which were dead and decayed rats and pigeons, or portions thereof. While the plaintiff was working near the pool, he experienced an

insect bite on his left leg. The wound subsequently developed an infection which progressively worsened and spread throughout the plaintiff's body, eventually necessitating the amputation of both of his legs. The U.S. Supreme Court stated that the foreseeability requirement had been satisfied when the jury found the railroad was negligent in maintaining the filthy pool of water. And the Supreme Court noted that "[i]t is widely held that for a defendant to be liable for consequential damages he need not foresee the particular consequences of his negligent acts: assuming the existence of a threshold tort against the person, then whatever damages flow from it are recoverable." *Gallick v. Baltimore & Ohio R. Co.*, 372 U.S. at 120.

In the present case, Union Pacific knew about WNV in 2002 and thought the issue was significant enough to post an accident prevention bulletin. Union Pacific knew that WNV is a "mosquito-borne disease" and knew or should have known that even a small amount of stagnant water can become home to a significant number of mosquitoes. The trainyard in Bill had an evaporation pond and a nearby creek. However, the trainyard was treated for mosquitoes only when Boersma, the treatment plant and operations manager in Bill, thought the mosquitoes constituted a noticeable problem. Furthermore, in her deposition, a public health physician testified as follows in response to a question by Deviney's counsel:

> Q. And are you aware of any investigation by [Union Pacific] to confirm that, in fact, co-workers had been complaining in 2003, prior to . . . Deviney's bites, about the presence of mosquitoes in the Bill yard?
>
> A. I've seen nothing written. [Union Pacific's defense counsel] told me yesterday that there were complaints of mosquitoes along the line and in the yard.

Based on this information, and the case law discussed above, the issue of foreseeability constituted a material issue of fact to be determined by the jury.

Causation.

The fourth element of common-law negligence is causation. Deviney testified that she was bitten by mosquitoes while doing a required roll-by inspection of another train at East

Cadaro Junction and again while at the trainyard in Bill. An infectious disease physician in Casper, Wyoming, testified by deposition that if Deviney was not bitten elsewhere, the bites at work would be the cause of her WNV. The close temporal relationship between being bitten on August 3, 2003, and the onset of Deviney's symptoms provides, on a motion for summary judgment, an inference of a causal relationship between Deviney's being bitten on August 3 and her WNV. Thus, there was a material question of fact regarding causation that should have been presented to a jury.

CONCLUSION

For the reasons stated above, we find that there were genuine issues of material fact on the four elements of Deviney's FELA claim preventing entry of judgment as a matter of law in favor of Union Pacific. We therefore reverse the decision of the district court and remand this matter for further proceedings.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

CASSEL, Judge, dissenting.

Because I do not believe Union Pacific Railroad Company (Union Pacific) owed Vivika A. Deviney a duty under the Federal Employers' Liability Act (FELA) to prevent her from being bitten by a mosquito carrying "West Nile" virus (WNV) in the mosquito's natural habitat, I would affirm the district court's entry of summary judgment.

Whether a legal duty exists for actionable negligence is a question of law dependent on the facts in a particular situation. *Knoll v. Board of Regents*, 258 Neb. 1, 601 N.W.2d 757 (1999). "'A decision by the court that, upon any version of the facts, there is no duty, must necessarily result in judgment for the defendant. A decision that, if certain facts are found to be true, a duty exists, leaves open the other questions . . . .'" *Id.* at 6, 601 N.W.2d at 762, quoting W. Page Keeton et al., Prosser and Keeton on the Law of Torts § 37 (5th ed. 1984).

FELA was a response to the special needs of railroad workers who are daily exposed to the risks inherent in railroad work and are helpless to provide adequately for their own safety.

Sinkler v. Missouri Pacific R. Co., 356 U.S. 326, 78 S. Ct. 758, 2 L. Ed. 2d 799 (1958); *Chapman v. Union Pacific Railroad*, 237 Neb. 617, 467 N.W.2d 388 (1991). It is highly doubtful that Congress intended FELA to cover this type of claim; acquiring WNV after being bitten by a mosquito in its natural habitat is not a danger peculiar to railroad workers. FELA does not make the employer the insurer of the safety of his employees while they are on duty; the basis of the employer's liability is negligence, not the fact that injuries occur. *Ellis v. Union Pacific R. Co.*, 329 U.S. 649, 67 S. Ct. 598, 91 L. Ed. 572 (1947).

Deviney states that she "never argued that [Union Pacific's] duty under the FELA was to kill every last mosquito that she might encounter while working for the railroad." Brief for appellant at 22. But Union Pacific correctly responds that "the nature of WNV dictates the opposite. It only takes one mosquito bite for a human to catch WNV." Brief for appellee at 18. Deviney herself acknowledged that the town where she lived in Wyoming had mosquitoes, and she rhetorically asked, "Where doesn't?" Indeed, the very randomness of the risk involved would effectively impose strict liability upon FELA employers for a mosquito bite resulting in WNV. While the majority opinion correctly notes that a FELA employer has a duty to furnish its employees a "reasonably safe place to work," the majority's decision effectively makes the employer an insurer for a random risk beyond human control.

It is not reasonable to impose upon Union Pacific a duty to eradicate mosquitoes that may fly into the area in which an employee happens to be working. I would hold that Union Pacific was not negligent, because it did not owe Deviney a duty to prevent her from being bitten by a WNV-infected mosquito while she was working outdoors.

GREGORY A. GING, APPELLANT, V. NATALIE L. GING, APPELLEE.

775 N.W.2d 479

Filed November 24, 2009. No. A-08-1249.

1. **Divorce: Property Division: Appeal and Error.** An appellate court's review in an action for dissolution of marriage is de novo on the record to determine whether there has been an abuse of discretion by the trial judge. This standard of review applies to the trial court's determination regarding the division of property.
2. **Judgments: Words and Phrases.** An abuse of discretion occurs when a trial court's decision is based upon reasons that are untenable or unreasonable or if its action is clearly against justice or conscience, reason, and evidence.
3. **Divorce: Property Division.** In a dissolution of marriage proceeding, if the parties fail to agree on a property settlement, the court shall order an equitable division of the marital estate.
4. **Property Division: Pensions.** For purposes of property division, the marital estate includes any pension and retirement plans owned by either party.
5. **Property Division.** Under Neb. Rev. Stat. § 42-365 (Reissue 2008), the equitable division of property is a three-step process. The first step is to classify the parties' property as marital or nonmarital. The second step is to value the marital assets and marital liabilities of the parties. The third step is to calculate and divide the net marital estate between the parties in accordance with the principles contained in § 42-365.
6. ____. The purpose of a property division is to distribute the marital assets equitably between the parties.
7. ____. Although the division of property is not subject to a precise mathematical formula, the general rule is to award a spouse one-third to one-half of the marital estate.
8. ____. The ultimate test for determining the appropriateness of the division of property is reasonableness as determined by the facts of each case.
9. **Evidence.** Statements of counsel in a brief are not evidence.
10. **Divorce: Property Division: Valuation: Time: Appeal and Error.** There is no "hard and fast" rule concerning the date on which marital property subject to division in a dissolution proceeding is valued, so long as the selected date bears a rational relationship to the property to be divided and is reviewed for an abuse of discretion.
11. **Divorce: Property Division: Valuation.** In dissolution proceedings, the trial court has broad discretion in valuing and dividing the parties' retirement accounts.

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

Kelly T. Shattuck, of Cohen, Vacanti, Higgins & Shattuck, for appellant.

Mark S. Bertolini, of Bertolini, Schroeder & Blount, for appellee.

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

MOORE, Judge.

INTRODUCTION

Gregory A. Ging appeals from a decree of dissolution entered by the district court for Sarpy County on November 3, 2008, which dissolved his marriage to Natalie L. Ging. Gregory's primary complaint on appeal relates to the division of his retirement account. For the reasons that follow, we affirm.

BACKGROUND

Gregory and Natalie were married on June 28, 1986, in Omaha, Nebraska. On July 3, 2007, Gregory filed a complaint for dissolution of marriage in Sarpy County District Court. The trial was held on May 28, 2008. Because the issue on appeal relates only to the division of property, specifically Gregory's retirement account, we limit our discussion of the facts to only those necessary for the resolution of this issue.

Among the marital property is Gregory's Omaha Public Power District (OPPD) 457 retirement account. On April 16, 2007, the parties took out a $50,000 loan against this account to pay certain marital debts, and Gregory testified that after accounting for the loan, the value of his account was $248,358.96. An account statement dated September 19, 2007, shows the withdrawal representing the $50,000 loan and reports that the account was valued at $320,475. On March 31, 2008, an account statement reported a value of $298,358.96.

Natalie disputed that the $50,000 loan was a marital debt. Natalie testified that when she signed the document authorizing the loan from Gregory's 457 account, she was not aware that the loan was for $50,000; rather, she believed it was for an amount between $4,000 and $9,000.

Natalie owns three retirement accounts which are subject to division. Evidence received at trial valued Natalie's OPPD 457 retirement account at $22,974, her Wells Fargo 401K retirement account at $16,050.81, and her OPPD 401K retirement

account at approximately $39,760.11. Natalie took out two loans against her OPPD 401K retirement account to pay marital debt, and the combined outstanding balance of those loans is $10,519.40.

In addition to their retirement accounts, the parties also owned three parcels of real property, two tractors, three vehicles, an Ameritrade investment account, and various items of personal property. Gregory is the insured and beneficiary of a life insurance policy which has a cash value of $10,762.60; he also has an OPPD pension plan. Marital debts in addition to the loans from the parties' retirement accounts include debts to American Express, AT&T, Wells Fargo, and a mortgage on the marital home.

Following the trial, the district court took the matter under advisement.

On June 26, 2008, the district court apparently issued written findings to counsel in a letter and directed Gregory's attorney to prepare a decree in accordance with the findings. That letter does not appear in the record. On September 24, prior to entry of a decree, Gregory filed a motion to reconsider, clarify, and compel. The motion states:

> On June 26, 2008, the court sent Tentative Findings to counsel setting a specific dollar amount [that Natalie] would be awarded from [Gregory's] 457 Plan instead of a percentage of the Plan. As the Court is aware, the Plan is subject to market fluctuations and dropped in value [between May 2008 and September 2008]. This Finding would result in [Gregory's] absorbing all the market loss which is unfair and unconscionable. [Gregory] requests the language be changed to award one-half of the value after subtracting the existing loan against the fund.

On October 1, Gregory filed an amended motion to reconsider, clarify, and compel; the changes in the amended motion are not relevant to this appeal.

On October 23, 2008, Natalie filed a motion for an order requesting that the court enter the decree. The same day, Natalie also filed an objection to Greg's amended motion. The objection asked the court to deny Gregory's amended motion and grant Natalie's motion to compel entry of the decree. The

district court heard Gregory's amended motion and Natalie's objection on October 24. Natalie's motion to compel was heard on October 31. No testimony or exhibits were offered as evidence at either of these hearings.

On November 3, 2008, the court denied Gregory's amended motion to reconsider, clarify, and compel and entered the decree of dissolution. With respect to the parties' retirement accounts, the decree provides:

> [Natalie] is awarded the sum of $95,845.50 of [Gregory's] 457 Plan and her 401K and 457 Plans. Each party [is] to execute all necessary documents to effect the transfer. In valuing the plan the Court did not add back the $50,000.00 loan for the reason [that] there was sufficient evidence [that Natalie] had knowledge of the loan distribution. Each party is awarded one-half of the vested pension of the other as determined by the coverture method, the same to be set over by a Qualified Domestic [Relations] Order.

The decree ordered the parties to sell the three parcels of real property as well as the two tractors and equally divide the proceeds. The court also divided the marital debts, the parties' three vehicles, and their household and personal items. The court ordered that the parties equally divide the Ameritrade account and that Gregory keep his life insurance policy.

Gregory timely filed this appeal.

ASSIGNMENT OF ERROR

Gregory assigns as error, restated, that the district court erred when it divided the parties' property, specifically as the property award relates to his 457 retirement plan.

STANDARD OF REVIEW

[1,2] An appellate court's review in an action for dissolution of marriage is de novo on the record to determine whether there has been an abuse of discretion by the trial judge. *Gress v. Gress*, 271 Neb. 122, 710 N.W.2d 318 (2006). This standard of review applies to the trial court's determination regarding the division of property. See *id*. An abuse of discretion occurs when a trial court's decision is based upon reasons that are

untenable or unreasonable or if its action is clearly against justice or conscience, reason, and evidence. *Schwartz v. Schwartz*, 275 Neb. 492, 747 N.W.2d 400 (2008).

ANALYSIS

Gregory assigns as error the district court's award of property, particularly as the award relates to his 457 retirement plan. He specifically argues that the court erred in awarding a lump-sum amount of his retirement account rather than a percentage of the same which would account for gains and losses during the time between the rendering of the court's decision and the implementation of the decision.

[3-5] In a dissolution of marriage proceeding, if the parties fail to agree on a property settlement, the court shall order an equitable division of the marital estate. Neb. Rev. Stat. § 42-366(8) (Reissue 2008). For purposes of property division, the marital estate includes any pension and retirement plans owned by either party. See § 42-366(8). Under Neb. Rev. Stat. § 42-365 (Reissue 2008), the equitable division of property is a three-step process. *Gress v. Gress, supra*. The first step is to classify the parties' property as marital or nonmarital. *Id*. The second step is to value the marital assets and marital liabilities of the parties. *Id*. The third step is to calculate and divide the net marital estate between the parties in accordance with the principles contained in § 42-365. *Gress v. Gress, supra*.

[6-8] The purpose of a property division is to distribute the marital assets equitably between the parties. § 42-365. Although the division of property is not subject to a precise mathematical formula, the general rule is to award a spouse one-third to one-half of the marital estate. See, *Gress v. Gress, supra*; *Carter v. Carter*, 261 Neb. 881, 626 N.W.2d 576 (2001). The ultimate test for determining the appropriateness of the division of property is reasonableness as determined by the facts of each case. *Carter v. Carter, supra*.

In the decree, the trial court did not specifically assign values to the property and debts, but in our de novo review, it is clear that the court attempted to arrive at a relatively equal division of assets and debts. Aside from the retirement

accounts, the court ordered that the remaining assets of any significant value—the real estate and the tractors—be sold and the net proceeds equally divided, along with the Ameritrade account. Although the court's order did not specifically so state, it appears and the record supports a conclusion that the district court intended to order that Gregory pay $95,845.50 from his 457 account to Natalie as a property equalization payment. The record supports the court's division of the marital property, including the $95,845.50 payment. Although the parties did dispute the values of some of the marital property, our review of the record reveals that regardless of which party's values the court utilized, the court's award falls within the general rule that an equitable division of property is achieved so long as a spouse is awarded one-third to one-half of the marital estate.

[9] Gregory's primary argument is that the court erred in ordering a cash payment from his retirement account as opposed to dividing the account on a percentage basis. Prior to entry of the decree, Gregory asked the court to reconsider the award of the lump-sum payment to Natalie, citing the recent decline in the stock market, which he claimed caused his 457 account to decrease in value. Gregory did not, however, offer evidence at the hearing on his motion to show that the account had actually decreased in value. Gregory makes the same argument in his brief regarding the decline in the stock market, stating that between the time of the court's tentative findings and his motion to reconsider, "the stock market crashed at levels not seen since the Great Depression," but of course, statements of counsel in a brief are not evidence. Brief for appellant at 7. See *Home Fed. Sav. & Loan v. McDermott & Miller*, 243 Neb. 136, 497 N.W.2d 678 (1993) (when reviewing decision of lower court, appellate court may consider only evidence included within record; party's brief may not expand evidentiary record).

In his brief, Gregory asserts that this case is analogous to our unpublished opinion in *Frasier v. Frasier*, No. A-07-003, 2008 WL 3523155 (Neb. App. Aug. 12, 2008) (not designated for permanent publication), and also to *Gruber v. Gruber*, 261 Neb. 914, 626 N.W.2d 582 (2001). However, both *Frasier* and

Gruber are distinguishable from the present case. In *Gruber*, the Supreme Court affirmed the modification of a decree necessitated by an employer's refusal to recognize a qualified domestic relations order designed to effectuate the division of a retirement plan. The court held that modification was appropriate to avoid a gross inequity, based upon "the record before [the court], particularly the undisputed evidence that both parties intended to divide the pension equally." *Id.* at 922, 626 N.W.2d at 588. In *Frasier*, which also involved a modification of a divorce decree, evidence was presented that the husband's retirement account became worthless due to his previous employer's filing bankruptcy, which, in turn, affected the division of his remaining retirement benefits. Under the unique facts of that case, this court concluded that modification was warranted to avoid gross inequity. In reaching this conclusion, we found that the employer's bankruptcy and the resultant decrease in the husband's pension were unforeseen.

The present case does not involve a modification of a decree to prevent gross inequity. Further, there is no evidence in the record to suggest either a gross inequity or an abuse of discretion in the division of the marital estate. To the extent that Gregory's allegations of market fluctuations are relevant, we note that such fluctuations would presumably apply to Natalie's retirement accounts as well and that such fluctuations, both upward and downward, are an ongoing occurrence.

[10] As with any item of property, it was necessary for the trial court in this case to determine the value of the parties' retirement accounts at a particular point in time in order to ultimately divide the marital estate in an equitable manner. At trial, Gregory adduced evidence of the value of his retirement account as of March 31, 2008, which was the most recent statement available to the court at the trial held on May 28. It is well settled that there is no "hard and fast" rule concerning the date on which marital property subject to division in a dissolution proceeding is valued, so long as the selected date bears a rational relationship to the property to be divided and is reviewed for an abuse of discretion. See *Myhra v. Myhra*, 16 Neb. App. 920, 756 N.W.2d 528 (2008). We find no abuse of

discretion in the trial court's consideration of the values of the parties' retirement accounts as adduced at trial.

[11] We further find no abuse of discretion in dividing the marital estate by ordering a lump-sum cash payment to Natalie from Gregory's retirement account as opposed to a payment on a percentage basis. In dissolution proceedings, the trial court has broad discretion in valuing and dividing the parties' retirement accounts. See *Schwartz v. Schwartz*, 275 Neb. 492, 747 N.W.2d 400 (2008).

For these reasons, we conclude that the district court did not abuse its discretion when it divided the parties' property in the decree, particularly regarding the award to Natalie of a lump-sum payment instead of a percentage of Gregory's 457 retirement account. The decree ordered a reasonable division of the marital estate and was not clearly against justice or conscience, reason, and evidence.

CONCLUSION

In our de novo review, we conclude that the district court did not abuse its discretion when it divided the parties' property, specifically related to the lump-sum award to Natalie from Gregory's 457 plan. We affirm the district court's entry of the decree.

AFFIRMED.

IRWIN, Judge, concurring.

I agree with the conclusion of the majority that Gregory's assertions on appeal have no merit. I write separately only to reaffirm my dissent in the case of *Frasier v. Frasier*, No. A-07-003, 2008 WL 3523155 (Neb. App. Aug. 12, 2008) (not designated for permanent publication), and to expressly disapprove of any implication by the majority in the present opinion that would endorse or extend the holding in *Frasier* to any other factual situation.

IN RE INTEREST OF MARCELLA B. AND JUAN S., CHILDREN UNDER 18 YEARS OF AGE. STATE OF NEBRASKA, APPELLEE, AND CANDICE J. NOVAK, GUARDIAN AD LITEM, APPELLANT, V. LATISHA J., APPELLEE.

775 N.W.2d 470

Filed November 24, 2009. No. A-09-382.

1. **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.
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. **Juvenile Courts: 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.
4. **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.
5. **Final Orders: Appeal and Error.** There are three types of final orders that can be reviewed on appeal: an order which affects a substantial right and which determines the action and prevents a judgment, an order affecting a substantial right made during a special proceeding, and an order affecting a substantial right made upon summary application in an action after a judgment is rendered.
6. ____: ____. Orders affecting a substantial right in a special proceeding must, by definition, meet two requirements: a substantial right and a special proceeding.
7. **Juvenile Courts: Appeal and Error.** Nebraska law is clearly established that a proceeding before a juvenile court is a special proceeding for appellate purposes.
8. **Final Orders: Appeal and Error.** When determining whether an order is final, a substantial right is an essential legal right, not a mere technical right.
9. ____: ____. When an order affects the subject matter of the litigation, by diminishing a claim or defense available to a defendant, this affects a substantial right.
10. ____: ____. If an order significantly impinges on a constitutional right, for example, parents' liberty interest in raising their children or a criminal defendant's right not to be subjected to double jeopardy, this affects a substantial right.
11. **Constitutional Law: Testimony.** Nebraska law does not recognize a constitutional right for a victim to testify against the accused.
12. **Testimony: Minors.** Nebraska law imposes limits on testimony by children, dependent on age, maturity, and understanding.
13. **Juvenile Courts: Parental Rights.** The purpose of the adjudication phase of an abuse and neglect proceeding is to protect the interests of the child.

14. **Juvenile Courts: Parental Rights: Testimony: Minors: Proof.** On a motion for a child's in-chambers testimony, the State must provide the child's parents with notice, the court must conduct a hearing to determine if reasons exist to exclude parents from the child's testimony, and the State must show that such testimony in the parents' presence would be harmful to the child.
15. **Juvenile Courts: Parental Rights: Testimony: Minors.** The trial court has the discretion to determine if there are legitimate concerns about the child's testifying in front of his or her parents.
16. **Juvenile Courts: Child Custody: Appeal and Error.** Allowing an interlocutory appeal promotes significant delay in the juvenile proceedings and the ultimate resolution of custody.
17. **Juvenile Courts: Appeal and Error.** Generally, delaying juvenile proceedings to grant interlocutory appeals is antagonistic to the child's best interests.
18. **Juvenile Courts: Parental Rights: Testimony: Minors.** An order ruling on a motion for in-chambers testimony of a child who was allegedly abused by his or her parents does not affect a substantial right of the child.
19. **Final Orders: Appeal and Error.** To fall within the collateral order doctrine, an order must conclusively determine the disputed question, resolve an important issue completely separate from the merits of the action, and be effectively unreviewable on appeal from a final judgment.
20. **Juvenile Courts: Testimony: Minors: Final Orders.** Whether a child's testimony occurs in chambers, in open court during the adjudication hearing, or not at all is not completely separate from the merits of the action for purposes of the collateral order doctrine; rather, like discovery motions, the issue is enmeshed in the merits of the adjudication action.
21. **Juvenile Courts: Jurisdiction: Appeal and Error.** Neb. Rev. Stat. § 43-246 (Reissue 2008) acknowledges that the juvenile courts have a responsibility to protect the public peace, but does not confer jurisdiction on an appellate court.
22. **Jurisdiction: Final Orders: Appeal and Error.** In the absence of a final order from which an appeal may be taken, the appeal must be dismissed for lack of jurisdiction.

Appeal from the Separate Juvenile Court of Douglas County: VERNON DANIELS, Judge. Appeal dismissed.

Candice J. Novak, of Thomas G. Incontro, P.C., L.L.O., guardian ad litem.

Thomas C. Riley, Douglas County Public Defender, and Martha J. Wharton for appellee Latisha J.

SIEVERS and CASSEL, Judges, and HANNON, Judge, Retired.

SIEVERS, Judge.

Latisha J. is the natural mother of Marcella B. and Juan S. The State filed a petition, based upon allegations of

physical abuse, to adjudicate the children under Neb. Rev. Stat. § 43-247(3)(a) (Reissue 2008). Before the adjudication hearing, the appointed guardian ad litem, Candice J. Novak, made a motion to have Marcella's testimony be heard in chambers. The separate juvenile court of Douglas County overruled the motion on April 3, 2009 (April 3 order), and Novak has appealed that order to this court. We dismiss the appeal because the juvenile court's April 3 order is not a final, appealable order, and therefore, this court lacks jurisdiction over this appeal.

FACTUAL AND PROCEDURAL BACKGROUND

On January 26, 2009, the State filed a petition in the separate juvenile court of Douglas County, alleging that Marcella and Juan were children within the meaning of § 43-247(3)(a) by reason of the faults or habits of their natural mother, Latisha, because Latisha has subjected Marcella to inappropriate physical contact and failed to provide Marcella and Juan with appropriate care, support, and/or supervision. The State also filed a motion for temporary custody of Marcella and Juan to be placed with the Department of Health and Human Services, which motion was granted by the court.

On March 3, 2009, Novak filed a motion to allow Marcella's testimony to be heard in chambers at the adjudication hearing, which hearing the court had previously set for April 7. The hearing on Novak's motion was held on March 9 and 23, when a therapist who had evaluated Marcella testified that having Marcella testify in front of her mother would cause Marcella harm. The court, in its April 3 order, overruled Novak's motion for in-chambers testimony because the court could not find by a preponderance of the evidence that the guardian ad litem met the burden of proof required by *In re Interest of Brian B. et al.*, 268 Neb. 870, 689 N.W.2d 184 (2004). The court stated that it

> distinguishes [the therapist's] speculation in the instant case from the educated guess of [the] therapist . . . in *Brian B.* in the following respect. The therapist in *Brian B.* was able to identify how the child's diagnosis

> manifests itself not only in the larger population, but also had a basis to render an opinion because of a treatment history with the child. Such is not the situation with [the] therapist . . . in the instant matter.

Novak filed her notice of appeal of the juvenile court's April 3 order on April 7, 2009.

ASSIGNMENTS OF ERROR

Novak, the guardian ad litem, assigns as error that the juvenile court erred when it (1) overruled Novak's motion to allow in-chambers testimony; (2) applied an incorrect standard in determining whether Marcella should have been allowed to testify in chambers; and (3) failed to recognize that Marcella had a right to testify in chambers due to the undisputed evidence of harm that would result from courtroom testimony, given the rights granted Novak under Neb. Rev. Stat. § 43-246 (Reissue 2008).

STANDARD OF REVIEW

[1] 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. *In re Interest of Anaya*, 276 Neb. 825, 758 N.W.2d 10 (2008).

[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 Taylor W.*, 276 Neb. 679, 757 N.W.2d 1 (2008).

ANALYSIS

Finality of April 3 Order.

[3] Novak, in her capacity as Marcella's guardian ad litem, argues that the juvenile court erred in overruling the motion for in-chambers testimony. However, Latisha argues that the April 3 order was not a final, appealable order, meaning that this court does not have jurisdiction to review this matter. 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 Taylor W., supra*.

[4,5] 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. *Keef v. State*, 262 Neb. 622, 634 N.W.2d 751 (2001). There are three types of final orders that can be reviewed on appeal: an order which affects a substantial right and which determines the action and prevents a judgment, an order affecting a substantial right made during a special proceeding, and an order affecting a substantial right made upon summary application in an action after a judgment is rendered. See *Richardson v. Griffiths*, 251 Neb. 825, 560 N.W.2d 430 (1997); Neb. Rev. Stat. § 25-1902 (Reissue 2008). Of the three types of final orders referenced above, the April 3 order is clearly not an order that determined the action and prevented judgment, because the action is ongoing as to all parties. Nor was it an order made on summary application after judgment, because there has been no judgment in this case. Therefore, overruling the motion for in-chambers testimony can be a final order only if it is an order affecting a substantial right made in a special proceeding.

[6,7] Orders affecting a substantial right in a special proceeding must, by definition, meet two requirements: a substantial right and a special proceeding. See *Hernandez v. Blankenship*, 257 Neb. 235, 596 N.W.2d 292 (1999). Nebraska law is clearly established that a proceeding before a juvenile court is a special proceeding for appellate purposes. *In re Interest of Anthony R. et al.*, 264 Neb. 699, 651 N.W.2d 231 (2002). See *In re Interest of R.G.*, 238 Neb. 405, 470 N.W.2d 780 (1991), *disapproved on other grounds, O'Connor v. Kaufman*, 255 Neb. 120, 582 N.W.2d 350 (1998). Therefore, the inquiry is whether overruling the motion for in-chambers testimony affected a substantial right of Marcella, given that she is, in essence, the appealing party through her guardian ad litem. In other words, does Marcella have a right to testify in chambers, instead of in the presence of her mother, and if so, is such right a "substantial" right? Based upon the procedural posture of the case and Novak's arguments in her brief, the substantial right that is allegedly affected by the April 3 order is Marcella's right to testify outside the presence of her mother at the adjudication hearing. However, in neither the

jurisdiction section nor the argument section of Novak's brief does Novak provide statutory or case law authority showing that the victim of parental abuse has a right, substantial or otherwise, to testify outside of the presence of the parent who is the alleged abuser.

[8-10] When determining whether an order is final, a substantial right is an essential legal right, not a mere technical right. *In re Interest of Enrique P. et al.*, 14 Neb. App. 453, 709 N.W.2d 676 (2006). When an order affects the subject matter of the litigation, by diminishing a claim or defense available to a defendant, this affects a substantial right. *Hernandez v. Blankenship, supra*. If an order significantly impinges on a constitutional right, for example, parents' liberty interest in raising their children or a criminal defendant's right not to be subjected to double jeopardy, this affects a substantial right. *Id.*

It is well established in Nebraska that the relationship between parent and child is constitutionally protected. *In re Interest of D.W.*, 249 Neb. 133, 542 N.W.2d 407 (1996). 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 Brian B. et al.*, 268 Neb. 870, 689 N.W.2d 184 (2004). Many cases involving final orders from a juvenile proceeding pertain to a parent's right. See, *In re Interest of R.G., supra* (temporary order returning custody of juvenile to parent unless State filed petition requesting continued detention is not final order, but order to keep juvenile's custody from parent pending adjudication hearing was final order); *In re Interest of Jaden H.*, 10 Neb. App. 87, 625 N.W.2d 218 (2001) (order of partial summary judgment entered in proceeding to adjudicate child as lacking proper parental care is final order); *In re Interest of Joshua M. et al.*, 4 Neb. App. 659, 548 N.W.2d 348 (1996) (temporary order keeping juvenile's custody from parent for short period of time is not final, but order after hearing which continues to keep custody from parent pending adjudication hearing is final). The Nebraska Supreme Court has found that an order concerning placement or custody of children affects a substantial right because the parent's liberty interest in raising

his or her children is implicated. *In re Interest of R.G.*, 238 Neb. 405, 470 N.W.2d 780 (1991), *disapproved on other grounds, O'Connor v. Kaufman*, 255 Neb. 120, 582 N.W.2d 350 (1998). The court specifically considers the object of the order and the length of time over which the parent's relationship with the juvenile could reasonably be expected to be disturbed to determine if such liberty interest is affected. See *id.*

However, Latisha's rights to parent are not at issue here. Rather, the question is whether Marcella has a right to testify outside of the presence of her mother. When constitutional rights, such as a parent's liberty interest, are not implicated by the order, we are less likely to find a substantial right. See, *Steven S. v. Mary S.*, 277 Neb. 124, 760 N.W.2d 28 (2009) (order for physical or mental examination does not affect substantial right and is not final order); *In re Guardianship of Sophia M.*, 271 Neb. 133, 710 N.W.2d 312 (2006) (order requiring psychological evaluation of mother was not final order, and order denying mother's visitation pending final guardianship hearing was not final order); *In re Interest of Anthony G.*, 6 Neb. App. 812, 578 N.W.2d 71 (1998) (State's parens patriae right is not substantial right, and order returning custody of child to parents is not final order).

[11,12] There is no precedent recognizing a constitutional right for a victim to testify against the accused. See, U.S. Const. amend. V and VI; *Ambles v. State*, 259 Ga. 406, 383 S.E.2d 555 (1989). In *Ambles, supra*, the Georgia Supreme Court found that in a criminal trial for child molestation, witness competency statutes were constitutional because while a defendant has a fundamental right in a criminal trial to testify in his own behalf under the Fifth and Sixth Amendments to the U.S. Constitution, no corresponding right of the victim has been identified. The Georgia court further reasoned that "any right of the victim to testify in a criminal trial is necessarily subject to the prosecutor's discretion . . . . Neither is there any unqualified right of the state to obtain the testimony of the victim." *Ambles*, 259 Ga. at 409, 383 S.E.2d at 558. The Georgia court further held that the victim's right to testify may be limited by the state legislature for a legitimate purpose. Similarly, our precedent imposes limits on testimony by

children, dependent on age, maturity, and understanding. See, *State v. Earl*, 252 Neb. 127, 560 N.W.2d 491 (1997); *State v. Roenfeldt*, 241 Neb. 30, 486 N.W.2d 197 (1992); *State v. Guy*, 227 Neb. 610, 419 N.W.2d 152 (1988). Therefore, we conclude that Marcella has no constitutional right to testify in juvenile proceedings.

[13-15] We acknowledge that the purpose of the adjudication phase of an abuse and neglect proceeding is to protect the interests of the child. *In re Interest of Rebekah T. et al.*, 11 Neb. App. 507, 654 N.W.2d 744 (2002). While we note that the court has a responsibility to protect Marcella, there are safeguards in place to protect her from harm caused by testimony in front of Latisha. *In re Interest of Danielle D. et al.*, 257 Neb. 198, 595 N.W.2d 544 (1999), requires, on a motion for a child's in-chambers testimony, that the State provide the child's parents with notice, that the court conduct a hearing to determine if reasons exist to exclude the parents from the child's testimony, and that the State show that such testimony in the parents' presence would be harmful to the child. The trial court then has the discretion to determine if there are legitimate concerns about the child's testifying in front of his or her parents. See *id*. See, also, *In re Interest of Brian B. et al.*, 268 Neb. 870, 689 N.W.2d 184 (2004). Such procedures were followed in this case. As an analogy, for the court to grant discovery motions, a moving party must make a showing of good cause, and such standards serve as protection of the best interests of the child. See *Steven S. v. Mary S.*, 277 Neb. 124, 760 N.W.2d 28 (2009) (discovery motions ordering psychological examinations in custody modification are not final orders). The Nebraska Supreme Court further says in *Steven S. v. Mary S.* that error in granting or overruling discovery motions is also reviewable at a later stage. A motion for in-chambers testimony would also be reviewable on appeal. See *In re Interest of Danielle D. et al., supra* (trial court's allowing 16-year-old child to testify in chambers was abuse of discretion when parents were not given advance notice of State's request that child's testimony be taken in chambers and State made no showing that presence of mother and stepfather during child's testimony would have been harmful to child).

[16,17] Admittedly, if Marcella were to testify at the adjudication hearing in the presence of her mother, no appellate court can "undo" that. Nonetheless, "allowing an interlocutory appeal in this case promotes significant delay in the [juvenile] proceedings and the ultimate resolution of . . . custody." *In re Guardianship of Sophia M.*, 271 Neb. 133, 138, 710 N.W.2d 312, 317 (2006). Generally, delaying juvenile proceedings to grant interlocutory appeals is antagonistic to the child's best interests. See *In re D.W.*, No. 07-1028, 2007 WL 2492454 (Iowa App. Sept. 6, 2007) (unpublished disposition listed in table of "Decisions Without Published Opinions" at 741 N.W.2d 821 (Iowa App. 2007)). We agree with the general concept articulated by the Iowa court.

[18] For these reasons, we find that Marcella does not have a substantial right to testify outside of the presence of her mother in this juvenile proceeding, and therefore, the April 3 order denying the motion for in-chambers testimony is not a final order that is subject to an interlocutory appeal.

Collateral Order Doctrine.

[19,20] Novak also argues that if the order overruling the motion for in-chambers testimony was not a final order, the order should nevertheless be reviewable under the collateral order doctrine. *Hallie Mgmt. Co. v. Perry*, 272 Neb. 81, 718 N.W.2d 531 (2006). To fall within the collateral order doctrine, an order must conclusively determine the disputed question, resolve an important issue completely separate from the merits of the action, and be effectively unreviewable on appeal from a final judgment. *Id.* The motion for in-chambers testimony was conclusively determined by the juvenile court in its April 3 order. However, the second two requirements under the collateral order doctrine are not met. Whether Marcella's testimony occurs in chambers, in open court during the adjudication hearing, or not at all can hardly be said to be completely separate from the merits of the action. Rather, like discovery motions, the issue is enmeshed in the merits of the adjudication action. See *State v. Pratt*, 273 Neb. 817, 733 N.W.2d 868 (2007). In addition, as we discussed earlier, a motion for in-chambers testimony is reviewable on appeal for an abuse of discretion by

the juvenile court. Because all three requirements are not met, we do not have authority to review the April 3 order under the collateral order doctrine.

Independent Grounds for Appeal.

[21] Novak also argues that this court should find independent grounds for appeal, "pursuant to its obligation to provide a 'procedure' to assure that Marcella is afforded 'care and protection' during the juvenile court process" under § 43-246(1) and (7). Brief for appellant at 1. Section 43-246 acknowledges that the juvenile courts have a responsibility to protect the public peace. Specifically, § 43-246(1) states it is the juvenile court's responsibility "[t]o assure the rights of all juveniles to care and protection and a safe and stable living environment and to development of their capacities for a healthy personality, physical well-being, and useful citizenship and to protect the public interest." Similarly, § 43-246(7) states it is the juvenile court's responsibility "[t]o provide a judicial procedure through which these purposes and goals are accomplished and enforced in which the parties are assured a fair hearing and their constitutional and other legal rights are recognized and enforced." The preadjudication hearing on the guardian ad litem's motion provides that protection. Finally, § 43-246 does not in any way address appellate jurisdiction over juvenile proceedings, and we decline to read into such statute any modification of the appellate courts' longstanding aversion to interlocutory appeals except in limited circumstances, which are not present here.

CONCLUSION

[22] The juvenile court's April 3 order was not a final, appealable order. In the absence of a final order from which an appeal may be taken, the appeal must be dismissed for lack of jurisdiction. *In re Adoption of Krystal P. & Kile P.*, 248 Neb. 907, 540 N.W.2d 312 (1995).

APPEAL DISMISSED.

STATE OF NEBRASKA, APPELLEE, V. BRADLEY A. GAY, APPELLANT.

778 N.W.2d 494

Filed December 1, 2009. No. A-08-1103.

1. **Assault: Words and Phrases.** Intimate partner within the context of Neb. Rev. Stat. § 28-323(7) (Reissue 2008) means a spouse, a former spouse, persons who have a child in common whether or not they have been married or lived together at any time, and persons who are or were involved in a dating relationship.
2. ____: ____. Dating relationship within the context of Neb. Rev. Stat. § 28-323(7) (Reissue 2008) means frequent, intimate associations primarily characterized by the expectation of affectional or sexual involvement, but does not include a casual relationship or an ordinary association between persons in a business or social context.

Appeal from the District Court for Douglas County, J RUSSELL DERR, Judge, on appeal thereto from the County Court for Douglas County, LAWRENCE E. BARRETT, Judge. Judgment of District Court affirmed.

James Martin Davis, of Davis Law Office, for appellant.

Jon Bruning, Attorney General, and Kimberly A. Klein for appellee.

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

IRWIN, Judge.

I. INTRODUCTION

Bradley A. Gay appeals an order of the district court for Douglas County, Nebraska, affirming his conviction and sentence by the county court for Douglas County for third degree domestic assault. On appeal, Gay alleges that there is insufficient evidence to prove the victim of the assault was an "intimate partner" pursuant to Neb. Rev. Stat. § 28-323 (Reissue 2008) and that as a result, there is insufficient evidence to sustain his conviction for third degree domestic assault. We affirm.

II. BACKGROUND

The State filed a criminal complaint charging Gay with third degree domestic assault pursuant to § 28-323. The charge

against Gay stems from an incident which occurred in August 2007. Evidence adduced at trial revealed that Gay was at his parents' house "hanging out" with Amy Walter (Amy), when she became upset with him and accused him of cheating on her. Gay and Amy began to argue, and the argument became physical. The argument was eventually broken up by Gay's mother. Subsequently, Amy left the Gay residence and went to the sheriff's office. There, she reported that Gay had "beat [her] up."

Gay's argument on appeal concerns whether there was sufficient evidence to demonstrate that Amy was his "intimate partner" at the time of the assault. As such, we limit our discussion of the facts presented at trial to only those necessary for the resolution of this issue.

At trial, both Gay and Amy testified concerning their relationship. Amy testified that in August 2007, she was dating Gay. She testified that at such time, they had been together for a year; however, she indicated that they had been arguing with each other for approximately 1 month because Gay was cheating on her.

During Gay's testimony, he also described his relationship with Amy as a dating relationship. He testified that he met Amy on a social networking Web site and that they "basically messaged each other randomly and began to hang out and that's how we became in a relationship and started dating." Gay testified that Amy often spent the night at his parents' house with him, but that his parents required her to sleep in the guestroom. Gay agreed with Amy's testimony that at the time of the incident, they had been fighting for about a month because Amy believed he was cheating on her. Gay testified that it was actually Amy who had cheated on him and that Amy was a very jealous person who would not let him "hang out with other females."

Gay's mother, father, and brother and Amy's father also testified about Gay and Amy's relationship. Gay's mother testified that at the time of the incident, Gay and Amy were in a dating relationship, and that she considered them to be "boyfriend/girlfriend." Gay's father testified that he had known Amy for about a year prior to the incident, that she had been

to his house numerous times during that year, and that she had even stayed overnight at his house on many occasions. Gay's brother described Amy as Gay's "ex-girlfriend." Amy's father testified that Amy and Gay had dated for about a year at the time of the incident.

After the conclusion of the trial, the county court found Gay guilty of third degree domestic assault and sentenced him to 90 days in jail. Subsequently, Gay appealed to the district court, which affirmed the conviction and sentence. Gay now appeals to this court.

III. ASSIGNMENTS OF ERROR

On appeal, Gay alleges that there is insufficient evidence to prove that Amy was his "intimate partner" pursuant to § 28-323 and that as a result, there is insufficient evidence to sustain his conviction for third degree domestic assault.

IV. STANDARD OF REVIEW

Regardless of whether the evidence is direct, circumstantial, or a combination thereof, and regardless of whether the issue is labeled as a failure to direct a verdict, insufficiency of the evidence, or failure to prove a prima facie case, the standard is the same: 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 evidence admitted at trial, viewed and construed most favorably to the State, is sufficient to support the conviction. *State v. McGhee*, 274 Neb. 660, 742 N.W.2d 497 (2007).

V. ANALYSIS

Section 28-323(1) provides, "A person commits the offense of domestic assault in the third degree if he or she: (a) Intentionally and knowingly causes bodily injury to his or her intimate partner; or (b) Places, by physical menace, his or her intimate partner in fear of imminent bodily injury." In this case, Gay does not dispute the sufficiency of the evidence concerning whether he intentionally and knowingly caused bodily injury to Amy or placed Amy in fear of imminent bodily injury.

Rather, Gay asserts that there is insufficient evidence to sustain his conviction for third degree domestic assault because the State did not present evidence to establish that Amy, the victim of the assault, was his intimate partner.

[1,2] Section 28-323(7) defines an "intimate partner" as "a spouse; a former spouse; persons who have a child in common whether or not they have been married or lived together at any time; and persons who are or were involved in a dating relationship." Section 28-323(7) goes on to define a "dating relationship" as "frequent, intimate associations primarily characterized by the expectation of affectional or sexual involvement, but does not include a casual relationship or an ordinary association between persons in a business or social context."

At trial, both Gay and Amy testified that they were dating at the time of the assault. Amy testified that she and Gay had been dating for about a year. Gay testified about the evolution of their relationship. He testified that they initially contacted each other on a social networking Web site and then began to "hang out" with each other. Gay indicated that eventually, he and Amy began a more serious relationship and started dating. Gay's and Amy's families also testified that Gay and Amy were in a dating relationship at the time of the assault. The families referred to Gay and Amy as "boyfriend/girlfriend." Gay's parents testified that Amy spent a lot of time at their home with Gay and that she often would spend the night in their home's guestroom.

Both Gay and Amy testified that the argument in August 2007 was precipitated by Amy's concerns that Gay had been cheating on her. Gay and Amy testified that for approximately 1 month prior to the incident, they had been arguing about whether Gay was cheating on Amy. Gay testified that Amy had actually cheated on him early on in their relationship and that Amy was a very jealous person who would not let him "hang out with other females." Gay testified that he and Amy struggled to trust each other.

In Gay's brief to this court, he argues that this evidence does not demonstrate any affectional or sexual involvement between Gay and Amy, but, rather, demonstrates that Gay and Amy had

only a casual relationship. In support of this argument, Gay highlights the testimony indicating that Amy slept in a guestroom when she stayed overnight at Gay's parents' home. Gay argues, "The *only* evidence at the trial relating to the relationship was that [Gay and Amy] were *prevented* from 'intimate' relations by their parents who required them to sleep in separate bedrooms when [Amy] spent the night at [Gay's] house." Brief for appellant at 9 (emphasis in original).

We recognize that there is no evidence that Gay and Amy had a sexual relationship. However, the language of § 28-323(7) does not provide that proof of a sexual relationship is necessary to establish a dating relationship between the victim and the defendant. Rather, under § 28-323(7), a dating relationship can be characterized by the expectation of either affectional involvement or sexual involvement.

Here, there is no dispute that Gay and Amy were dating each other or that they were considered to be "boyfriend/girlfriend." Furthermore, there is evidence of the expectation of affectional involvement. The altercation was precipitated by Amy's concerns that Gay was dating other girls or cheating on her. Gay testified that he had concerns that Amy had previously cheated on him. Such evidence indicates that Gay and Amy considered their relationship to be more than casual or ordinary. In fact, Gay's testimony about the progression of their relationship demonstrates that initially the relationship was casual or social, but that over time it developed into a more involved and serious dating relationship.

When we view the evidence in the light most favorable to the State, we find that there is sufficient evidence to demonstrate that Gay and Amy were in a dating relationship at the time of the assault and that as a result, Amy was Gay's intimate partner pursuant to § 28-323.

VI. CONCLUSION

We find that the State presented sufficient evidence to establish that Amy, the victim of the assault, was Gay's intimate partner. As such, we find sufficient evidence to support Gay's conviction for third degree domestic assault. We affirm.

AFFIRMED.

PHYLLIS COOK, PERSONAL REPRESENTATIVE OF THE ESTATE OF RONALD D. COOK, APPELLANT, V. SONIA K. HALL, INDIVIDUALLY AND AS PERSONAL REPRESENTATIVE OF THE ESTATE OF VIOLA W. COOK, APPELLEE.

778 N.W.2d 744

Filed December 1, 2009. No. A-09-056.

1. **Summary Judgment.** Summary judgment is proper when the pleadings and evidence admitted at the hearing disclose 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 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.
3. **Deeds: Proof.** It is essential to the validity of a deed that there be a delivery, and the burden of proof rests upon the party asserting delivery to establish it by a preponderance of the evidence.
4. **Deeds: Intent.** To constitute a valid delivery of a deed, there must be an intent on the part of the grantor that the deed shall operate as a muniment of title to take effect presently.
5. **Deeds.** The essential fact to render delivery effective is always that the deed itself has left the control of the grantor, who has reserved no right to recall it, and it has passed to the grantee.
6. **Deeds: Intent.** No particular acts or words are necessary to constitute delivery of a deed; anything done by the grantor from which it is apparent that a delivery was intended, either by words or acts, or both combined, is sufficient.
7. **Deeds.** It is not necessary for delivery of a deed that grantees have knowledge of the deed prior to the death of the grantor.

Appeal from the District Court for Douglas County: JOHN D. HARTIGAN, JR., Judge. Affirmed.

James Walter Crampton for appellant.

Eileen A. Hansen, of Smith & Hansen, and Larry A. Duff for appellee.

SIEVERS and CASSEL, Judges, and HANNON, Judge, Retired.

HANNON, Judge, Retired.

INTRODUCTION

Viola W. Cook, now deceased, executed and recorded a deed to her home, referred to as "Lot 4," to herself and her

two children as joint tenants with right of survivorship. After Viola's death, the children listed Lot 4 for sale but did not succeed in selling it before one of the children, Ronald D. Cook, died. Phyllis Cook, as the personal representative of Ronald's estate, brought this declaratory action against Sonia K. Hall (Sonia), Viola's child and surviving grantee of Viola's deed, seeking to have the deed declared void on two theories at issue in this appeal. Phyllis alleged that the deed was not delivered and that the joint tenancy had been severed by Ronald. The trial court granted Sonia's motion for summary judgment and dismissed the complaint. Phyllis has timely appealed to this court. We conclude that under the facts in this case, Viola's recording of the deed in joint tenancy on the date it was executed created a presumption that the deed was delivered, there is no evidence to rebut that presumption, and there is no evidence that Ronald severed the joint tenancy. Therefore, we conclude there is no material issue of fact, and we affirm.

BACKGROUND

In the complaint, Phyllis alleges her appointment as personal representative of Ronald's estate. She also alleges that "[o]n or about August 29, 1986, a deed purportedly executed by Viola Cook to Sonia K. Hall and Ronald D. Cook concerning Lot 4 was filed at the Douglas County Register of Deeds and returned to Viola W. Cook, a true and correct copy of which . . . is attached . . . ." The attached deed shows Viola, Ronald, and Sonia as the grantees. Phyllis further alleges in the complaint that the deed was never delivered to Sonia or Ronald and that Ronald was not aware of said deed during Viola's lifetime. In addition, Phyllis alleges that Ronald died after Viola and that prior to Ronald's death, he severed any joint tenancy which would have existed between him and Sonia. Phyllis asked the court to declare the deed void and find that Ronald's estate is entitled to a one-half interest in Lot 4.

Sonia's answer contains a general denial plus allegations that essentially support the factual allegations of the complaint, but disputes and denies the conclusion of no delivery and severance. In regard to delivery, Sonia alleges that Viola mailed to Sonia a photocopy of the recorded deed along with

a document giving Sonia power of attorney over Viola's real estate decisions. Sonia further alleges that in December 2006 or January 2007, Viola told Sonia where the original deed was located, and that Sonia retrieved it shortly before Viola's death. We note that Neb. Ct. R. Pldg. § 6-1108(d) provides in part that "[a]verments in a pleading to which no responsive pleading is required or permitted shall be taken as denied or avoided." Phyllis did not need to respond to Sonia's allegations, and they are deemed denied.

This appeal is made more complicated by the fact that the parties did not follow Neb. Rev. Stat. § 25-1332 (Reissue 2008), which provides in part: "The evidence that may be received on a motion for summary judgment includes depositions, answers to interrogatories, admissions, stipulations, and affidavits." The bill of exceptions contains none of these types of evidence or stipulations. The bill of exceptions consists only of copies of documents which were offered into evidence and not objected to, but were also largely unexplained. The documents include (1) Viola's will, executed in 1990, leaving her estate to her two children equally; (2) a codicil to that will, executed in 2002, providing that a piece of real estate she had acquired after the execution of her will should go to her grandson; (3) the original of the deed in question; (4) a listing agreement showing that on July 19, 2007, Ronald and Phyllis listed Lot 4 for sale; (5) a listing agreement showing that on January 18, 2008, Sonia and her husband listed Lot 4 for sale; (6) a document entitled "Estimated Sellers Figures," in connection with each of the two listing agreements, showing the broker's estimate of what the sellers would realize if Lot 4 sold for the amount shown on the listing; and (7) court documents showing that Ronald and Sonia were appointed copersonal representatives of Viola's estate and that Sonia was appointed successor copersonal representative of Viola's estate after Ronald's death. The documents in the record also show that Viola died on January 24, 2007, and that Ronald died on September 29, 2007. As previously stated, the parties did not object to the admission of the documents into evidence.

The pleadings and the documents do not establish all of the facts the parties seem to assume in their briefs. The pleadings

and the documents show without dispute that on August 29, 1986, Viola executed, acknowledged, and recorded a deed for Lot 4 to herself, Ronald, and Sonia as joint tenants with right of survivorship, and that the deed was returned to her. In their briefs, the parties agree that Viola lived on Lot 4 until her death on January 24, 2007, at 84 years of age. The evidence shows that Ronald and Sonya were Viola's children and that after she died, they listed Lot 4 for sale but did not contract to sell it before Ronald's death on September 29, 2007. Thereafter, Sonia and her husband listed the home for sale with the same broker.

ASSIGNMENT OF ERROR

Phyllis alleges that the trial court erred in granting summary judgment in favor of Sonia because the facts in regard to delivery and severance of the joint tenancy are controverted.

STANDARD OF REVIEW

[1] Summary judgment is proper when the pleadings and evidence admitted at the hearing disclose 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. *Hauptman, O'Brien v. Turco*, 277 Neb. 604, 764 N.W.2d 393 (2009).

[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. *Id.*

ANALYSIS

Delivery of Deed.

[3-5] Phyllis first contends that the trial court erred in granting summary judgment because there is a genuine issue of fact in regard to whether the deed was delivered. It is essential to the validity of a deed that there be a delivery, and the burden of proof rests upon the party asserting delivery to establish it by a preponderance of the evidence. *Caruso v. Parkos*, 262 Neb. 961, 637 N.W.2d 351 (2002); *Brtek v. Cihal*, 245 Neb. 756, 515 N.W.2d 628 (1994). To constitute a valid delivery of

a deed, there must be an intent on the part of the grantor that the deed shall operate as a muniment of title to take effect presently. *Id.* The essential fact to render delivery effective is always that the deed itself has left the control of the grantor, who has reserved no right to recall it, and it has passed to the grantee. *Id.*

Sonia contends that there was delivery of the deed because the deed was recorded. For the moment, we will ignore her other allegation that she possessed the deed before Viola's death. Relying on *Brtek*, Phyllis asserts that "Sonia's version of the delivery does not support the vital factual conclusion that Viola's intent was relinquishing all dominion over [the deed] and of making it presently operative as a conveyance of the title to the land." Brief for appellant at 7 (emphasis omitted). The facts in *Brtek* are not comparable to the facts in the instant case. In *Brtek*, the deceased had executed a deed to the "Urbanek place" to himself and his sister as joint tenants and he then gave the deed to his mother, a woman who dominated the family. 245 Neb. at 762, 515 N.W.2d at 634. After the grantor's death, the mother gave the deed to the sister and told her the land described in it was hers. The deed was recorded a short time later. Following a trial, the court found that the deed was never delivered during the grantor's lifetime. The Nebraska Supreme Court affirmed the trial court's finding.

[6] Phyllis also ignores an important discussion in the *Brtek* decision. The court noted the proposition that states: "No particular acts or words are necessary to constitute delivery of a deed; anything done by the grantor from which it is apparent that a delivery was intended, either by words or acts, or both combined, is sufficient." *Brtek*, 245 Neb. at 765, 515 N.W.2d at 636. The *Brtek* court then went on to discuss various cases where delivery was in question and the acts within these cases that showed intent to deliver. One of the cases the court discussed was *Perry v. Markle*, 127 Neb. 29, 254 N.W. 692 (1934). In *Perry*, the deed had been in the possession of one of the grantees from the time it was executed and the deed had been recorded several months after it had been signed and acknowledged. The *Brtek* court commented on

the presumption normally given when a deed is found in the possession of the grantee and observed the following about the *Perry* decision:

> Although the syllabus of the court in *Perry* states that "[d]elivery of a deed by the grantor to one of several named grantees is sufficient delivery as to all," it is clear from a reading of the opinion that this was only one of several factors which were considered in reaching the conclusion that a valid delivery had been made. Perhaps of great importance were the facts relating to adverse possession and statute of limitations and the fact that the deed was recorded prior to the death of the one grantee. Recordation of a deed generally presumes delivery. *Kresser v. Peterson*, 675 P.2d 1193 (Utah 1984).

Brtek v. Cihal, 245 Neb. 756, 766, 515 N.W.2d 628, 636 (1994).

In deciding *Brtek*, the Nebraska Supreme Court also discussed *Kresser v. Peterson*, 675 P.2d 1193 (Utah 1984). In *Kresser*, the grantor executed and recorded a deed to her home naming herself and her two children as joint tenants with right of survivorship. The grantor put the recorded deed in a safety deposit box to which the two children were permitted access if they wished. The children did not know about the deed and did not have a key to the safety deposit box. In affirming the trial court's finding that there was delivery of the deed, the *Kresser* court said: "An effective deed requires delivery, actual or constructive, without exclusive control or recall. Recording generally presumes delivery. *Delivery to one cotenant or reservation of an estate connotes delivery to all cotenants, where the grantor is also the grantee*." *Id.* at 1194 (emphasis supplied).

The significant facts in *Kresser* are quite close to the facts in the present case. In the instant case, the evidence shows without dispute that Viola executed, acknowledged, and recorded the deed on the same date and had the deed returned to her. Viola remained in possession of both Lot 4 and the deed. It is significant that Viola was one of the grantees, along with Ronald and Sonia. "If only one joint tenant is in occupancy of the property, he or she must be considered as possessing, not

only for himself or herself, but also for his or her cotenants, although there is no contract between them." 48A C.J.S. *Joint Tenancy* § 26 (2004).

[7] It has also been held that it is not necessary that grantees have knowledge of the deed prior to the death of the grantor. *Smith v. Black*, 143 Neb. 244, 9 N.W.2d 193 (1943). In *Smith*, the appellants maintained that because the grantees had no knowledge of the deed, there was no delivery inasmuch as there was no assent by the grantees. The *Smith* court stated: "'The recording of a deed will not of itself constitute a delivery to the grantee in the absence of an acceptance by him of the instrument, but if subsequently accepted the deed will be valid.'" 143 Neb. at 252, 9 N.W.2d at 198. Accord *Ehlers v. Seip*, 136 Neb. 722, 287 N.W. 202 (1939). See 26A C.J.S. *Deeds* § 82 (2001). The *Smith* court concluded: "We think that the most that can be said for this statement is that proof of acceptance is but one evidentiary phase by which delivery may be proved." 245 Neb. at 252, 9 N.W.2d at 198.

In the instant case, shortly after Viola's death, Ronald and Sonia listed the real estate for sale, and they did so as individuals and not as personal representatives of Viola's estate. This conduct, occurring while both surviving grantees were alive, clearly shows their acceptance of the benefits of the deed in question.

As previously stated, Sonia also argues, based on allegations in her answer, that a copy of the deed had been mailed to her by Viola and that she later obtained possession of the actual deed with Viola's consent before her death. This may well be the case, but there is no valid evidence on that point. There is no affidavit or other valid evidence to establish these facts and allegations in the answer. We therefore disregard any claim that either Sonia or Ronald knew about the deed or obtained possession of it before Viola's death. In the complaint, Phyllis only alleges that Ronald did not know about the deed until after Viola's death, but this does not establish that Sonia knew about the deed.

Under the status of the record, we conclude that Viola executed and recorded the deed to herself and her two children and had it returned to her and that she had possession of the deed

and Lot 4 until her death many years later. Under the authority of the cases discussed above, we conclude that the deed was delivered and that there is no genuine issue of material fact in regard to delivery.

Severance of Joint Tenancy.

Phyllis next maintains that the trial court erred in granting summary judgment, because there is a genuine issue of material fact as to whether Ronald severed the joint tenancy by listing and possibly selling Lot 4 before he died. Neb. Rev. Stat. § 76-2,109 (Reissue 2003) provides: "There shall be no severance of an existing joint tenancy in real estate when all joint tenants execute any instrument with respect to the property held in joint tenancy, unless the intention to effect a severance expressly appears in the instrument." There is no document which expressly appears to effect a severance. The listing agreement does not mention joint tenancy or severance. The case of *Hughes v. de Barberi*, 171 Neb. 780, 107 N.W.2d 747 (1961), holds that a contract to sell real estate in joint tenancy severs the joint tenancy and the joint tenants become tenants in common. Since the *Hughes* case was decided in 1961 and § 76-2,109 was enacted in 1979, we are inclined to think the *Hughes* rule is no longer the rule. However, since there is no evidence a contract to sell Lot 4 was ever entered into, we need not spend resources determining the effect of a contract to sell.

Phyllis also argues that there is a genuine issue of fact as to whether Lot 4 was sold, thereby severing Robert's joint tenancy with Sonia. As we just stated, there is no evidence of a contract to sell Lot 4. However, Phyllis argues that a "'closing statement'" related to the listing for sale indicates that a sale may have occurred to sever the tenancy. Brief for appellant at 9. We do not find a closing statement in the documents in evidence. The evidence does contain a document entitled "Estimated Sellers Figures" found with each of the two listing agreements. Both such documents are dated the same date as their respective listing and are clearly the broker's estimate of what sellers could expect to realize after estimated expenses if the property sold for the listed sale price. There is no evidence

that Lot 4 was sold, and accordingly, there is no evidence that the joint tenancy was severed.

CONCLUSION

We conclude that there are no genuine issues of material fact in regard to delivery of the deed and severance of the joint tenancy. After a movant for summary judgment has shown facts entitling the movant to judgment as a matter of law, the opposing party has the burden to present evidence showing an issue of material fact which prevents judgment as a matter of law for the moving party. *Martin v. Curry*, 13 Neb. App. 171, 690 N.W.2d 186 (2004). See, *In re Estate of Ellis*, 9 Neb. App. 598, 616 N.W.2d 59 (2000); *Sindelar v. Hanel Oil, Inc.*, 6 Neb. App. 349, 573 N.W.2d 782 (1998); *Weatherwax v. Equitable Variable Life Ins. Co.*, 5 Neb. App. 926, 567 N.W.2d 609 (1997); *Northern Bank v. Pefferoni Pizza Co.*, 5 Neb. App. 50, 555 N.W.2d 338 (1996). Phyllis, as the opposing party, has failed to meet her burden. Accordingly, the judgment of the trial court is affirmed.

AFFIRMED.

IN RE INTEREST OF T.T., A CHILD UNDER 18 YEARS OF AGE. STATE OF NEBRASKA, APPELLEE, V. S.Q. AND A.Q., APPELLANTS.

779 N.W.2d 602

Filed December 8, 2009. No. A-09-244.

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. **Juvenile Courts: 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.
3. **Juvenile Courts: Final Orders: Appeal and Error.** Dispositional orders of the juvenile court are final, appealable orders.
4. **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.

5. **Final Orders.** An order affecting a substantial right made during a special proceeding is one of three types of final orders defined by Nebraska law.
6. **Juvenile Courts: Appeal and Error.** A proceeding before a juvenile court is a "special proceeding" for appellate purposes.
7. **Final Orders: Time: Appeal and Error.** The continuing order doctrine holds that when a court's order is already in place and a subsequent order merely extends the time that the previous order is applicable, the subsequent order does not extend the time in which the original order may be appealed.
8. **Juvenile Courts: Final Orders: Appeal and Error.** The continuing order doctrine has been extended to juvenile cases, and the subsequent order does not by itself affect a substantial right.
9. **Final Orders: Collateral Attack: Appeal and Error.** An appeal from a subsequent order that merely continues the effectiveness of a prior order is an impermissible collateral attack on the previous order.
10. **Words and Phrases.** A substantial right is an essential legal right, not a mere technical right.
11. **Final Orders: Appeal and Error.** A substantial right is affected if the order affects the subject matter of the litigation, such as diminishing a claim or defense that was available to an appellant prior to the order from which an appeal is taken.
12. **Juvenile Courts: Parental Rights.** The question of whether a substantial right of a parent has been affected by an order in juvenile court litigation is dependent upon both the object of the order and the length of time over which the parent's relationship with the juvenile may reasonably be expected to be disturbed.
13. **Constitutional Law.** The object of a gag order is to restrain the constitutional right of free speech.
14. **Constitutional Law: Words and Phrases.** The right of free speech is "constitutional bedrock" and a right by which other freedoms, such as assembly and free press, are given meaning and power. Therefore, the right which is the object of a gag order cannot be considered a "mere technical right."
15. **Constitutional Law: Presumptions.** Gag orders are a prior restraint on the right of free speech, and while they are not unconstitutional per se, there is a heavy presumption against their constitutional validity.
16. **Final Orders: Time.** Where the burden of an order is blunted by its brief operative timeframe when considered in the context of the ongoing case, such fact can support the conclusion that it did not affect a substantial right.
17. **Appeal and Error: Time.** A litigant must be able to assess whether a court's order is appealable when it is entered, not by what happens in the case thereafter.
18. **Constitutional Law.** Any attempt to effect a prior restraint is subject to exacting scrutiny.
19. ____. The application of exacting scrutiny to a prior restraint requires a court to make its own inquiry into the imminence and magnitude of the danger and then to balance the character of the evil against the need for free and unfettered expression. The possibility that other measures will serve the State's interests should also be weighed.
20. ____. The First Amendment tolerates absolutely no prior judicial restraints predicated upon the surmise or conjecture that untoward consequences may result.

Only governmental allegation and proof that publication must inevitably, directly, and immediately cause the occurrence of the danger identified can support even the issuance of an interim restraining order. In no event may mere conclusions be sufficient.

21. **Constitutional Law: Juvenile Courts.** A juvenile court, which is not presumptively open, has the power to control extrajudicial comments by the litigants, provided the restrictions are consistent with constitutional standards.
22. **Constitutional Law.** To secure a prior restraint, the State has to present evidence of some compelling interest that would be endangered without the limitation on speech.
23. **Constitutional Law: Juvenile Courts.** In considering a prior restraint on parental speech, the juvenile court must conduct a proper inquiry into the government's interests and balance the imminence and magnitude of the danger presented against the parents' right to free and unfettered expression.
24. **Constitutional Law.** A judicial order restraining speech will not be held invalid as a prior restraint if it is (1) necessary to obviate a serious and imminent threat of impending harm which (2) cannot adequately be addressed by other, less speech-restrictive means.
25. **Constitutional Law: Minors.** A restraint on speech against disclosure to the public of information about a juvenile because it is in the juvenile's best interests is insufficient to justify a prior restraint on speech.
26. **Constitutional Law.** The fact that at least some of the information restricted by a gag order is already in the public domain is a factor that reduces the effectiveness of the gag order, as well as undercuts any claim that the danger of harm is imminent.
27. **Juvenile Courts: Parental Rights.** Once a plan of reunification has been ordered to correct the conditions underlying an adjudication under Neb. Rev. Stat. § 43-247(3)(a) (Reissue 2008), the plan must be reasonably related to the objective of reuniting the parents with the children.
28. **Parental Rights.** The reasonableness of a rehabilitative plan for a parent depends on the circumstances in a particular case and, therefore, is examined on a case-by-case basis.
29. **Juvenile Courts: Minors.** The Nebraska Juvenile Code must be liberally construed to accomplish its purpose of serving the best interests of the juveniles who fall within it.
30. **Juvenile Courts.** Juvenile courts have broad discretion to accomplish the purpose of serving the best interests of the children involved.
31. **Juvenile Courts: Child Custody: Visitation.** Psychiatric testing or psychological evaluations of a parent may be required to determine the best interests of children when issues of custody and visitation are presented.

Appeal from the Separate Juvenile Court of Lancaster County: TONI G. THORSON, Judge. Affirmed in part, and in part reversed and vacated.

Christopher A. Furches, of Furches Law Office, and David P. Kyker for appellants.

Sarah E. Sujith, Special Assistant Attorney General, for appellee.

SIEVERS and CASSEL, Judges.

SIEVERS, Judge.

This appeal involves a 17-year-old youth, T.T., who was left by his parents at a Lincoln, Nebraska, hospital under a previous version of Nebraska's "Safe Haven" law. The mother and stepfather, S.Q. and A.Q., respectively, whom we generally reference throughout as "the parents," appeal from the decision of the separate juvenile court of Lancaster County prohibiting them from disclosing to the public specified information concerning T.T., his medical condition, and his treatment (the gag order), as well as from the court's order that they participate in a pretreatment assessment. We conclude that the gag order cannot survive constitutional scrutiny, and we reverse, and vacate that portion of the juvenile court's order.

FACTUAL AND PROCEDURAL BACKGROUND

S.Q. is T.T.'s biological mother, and A.Q. is T.T.'s stepfather. On October 28, 2008, S.Q. and A.Q. took 17-year-old T.T. to a hospital in Lincoln, invoked Nebraska's Safe Haven law, and left him there. The version of Nebraska's Safe Haven law in effect on October 28 stated in part: "No person shall be prosecuted for any crime based solely upon the act of leaving a child in the custody of an employee on duty at a hospital licensed by the State of Nebraska." Neb. Rev. Stat. § 29-121 (Reissue 2008). We note that § 29-121 has since been amended, although the changes are not germane to this appeal.

The State filed an amended petition on October 29, 2008, alleging that T.T. was a child as defined by Neb. Rev. Stat. § 43-247(3)(a) (Reissue 2008) because he was "in a situation dangerous to [his] life or injurious to [his] health or morals" in that on October 28, S.Q. and A.Q. left him at the hospital under Nebraska's Safe Haven law. A motion for temporary custody was filed and granted that same day. T.T. has been in the custody of the Nebraska Department of Health and Human Services (DHHS) since that time. DHHS eventually placed T.T. with relatives.

At a hearing on November 24, 2008, S.Q. entered an admission to the allegations of the amended petition. A.Q. made no objection to the juvenile court's accepting the admission and taking jurisdiction in the matter. By an order filed by the juvenile court on November 26, T.T. was adjudicated to be within the meaning of § 43-247(3)(a) because he was "in a situation dangerous to [his life] or injurious to [his] health or morals." Also pursuant to the November 26 order, S.Q. and A.Q. were ordered to "not discuss past and ongoing medical treatment of [T.T.] with the public"—the court designated this portion of the order as the "additional temporary order." The record before us does not indicate at whose instance this gag order was entered.

On December 10, 2008, DHHS filed a motion to clarify or amend the November 26 order. On December 11, S.Q. and A.Q. filed a motion to modify the temporary order. After a hearing on December 30 on these motions, the court's order was filed on January 2, 2009. In that order, the juvenile court stated:

> Although disposition has not been entered, it is reasonable to assume that reunification will be the permanency goal in this case. [DHHS] is already providing therapeutic visitation between [T.T.] and his parents to work on the problems in their relationship and both [T.T.] and his mother have indicated a desire for further contact. Release of private, sensitive information regarding [T.T.] must be considered in light of the probable goal of reunification and [T.T.'s] best interest. Any further public disclosure by the parent of private medical information to the public would jeopardize the efforts being made to effect reconciliation and reunification between [T.T.] and his parent and would be harmful to [T.T.'s] best interest, both in the long term and short term.

The juvenile court found that it was in T.T.'s "best interest and it is in furtherance of efforts at reunification" that specific guidelines be given regarding disclosure or release of T.T.'s medical information to the public. The juvenile court therefore ordered:

> [T]here will be no further public disclosure by the parents of [T.T.'s] private medical information: [T.T.'s] full, legal

> name; [T.T.'s] date of birth; his social security number; any specific diagnosis that he has been given; any medication he has been prescribed; names of any providers of treatment to [T.T.] and type of treatment provided.

In a disposition order filed on February 3, 2009, the juvenile court stated that the primary permanency plan for T.T. was "Independent Living" with an alternative plan of "Self Sufficiency." Once again the juvenile court ordered:

> There will be no further public disclosure by the parents of [T.T.'s] private medical information: [T.T.'s] full, legal name; [T.T.'s] date of birth; his social security number; any specific diagnosis that he has been given; any medication he has been prescribed; names of any providers of treatment to [T.T.] and type of treatment provided.

Hereafter, we will generally reference these two orders by the term "gag order," the common colloquial phrase used to describe orders restricting disclosure or speech. The juvenile court also ordered S.Q. and A.Q. to "participate in a pretreatment assessment and sign releases of information so that [DHHS] can provide documents to the evaluator." S.Q. and A.Q. now appeal from the district court's February 3 order.

ASSIGNMENTS OF ERROR

S.Q. and A.Q. allege that the juvenile court erred in (1) violating their rights to free speech and (2) ordering them to submit to a pretreatment assessment when the permanency objective was independent living and not reunification.

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 Laurance S.*, 274 Neb. 620, 742 N.W.2d 484 (2007).

ANALYSIS

Jurisdiction Over Gag Order of February 3, 2009.

[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 Taylor W.*, 276 Neb. 679, 757

N.W.2d 1 (2008). Additionally, DHHS has moved to dismiss the appeal because the order of January 2, 2009, contained an identical gag order and was a final, appealable order but the notice of appeal was not filed until February 27, more than 30 days after the January 2 order, and thus, the appeal was filed out of time. We notified the parties that we would not rule on the motion to dismiss until after oral argument and submission of the case for decision.

[3-5] We begin our jurisdictional analysis by noting that the juvenile court's order of February 3, 2009, is an "Order of Disposition" and that such orders of the juvenile court are final, appealable orders. See *In re Interest of Clifford M. et al.*, 6 Neb. App. 754, 577 N.W.2d 547 (1998). But here, the State asserts that both of the parents' assignments of error involve matters over which we have no jurisdiction even though this appeal was filed within 30 days of the February 3 order. It is well known that in order 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. *In re Interest of Michael U.*, 273 Neb. 198, 728 N.W.2d 116 (2007). Conversely, an appellate court is without jurisdiction to entertain appeals from nonfinal orders. See *id.* While there are three types of final orders defined by Nebraska law, we find that the jurisdictional issue here centers on the second of the three types of appealable orders—an order affecting a substantial right made during a special proceeding. See *In re Estate of Rose*, 273 Neb. 490, 730 N.W.2d 391 (2007). See, also, Neb. Rev. Stat. § 25-1902 (Reissue 2008).

[6-9] There is no doubt that a proceeding before a juvenile court is a "special proceeding" for appellate purposes. See *In re Interest of Walter W.*, 274 Neb. 859, 744 N.W.2d 55 (2008). Thus, the jurisdictional issue concerning the gag order is resolved by determining whether the January 2, 2009, order affects a substantial right as that concept has been articulated under Nebraska law. The analysis of this issue is undertaken against the backdrop that the language in the gag orders of January 2 and February 3 is identical, a fact which necessarily involves application of the continuing order doctrine detailed in *Federal Land Bank v. McElhose*, 222 Neb. 448, 384 N.W.2d

295 (1986). In *McElhose*, the Nebraska Supreme Court held that when a court's order is already in place and a subsequent order merely extends the time that the previous order is applicable, the subsequent order does not extend the time in which the original order may be appealed. This concept has been extended to juvenile cases, and the Supreme Court has said that the subsequent order does not by itself affect a substantial right. See *In re Guardianship of Rebecca B. et al.*, 260 Neb. 922, 621 N.W.2d 289 (2000). The Supreme Court has reasoned that an appeal from a subsequent order that merely continues the effectiveness of a prior order is an impermissible collateral attack on the previous order. *In re Interest of Sarah K.*, 258 Neb. 52, 601 N.W.2d 780 (1999). Thus, at first blush it appears that the parents had to appeal within 30 days of the January 2 gag order because the February 3 order merely continues the previous order, using identical language. This is the essence of the State's argument asserted in the motion to dismiss, that we lack jurisdiction.

However, the parents counter that the January 2, 2009, order was merely a "temporary order" and that it is the February 3 order that affected a substantial right under our jurisdictional jurisprudence. Accordingly, we must delve deeper into the nature of a substantial right.

[10,11] A substantial right is an essential legal right, not a mere technical right. *In re Guardianship of Sophia M.*, 271 Neb. 133, 710 N.W.2d 312 (2006). A substantial right is affected if the order affects the subject matter of the litigation, such as diminishing a claim or defense that was available to an appellant prior to the order from which an appeal is taken. *Id.*, citing *In re Guardianship & Conservatorship of Larson*, 270 Neb. 837, 708 N.W.2d 262 (2006). The parents claim that the February 3, 2009, order affects a substantial right because the constitutional guarantee of free speech protects their right to publicly disclose the information about T.T. that is prohibited by the trial court's order of February 3.

[12] In *In re Interest of R.G.*, 238 Neb. 405, 470 N.W.2d 780 (1991), *disapproved on other grounds, O'Connor v. Kaufman*, 255 Neb. 120, 582 N.W.2d 350 (1998), the court said that the question of whether a substantial right of a parent has been

affected by an order in juvenile court litigation is dependent upon both the object of the order and the length of time over which the parent's relationship with the juvenile may reasonably be expected to be disturbed. And in *In re Interest of Zachary W. & Alyssa W.*, 3 Neb. App. 274, 278, 526 N.W.2d 233, 237 (1994), an appeal involving grandparent visitation, we said that the order being appealed was of "sufficient importance and may reasonably be expected to last a sufficiently long period of time that the order affects a substantial right of [the parent]." Consequently, our analysis of the first gag order, of January 2, 2009, turns to (1) the object of the order and its importance and (2) the timeframe over which the order can reasonably be expected to operate.

[13-15] The object of the gag order is clearly to restrain the parents' constitutional right of free speech. The right of free speech is "constitutional bedrock" and a right by which other freedoms, such as assembly and free press, are given meaning and power. Therefore, the right which is the object of the gag order can hardly be considered a "mere technical right." The orders at issue are obviously a "prior restraint" on the parents' right of free speech, and while they are not unconstitutional per se, there is a "'heavy presumption'" against their constitutional validity. See *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 558, 95 S. Ct. 1239, 43 L. Ed. 2d 448 (1975). Thus, we readily conclude that the object of the January 2, 2009, order is of "sufficient importance" under the continuing order doctrine to make it appealable.

We now turn to the second aspect of the substantial right analysis—the timeframe during which the January 2, 2009, order was expected to last. This portion of the analysis requires that we provide some context from the record concerning the entry of the court's order on that date.

Earlier, we alluded to the entry of the first gag order by the juvenile court on November 26, 2008. The November 26 gag order was worded substantially differently from the January and February orders. The parents and DHHS both found the November order to be vague or overbroad and moved the court for modification of such so as to clarify what the parents could and could not disclose about T.T. A hearing was held

December 30 on both motions. In this hearing, the mother, S.Q., explained that she wanted to participate in a state senator's task force examining the Safe Haven law and the availability of services for troubled youth, as well as be involved in a "support group" for parents of similarly situated youth. S.Q. testified that the gag order prevented her from, and we paraphrase, telling "her story" which is intertwined with "T.T.'s story." The evidence was that there was a "parents' roundtable" discussion as part of the senator's task force scheduled for January 5, 2009, in which S.Q. wanted to participate, but she did not want to violate the court's order by anything that she said. Evidence was adduced as to why the parents should be restricted in what they could say about T.T., but we need not discuss that evidence in our jurisdictional analysis. After the evidence had concluded, the juvenile court judge announced that she would issue her order "before the 5th, so [that the parents would] know what the guidelines are." And the court did as promised and issued the new and more refined gag order of January 2, which replaced the November order.

In considering the time over which the January 2, 2009, order could reasonably be expected to operate, it is important to note that this order was captioned by the court as, in part, "Order Continuing Temporary Orders; Notice of Dispositional Hearing." The January 2 order, after setting forth factual findings, was structured in five paragraphs. The first contained the gag order under discussion, and the second dealt with a visitation issue not of import in this appeal. We quote the next two paragraphs:

> All temporary orders shall continue in full force and effect until further order of the Court.
>
> Disposition on the Amended Petition is scheduled for **January 7, 2009 at 3:00 p.m.** at which time parties and counsel shall appear.

[16] The parents argue that the quoted language limiting the effectiveness of the gag order "until further order of the Court" entered in the contextual framework of the upcoming public meeting on January 5, 2009, plus the pendency of the dispositional hearing on January 7 means that the gag order of January 5 could reasonably be expected to operate only

for a brief period of time. In short, the parents assert that it was only a temporary order, and, as noted above, the juvenile court captioned it as such. An example where the burden of an order was blunted by its brief operative timeframe when considered in the context of the ongoing case so as to support the conclusion that it did not affect a substantial right is found in *In re Guardianship of Sophia M.*, 271 Neb. 133, 710 N.W.2d 312 (2006). In *In re Guardianship of Sophia M.*, the Supreme Court reasoned:

> Here, the visitation order denied visitation pending the final guardianship hearing, which was scheduled to occur approximately 3 weeks later. The court explained that prior efforts to provide visitation had been unsuccessful and that, with only 3 weeks until the final guardianship hearing and a final resolution of the issue, very little would be gained by attempting to construct another visitation arrangement. Further, since the order effectively denied visitation only until the final guardianship hearing, the length of time that [the mother's] relationship with [the child] was to be disturbed was brief, and the order was not a permanent disposition. The fact that [the mother's] appeal of the visitation order has delayed the final disposition of the guardianship proceeding is unfortunate but irrelevant in our determination whether the order, when issued, affected a substantial right. The visitation order did not affect a substantial right and is not a final, appealable order.

271 Neb. at 139, 710 N.W.2d at 317.

Following the reasoning of *In re Guardianship of Sophia M.*, we conclude that while the January 2, 2009, order affected a matter of significance so as to be appealable, the timeframe during which it was intended to operate was only 5 days, until the scheduled dispositional hearing on January 7. Thus, the January 2 order, like the order in *In re Guardianship of Sophia M.*, was a nonfinal order because of the brief timeframe during which it was intended to operate.

[17] Although the January 7, 2009, dispositional hearing was actually continued until January 29, such fact does not affect our analysis or conclusion, because a litigant must be able to

assess whether a court's order is appealable when it is entered, not by what happens in the case thereafter. Accordingly, we find that the gag order of January 2 was a temporary order that did not affect a substantial right and that the gag order found in the dispositional order of February 3 was a final, appealable order that was to remain in effect until the next hearing that the court scheduled, for August 7. Therefore, we have jurisdiction to consider the merits of the February 3 gag order, and the State's motion to dismiss the appeal is overruled.

Constitutionality of Gag Order.

The gag order contained within the juvenile court's dispositional order of February 3, 2009, is clearly a prior restraint on the parents' right of free speech. Although there is no Nebraska authority dealing with a parent's right to speak publicly about his or her minor child, the general constitutional principles relating to prior restraints of speech are well established.

[18,19] Governmental action constitutes a prior restraint when it is directed to suppressing speech because of its content before the speech is communicated. *City of Lincoln v. ABC Books, Inc.*, 238 Neb. 378, 470 N.W.2d 760 (1991). While prior restraints are not unconstitutional per se, they bear a "'heavy presumption'" against constitutional validity. *J. Q. Office Equip. v. Sullivan*, 230 Neb. 397, 399, 432 N.W.2d 211, 213 (1988), quoting *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 95 S. Ct. 1239, 43 L. Ed. 2d 448 (1975). "The Government 'thus carries a heavy burden of showing justification for the imposition of such a restraint.'" *New York Times Co. v. United States*, 403 U.S. 713, 714, 91 S. Ct. 2140, 29 L. Ed. 2d 822 (1971) (often and hereinafter cited as "*The Pentagon Papers*"). Any attempt to effect a prior restraint is subject to "exacting scrutiny." See *Smith v. Daily Mail Publishing Co.*, 443 U.S. 97, 102, 99 S. Ct. 2667, 61 L. Ed. 2d 399 (1979). Or, as stated in *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 842-43, 98 S. Ct. 1535, 56 L. Ed. 2d 1 (1978):

> Properly applied, the [application of exacting scrutiny] requires a court to make its own inquiry into the

> imminence and magnitude of the danger . . . and then to balance the character of the evil . . . against the need for free and unfettered expression. The possibility that other measures will serve the State's interests should also be weighed.

[20] In *The Pentagon Papers*, the U.S. Supreme Court considered the constitutional validity of a restraining order against the publication of governmental documents concerning the war in Vietnam. The government argued that harm to the national security interests of the United States justified the restraint against publication. One of several concurring opinions said:

> [T]he First Amendment tolerates absolutely no prior judicial restraints . . . predicated upon [the] surmise or conjecture that untoward consequences *may* result. . . . [O]nly governmental allegation and proof that publication must inevitably, directly, and immediately cause the occurrence [of the danger identified] can support even the issuance of an interim restraining order. In no event may mere conclusions be sufficient . . . .

403 U.S. at 725-27 (Brennan, J., concurring) (emphasis supplied). Thus, it is apparent that the "bar" to sustain a prior restraint is high.

There are a number of reported decisions from other jurisdictions involving judicial restrictions on dissemination of information about a juvenile court proceeding or the juvenile involved in such proceeding. Often such cases involve closure of the juvenile court proceedings or restrictions on what the media may publish, e.g., *In re T.R.*, 52 Ohio St. 3d 6, 556 N.E.2d 439 (1990) (case involving surrogate parenting agreement, closed court proceeding, and gag order on parties and their attorneys). In *In re T.R.*, the Ohio Supreme Court found that the standards used by the trial court for the imposition of the restraints, "'scintilla of possibility of harm'" and "'best interests of the child,'" were incorrect. 52 Ohio St. 3d at 18, 556 N.E.2d at 451. The Ohio court reasoned that given the juvenile court's history of confidentiality, it is possible to reasonably argue that public access is never in the child's best interests, but that the standards used by the trial judge gave

insufficient weight to the public's interest in access to workings of the juvenile court and in scrutinizing such.

[21] Gag orders have been held to be a less restrictive alternative to restrictions imposed on the media. See *Nebraska Press Assn. v. Stuart*, 427 U.S. 539, 96 S. Ct. 2791, 49 L. Ed. 2d 683 (1976). But this appeal does not involve courtroom closure or restrictions on the media. In the Ohio case, *In re T.R.*, discussed above, the court held that "a juvenile court, which is not presumptively open, has the power to control extrajudicial comments by the litigants, provided the restrictions are consistent with [constitutional] standards . . . ." 52 Ohio St. 3d at 21, 556 N.E.2d at 454. The Ohio court also noted that prior restraints have been used to attempt to protect the privacy interests of parties to "sensational cases." *Id.*, citing *S.N.E. v. R.L.B.*, 699 P.2d 875 (Alaska 1985) (child custody case involving lesbian mother where gag order was found to be overbroad), and *Mason v. Reiter*, 531 So. 2d 348 (Fla. App. 1988) (contempt citation for violation of gag order in case involving famous comedian held technically defective). In the Alaska case, *S.N.E. v. R.L.B., supra*, a blanket prohibition against all communications with persons not specified in the order was held to be unconstitutionally overbroad. In *In re Dependency of T.L.G.*, 139 Wash. App. 1, 20, 156 P.3d 222, 232 (2007), the trial court's gag order prohibiting the father from disseminating any documents, reports, and orders without permission of the court and of the children's guardian ad litem was found overbroad and the matter was remanded to "[determine] whether a protective order [was] necessary and, if so, enter a new order that is consistent with [the father's] constitutional and statutory rights." Although in the present case, the juvenile court's gag order is more narrowly tailored, these cases illustrate the exacting scrutiny restrictive orders on speech and freedom of the press are to receive.

[22,23] In *State ex rel. L.M.*, 37 P.3d 1188 (Utah App. 2001), the trial court's gag order prohibited all involved parties from discussing the case with the media. The Utah court, after citation of many of the First Amendment principles we have outlined above, said that the State had to present evidence of some compelling interest that would be endangered

without the limitation on speech. The Utah court found that the State had a compelling interest in maintaining the confidentiality of juvenile court proceedings, which confidentiality normally serves the best interests of children involved in such proceedings. Nonetheless, the Utah court could find no evidence in the record that the juvenile court properly discharged its duty to

> (1) clearly identify "the imminence and magnitude of the [possible] danger," *Landmark Communications*[*, Inc. v. Virginia*, 435 U.S. 829, 843, 98 S. Ct. 1535, 56 L. Ed. 2d 1 (1978)]; (2) balance the parties' interests to determine whose interest deserved the greater protection; and (3) if the court determined that the State's interests in protecting [the child at issue] deserved the greater protection, . . . either (a) explore other possible measures, or (b) narrowly draft the gag order to ensure that it was no more restrictive than necessary to protect the compelling interests. *See id.; see also Procunier* [*v. Martinez*, 416 U.S. 396, 94 S. Ct. 1800, 40 L. Ed. 2d 224 (1974)].

State ex rel. L.M., 37 P.3d at 1195. Therefore, the juvenile court's gag order was vacated, and on remand, the juvenile court was to conduct a "proper inquiry into the government's interests and balance the imminence and magnitude of the danger presented against [the parents'] right to free and unfettered expression." *Id.* at 1196.

[24] In the Illinois case *In re J.S.*, 267 Ill. App. 3d 145, 640 N.E.2d 1379, 204 Ill. Dec. 30 (1994), the mother filed an interlocutory appeal of a gag order in a child custody dispute that resulted in the state's filing a petition to declare the minor child neglected. The gag order in *In re J.S.* prohibited the parties and their attorneys from discussing the underlying case with members of the news media. The court, while acknowledging the presumption of invalidity of a prior restraint on speech, said that "'a judicial order restraining speech will not be held invalid as a prior restraint if it is: (1) necessary to obviate a "serious and imminent" threat of impending harm, which (2) cannot adequately be addressed by other, less speech-restrictive means.'" 267 Ill. App. 3d at 148, 640 N.E.2d at 1382, 204 Ill. Dec. at 33, quoting *In re A Minor*, 127 Ill.

2d 247, 537 N.E.2d 292, 130 Ill. Dec. 225 (1989) (*Minor I*). However, the court distinguished *Minor I* because the child in *In re J.S.* was an innocent victim, not a juvenile criminal suspect as in *Minor I*, and because in *Minor I*, the appellant was a news organization seeking to print information it deemed newsworthy. The court in *In re J.S.* then turned to another decision of the Illinois Supreme Court, *In re A Minor*, 149 Ill. 2d 247, 595 N.E.2d 1052, 172 Ill. Dec. 382 (1992) (*Minor II*), which involved a gag order against a newspaper that wanted to print the identities of child victims of sexual and physical abuse. The newspaper had secured the identities through court proceedings rather than by its own journalistic efforts. The *Minor II* court found:

> [T]he State has an interest in the nondisclosure of the minor victims' identities in its role as *parens patriae.* It was in its role as *parens patriae* that the State initiated these juvenile proceedings to provide shelter and care for these abused children. The minor victims reside and will continue to reside in a small community. Public identity could cause continuing emotional trauma to these unfortunate children and impede the lengthy and difficult healing process which they must endure. We find that the danger of public disclosure and the probability of irreparable adverse effects which such disclosure would entail to be a compelling State interest at stake in this case.
>
> Coupled with the State's interest in nondisclosure, we find that the minor victims themselves have a compelling interest at stake in this case.

149 Ill. 2d at 255, 595 N.E.2d at 1056, 172 Ill. Dec. at 386. The court in *Minor II* emphasized, however, that the children's and the State's compelling interests in nondisclosure must be weighed against "'the need for free and unfettered expression.'" 149 Ill. 2d at 257, 595 N.E.2d at 1056, 172 Ill. Dec. at 386, quoting *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 98 S. Ct. 1535, 56 L. Ed. 2d 1 (1978).

However, *Minor II* is not a gag order case in the same sense as the matter before us. Rather, it involves an order which prohibited a newspaper from disclosing the identities of minor victims of physical and sexual abuse which had been obtained

in the course of court proceedings. The Illinois Supreme Court concluded that a section of Illinois' Juvenile Court Act authorizing the juvenile court to prohibit newspapers from disclosing the identities of minors who are victims of sexual crimes was not an unconstitutional prior restraint on freedom of the press. The *Minor II* court further held that the danger of public disclosure and probability of irreparable adverse effects of such disclosure constituted a compelling state interest, in addition to the minors' own compelling interest in freedom from invasion of their privacy. In the end, the Illinois court concluded that the First Amendment role of the media was not diminished by withholding the names of the juvenile victims.

We digress to note that the Nebraska Constitution does not contain an express right of privacy as does the Illinois Constitution. See Ill. Const. art. I, § 6. See, also, Ill. Const. art. I, § 12. In *State v. Senters*, 270 Neb. 19, 699 N.W.2d 810 (2005), our Supreme Court held that the due process clause of the Nebraska Constitution does not contain a right of privacy broader than that recognized under the federal Constitution. See, also, *Hamit v. Hamit*, 271 Neb. 659, 715 N.W.2d 512 (2006). And we have found no authority holding that the federal Due Process Clause protects the anonymity of a juvenile involved in court proceedings.

Returning to *In re J.S.*, 267 Ill. App. 3d 145, 640 N.E.2d 1379, 204 Ill. Dec. 30 (1994), the underlying litigation was between the parents over custody of the child. The mother alleged that the father had subjected the child to sexual abuse, and she wanted to discuss the case with the media, although there was no evidence that the media was interested in the case. In upholding the gag order, the *In re J.S.* court reasoned:

> We fail to comprehend how the mother could discuss with the news media the scandalous, horrendous details of sexual abuse that she alleges occurred while keeping confidential the identity of the alleged victim. Under the facts of this case, we believe that the trial court was correct to protect [the child's] anonymity and that it used the order with sufficient restraint that constitutionally protected speech was not unduly burdened.

267 Ill. App. 3d at 154, 640 N.E.2d at 1385-86, 204 Ill. Dec. at 36-37. However, the case before us involves not a juvenile victim of sexual or physical abuse, but, rather, a youth who has behavioral issues at home, in school, and at work—not uncommon issues with some youth—which do not connote the same need for protection as is present with a minor who is a victim of sexual crimes. Thus, the considerations in *In re J.S.* which supported the imposition of the gag order therein are not present here.

With the foregoing discussion of pertinent constitutional principles and representative cases from other jurisdictions in mind, we turn to the specifics of the gag order before us. The bill of exceptions before us contains the hearing on the motions of the parties to clarify and limit the November 26, 2008, gag order, but not the hearing when that original order was entered. Nonetheless, we can surmise from the record we do have that the November 26 gag order arose from the publication of an article in the Wall Street Journal about T.T. and Nebraska's then-existing Safe Haven law. However, the Wall Street Journal article is not in our record.

T.T.'s therapist testified that T.T. expressed anger and embarrassment at having his personal information in the media, but that it had not interfered with his treatment. However, according to the therapist, T.T. had had issues since the article came out with resulting "somatoform problems" such as sleep problems, increased acne, and increased anger. The therapist testified that dealing with the anger and embarrassment had become a "central theme of [T.T.'s] therapy quite often." In the therapist's opinion, disclosure of last name, date of birth, Social Security number, types of treatment, diagnosis, and treatment providers should be restricted because such were "things that could be detrimental to a person's future or self-esteem." During the cross-examination of the therapist, it was suggested that previous medical records (which the therapist admitted she had not gotten) revealed that T.T.'s sleep problems and acne predated the Wall Street Journal article. We note that exhibits included in our record from the dispositional hearing of January 29, 2009, clearly support the conclusion that T.T. had difficulties

with sleep and, by inference, acne, before the publication of the Wall Street Journal article.

The therapist testified that among T.T.'s concerns are the fact that an Internet search will bring up T.T.'s name and the Wall Street Journal article; the fact that S.Q., his mother, provided information to a reporter on how to contact him; and the fact that the reporter did try to reach him. The therapist stated that T.T. also told her the article had misinformation about him. The therapist said that in a therapy session involving T.T. and S.Q., the article and his anger at S.Q. were discussed, and that T.T. and S.Q. "are making progress with it." The therapist acknowledged that the parents related during therapy that their intent in providing information for the Wall Street Journal article was not to hurt or embarrass T.T., but to help others in similar situations. The therapist said that T.T. has resolved his negative feelings about that past occurrence, but that he was skeptical about the expressed motivation of the parents. The therapist further testified that T.T. told her that he felt it was intended to hurt and embarrass him and that he would be upset if new attempts to disclose information about him were made. The therapist agreed with T.T.'s guardian ad litem that disclosure of protected health information could impact T.T.'s future insurability, employability, or admission to college or the military.

Included in evidence is the therapist's progress note from a family therapy session of December 12, 2008, and we quote the portion thereof relevant to the issue before us:

> [T.T.] confronts his mom re Wall Street [Journal] article, said it "totally exposed me, embarrassed me". Mom discusses why she did this — out of frustration. Mom asks "is there anything in that article that anyone didn't know already?" Mom said the article was meant to draw attention to loopholes in Nebr. care — not to hurt [T.T.] Family asks how [T.T.] was introduced to Wall Street [Journal] article and th[e] therapist explained that [the therapist's DHHS supervisor] asked her to help [T.T.] understand. [T.T.] cont. to assert that the article felt negative to him and very critical. Mom asks him to try looking at article from a different angle — Sister . . . said she talked to

> reporters for an hour trying to "help all the other kids out there". [T.T.] cont[.] to assert why nothing positive was forthcoming.

T.T.'s mother, S.Q., testified that she did not intend to harm or embarrass her son and that her goal was to help others who were in similar situations with their children and struggling to get services and assistance for them. And she wanted to be able to participate in the policy discussions with a state senator's Safe Haven law task force and the associated "parents' roundtable" discussion that was to occur on January 5, 2009. She testified that she was willing not to use T.T.'s name in any of such endeavors, but that T.T.'s history was a part of that process. S.Q. testified that her son had a long history of "mental health issues" and that the only reason she wanted the language from the November 26, 2008, order removed was so that she could participate in the state senator's task force. In evidence is a letter of December 17 from T.T.'s therapist to her supervisor, stating:

> [T.T.] has reported feeling strongly "embarrassed and angry" by this having been publicized by his parents.
>
> [T.T.] is a young man dealing with issues of self-esteem, anger towards his parents (on both sides) and reported somatoform reactions related to the stress from this particular situation. I do not believe it is in [T.T.'s] best interest to have additional protected health information disseminated to the general public. In therapy, this situation continues to be central and of trouble to [T.T.]

The therapist's supervisor's affidavit of December 18, 2008, is in evidence, and it recounts that in a meeting with T.T. the previous day, she asked him about the Wall Street Journal article and he told her that he was pretty much "'over it,'" as it had been several weeks and he had had time to process his feelings. The supervisor then related that she inquired about how he would feel if there were an additional release of information about him to the public, to which he responded, "'I know that won't happen because you will protect me'" and "'I don't want any other information going out to people about me.'" The supervisor also included in her affidavit that she had talked with the people with whom T.T. was placed in foster care and

that they told her that on "numerous occasions," he has stated that he wants this to be a "'family issue.'" No one testified about any physical or emotional harm that would come to T.T. from additional public disclosure of information that would be above and beyond what he has already experienced as a result of the Wall Street Journal article.

The juvenile court's first iteration of the gag order under consideration was entered January 2, 2009, after the evidence we have summarized above was adduced. The order made the following finding: "[F]urther public disclosure of [T.T.'s] private medical information is contrary to his best interest. It is in [T.T.'s] best interest and it is in furtherance of efforts at reunification that specific guidelines be given regarding disclosure of or release of [T.T.'s] medical information to the public."

[25] We do not disagree with the juvenile court's conclusion that further disclosure of T.T.'s private medical information is not in T.T.'s best interests, because we think the evidence recited above makes that conclusion inescapable. However, the fundamental difficulty is that the child's best interests are not the standard, nor does the juvenile court's rationale for the entry of the gag order comport with the established law allowing the lawful entry of a judicial order imposing a prior restraint on speech. The law is clear that our obligation is to subject a prior restraint on free speech to "exacting scrutiny" and that such restraints begin with a "heavy presumption" of unconstitutionality. When we scrutinize the gag order, remembering that it is the State's "heavy burden" to justify the restraint, we must assess "the imminence and magnitude of the danger . . . and then . . . balance the character of the evil . . . against the need for free and unfettered expression." *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 843, 98 S. Ct. 1535, 56 L. Ed. 2d 1 (1978). And in this case, the evidence is that the parents wish to exercise their right of free speech in the arena where public policy is formed, rather than merely for their own personal ends. Given the applicable legal principles regarding prior restraints on speech, we hold that a restraint on speech against disclosure to the public of information about a juvenile because it is in the juvenile's "best interest," as the juvenile court found, is an insufficiently justified prior restraint

on speech. We now turn to the danger or harm to T.T. and its imminence.

[26] No witness testified that further disclosure posed imminent physical or emotional harm or danger to T.T. of any magnitude. The record clearly supports the conclusion that if T.T.'s parents make further public disclosure about him, his past difficulties, or his treatment, T.T. will likely be angry and embarrassed, plus reconciliation with his family will be more difficult. On the other hand, we remember that the evidence shows he is "over it" with respect to the Wall Street Journal article. And, as said in *The Pentagon Papers*, a prior restraint on speech cannot be predicated on "surmise or conjecture that untoward consequence may result." 403 U.S. at 725-26. Moreover, while we do not know exactly what was disclosed in the Wall Street Journal article, it is a permissible inference that at least some of the information restricted by the gag order is already in the public domain. Thus, this factor reduces the effectiveness of the gag order, as well as undercuts any claim that the danger of harm is imminent.

The parents are obviously now aware of how T.T. feels about their prior disclosures about him in the Wall Street Journal article and that he, quite understandably, wants his difficulties to be a "family issue." Whether the parents are acting in his best interests by further disclosure is not the standard by which we judge the gag order. Nonetheless, we cannot help but observe that the parents can be meaningfully involved in the public policy discussions in which they are interested while simultaneously striving to minimize discussion of specific medical information about T.T. Moreover, the juvenile court can address future parental actions which are not in T.T.'s best interests because there are remedies within the juvenile system in the event of future parental actions that are not in a child's best interests. The availability of such future remedies would be "other measures that will serve the State's interests [that] should also be weighed." See *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 843, 98 S. Ct. 1535, 56 L. Ed. 2d 1 (1978). Having said this, we must acknowledge the tension between the parents' right to speak about T.T., although doing so is not in his best interests, and our often-stated doctrine that

the juvenile court need not wait for disaster to befall a minor child before acting. See *In re Interest of Joshua M. et al.*, 4 Neb. App. 659, 548 N.W.2d 348 (1996), *reversed in part on other grounds* 251 Neb. 614, 558 N.W.2d 548 (1997). But, that doctrine has never been applied in the context of a gag order on parents involved in the juvenile system.

In the end, we must conclude that the evidence is simply insufficient, absent conjecture and speculation which we cannot engage in, to satisfy the State's heavy burden to justify this prior restraint on free speech and to overcome the heavy presumption of unconstitutionality of a prior restraint on speech. There is no evidence proving imminent harm to T.T. of a magnitude that justifies a prior restraint on free speech. Therefore, we vacate that portion of the juvenile court's order of February 3, 2009, preventing the parents from disclosing information about T.T.

Pretreatment Assessment.

S.Q. and A.Q. argue that the juvenile court also erred in ordering them to submit to a pretreatment assessment when the permanency objective was independent living and not reunification. Once again, 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 Taylor W.*, 276 Neb. 679, 757 N.W.2d 1 (2008); *In re Interest of Anthony R. et al.*, 264 Neb. 699, 651 N.W.2d 231 (2002).

The State cites to Neb. Rev. Stat. § 43-287.01 et seq. (Reissue 2008) and *In re Interest of Laura O. & Joshua O.*, 6 Neb. App. 554, 574 N.W.2d 776 (1998), in support of its argument that the juvenile court review panel is the only avenue for review in situations where a dispositional order is entered which differs from the plan of DHHS and where the party seeking review believes that the court-ordered plan is not in the best interests of the juvenile. We agree that is the law.

The State argues that the court order differed from DHHS' recommendation in that the juvenile court did not order the recommended psychological evaluation. A side-by-side comparison of DHHS' plan and the court order supports the State's argument to a degree. DHHS' case plan of January 22, 2009,

recommended that S.Q. and A.Q. "participate in psychological evaluations." And the juvenile court ordered that S.Q. and A.Q. "shall participate in a pretreatment assessment." However, the State forgets that at the January 29 hearing, DHHS stated it would be agreeable to have the parents undergo a pretreatment assessment, rather than a psychological evaluation, and that DHHS stated it did not have "any problems" amending its recommendation. Because the court order was consistent with the ultimate recommendations by DHHS to the juvenile court, S.Q. and A.Q. were not required to appeal to the juvenile review panel pursuant to § 43-287.01. Because we have jurisdiction over the issue, we now address the merits—whether the juvenile court's order requiring S.Q. and A.Q. to participate in a pretreatment assessment was appropriate.

[27,28] Once a plan of reunification has been ordered to correct the conditions underlying the adjudication under § 43-247(3)(a), the plan must be reasonably related to the objective of reuniting the parents with the children. *In re Interest of Mainor T. & Estela T.*, 267 Neb. 232, 674 N.W.2d 442 (2004). In *In re Interest of J.S., A.C, and C.S.*, 227 Neb. 251, 268, 417 N.W.2d 147, 158 (1987), the Nebraska Supreme Court said:

> Materiality of a provision in a court-ordered rehabilitative plan is determined by a cause-and-effect relationship: Does a provision in the plan tend to correct, eliminate, or ameliorate the situation or condition on which the adjudication has been obtained under the Nebraska Juvenile Code? An affirmative answer to the preceding question provides the materiality necessary in a rehabilitative plan for a parent involved in proceedings within a juvenile court's jurisdiction. Otherwise, a court-ordered plan, ostensibly rehabilitative of the conditions leading to an adjudication under the Nebraska Juvenile Code, is nothing more than a plan for the sake of a plan, devoid of corrective and remedial measures.

The reasonableness of a rehabilitative plan for a parent depends on the circumstances in a particular case and, therefore, is examined on a case-by-case basis. *Id.* S.Q. and A.Q. argue that their participation in a pretreatment assessment is not

reasonably related to the permanency objective identified in DHHS' plan, such being independent living.

[29-31] The Nebraska Juvenile Code must be liberally construed to accomplish its purpose of serving the best interests of the juveniles who fall within it. *In re Interest of R.A. and V.A.*, 225 Neb. 157, 403 N.W.2d 357 (1987), *overruled on other grounds, State v. Jacob*, 242 Neb. 176, 494 N.W.2d 109 (1993). The juvenile court has broad discretion as to the disposition of those who fall within its jurisdiction. *In re Interest of R.A. and V.A., supra*. Juvenile courts have broad discretion to accomplish the purpose of serving the best interests of the children involved. *Id*. Juvenile courts have long recognized that psychiatric testing or psychological evaluations of a parent may be required to determine the best interests of children when issues of custody and visitation are presented. *Id.*

In the instant case, S.Q. and A.Q. still seek a relationship with T.T. even though T.T. is working toward independent living. S.Q. and A.Q. participate in family therapy with T.T. And, in the dispositional order, the juvenile court ordered that S.Q. and A.Q. shall have "therapeutic/supervised" visitation and reasonable telephone contact with T.T., as recommended by his therapist.

T.T.'s therapist, a licensed mental health professional, testified that one of the treatment goals in this case is communication between S.Q., A.Q., and T.T. The therapist testified that having S.Q. and A.Q. do a pretreatment assessment would "be advisable" and would help with the therapeutic treatment of this family because it "opens avenues for more proactivity" and would "make things better potentially." The therapist also stated that given the situation (i.e., use of the Safe Haven law), it would be appropriate for the parents to do a pretreatment assessment to see what issues are involved with the family. The therapist testified that it would be in T.T.'s, and the family's, best interests for S.Q. and A.Q. to do a pretreatment assessment and that such would be helpful even though the permanency goal for T.T. is independent living.

The parents' participation in a pretreatment assessment does "tend to correct, eliminate, or ameliorate the situation or condition on which the adjudication has been obtained." See *In re*

Interest of J.S., A.C., and C.S., 227 Neb. 251, 268, 417 N.W.2d 147, 158 (1987). The adjudication was based on T.T.'s being "in a situation dangerous to [his life] or injurious to [his] health or morals," see § 43-247(3)(a), in that his parents effectively removed him from his home by leaving him at a hospital under the then-effective Safe Haven law. A pretreatment assessment is reasonably related to the rehabilitative plan, even though the permanency goal is independent living, because S.Q., A.Q., and T.T. want a continued relationship and T.T. is still a minor. Working toward an improved relationship was clearly included in the juvenile court's order of February 3, 2009, because it ordered "therapeutic/supervised" visitation and telephone contact. The therapist testified that the parents' participation in a pretreatment assessment would help with the family's therapeutic treatment and would be in T.T.'s, and the family's, best interests. Giving the juvenile code a liberal construction, as we must, see *In re Interest of R.A. and V.A.*, 225 Neb. 157, 403 N.W.2d 357 (1987), *overruled on other grounds, State v. Jacob*, 242 Neb. 176, 494 N.W.2d 109 (1993), we find that the juvenile court's rehabilitative plan requiring the parents to participate in a pretreatment assessment was reasonable in this case. We affirm such order.

CONCLUSION

For the reasons stated above, we find that S.Q. and A.Q.'s appeal regarding the order restricting parental disclosure of information about T.T. was timely. We find that the State did not introduce evidence of imminent harm to T.T. of sufficient magnitude to overcome the heavy presumption of the unconstitutionality of the gag order. Therefore, we reverse, and vacate that portion of the juvenile court's dispositional order of February 3, 2009.

We further find that the juvenile court's order requiring the parents to participate in a pretreatment assessment was timely appealed, but that the order was reasonable, appropriate, and supported by the evidence. Thus, we affirm such order.

AFFIRMED IN PART, AND IN PART REVERSED AND VACATED.

MOORE, Judge, participating on briefs.

ODILON VISOSO, ALSO KNOWN AS ADAM RODRIGUEZ, APPELLEE, V. CARGILL MEAT SOLUTIONS, APPELLANT.

778 N.W.2d 504

Filed December 8, 2009. No. A-09-339.

1. **Workers' Compensation: Appeal and Error.** Pursuant to Neb. Rev. Stat. § 48-185 (Reissue 2004), 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 no 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. ____: ____. 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. **Workers' Compensation: Legislature: Intent.** The Legislature enacted the Nebraska Workers' Compensation Act in order to relieve injured workers from the adverse economic effects caused by a work-related injury or occupational disease.
5. **Workers' Compensation.** Nebraska courts have consistently given the Nebraska Workers' Compensation Act a liberal construction to carry out justly the spirit of the act.
6. **Workers' Compensation: Words and Phrases.** For purposes of the Nebraska Workers' Compensation Act, the definition of employee or worker includes every person in the service of an employer who is engaged in any trade, occupation, business, or profession as described in Neb. Rev. Stat. § 48-106 (Cum. Supp. 2008) under any contract of hire, expressed or implied, oral or written, including aliens and also including minors.
7. **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.
8. **Workers' Compensation: Words and Phrases.** Under its plain and ordinary meaning, work status is not involved in the definition of "alien."
9. ____: ____. As a general proposition, an illegal alien is an employee or worker who is covered by the Nebraska Workers' Compensation Act.
10. ____: ____. Temporary disability is defined as the period during which the employee is submitting to treatment, is convalescing, is suffering from the injury, and is unable to work because of the accident.
11. **Workers' Compensation.** Even though an employee's illegal work status would prevent such employee from working, the employee is nonetheless entitled to temporary total disability benefits if at least one of the causes of the employee's inability to return to work is the employee's work injury.

12. **Workers' Compensation: Liability.** Under Neb. Rev. Stat. § 48-120(1) (Cum. Supp. 2006), the employer is liable for all reasonable medical, surgical, and hospital services as and when needed, which are required by the nature of the injury and which will relieve pain or promote and hasten the employee's restoration to health and employment.
13. ____: ____. The only limitation on medical benefits set forth in Neb. Rev. Stat. § 48-120 (Cum. Supp. 2006) is that the treatment be reasonable and that the compensation court has the authority to determine the necessity, character, and sufficiency of the treatment furnished.
14. **Workers' Compensation: Evidence: Proof.** When an employee in a workers' compensation case presents evidence of medical expenses resulting from injury, he or she has made out a prima facie case of fairness and reasonableness, causing the burden to shift to the employer to adduce evidence that the expenses are not fair and reasonable. There must, of course, be a causal relationship between the original compensable injury and the medical care.
15. **Workers' Compensation.** In workers' compensation cases, the fact that a disputed doctor visit encompassed medical matters in addition to a work-related injury does not, by itself, mean that the costs of such visits were not compensable.
16. ____. Whether medical services were reasonably necessary and related to a compensable injury is a question of fact which is to be determined by the trial judge.
17. ____. In workers' compensation cases, travel expenses are compensable if they are shown to be reasonably necessary and related to the compensable injury.
18. ____. Whether the travel expenses were reasonably necessary and related to the compensable injury is a question of fact which is to be determined by the trial judge.
19. ____. When as a result of an 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 vocational rehabilitation services.
20. ____. The purpose of vocational rehabilitation under workers' compensation is to restore an injured employee to suitable gainful employment. In order to effectuate this purpose, the employee must be eligible and willing to return to some form of employment.
21. ____. Any determination regarding an employee's entitlement to vocational rehabilitation is made at the time of maximum medical improvement.

Appeal from the Workers' Compensation Court. Affirmed.

James D. Hamilton and Amanda A. Dutton, of Baylor, Evnen, Curtiss, Grimit & Witt, L.L.P., for appellant.

Ryan C. Holsten and Travis Allan Spier, of Atwood, Holsten & Brown, P.C., L.L.O., for appellee.

SIEVERS and CASSEL, Judges, and HANNON, Judge, Retired.

SIEVERS, Judge.

This appeal presents the question of whether the employee's status as an illegal immigrant impacts his entitlement to temporary total disability and vocational rehabilitation under the Nebraska Workers' Compensation Act. Cargill Meat Solutions (Cargill) appeals from an order of a three-judge review panel for the Nebraska Workers' Compensation Court. The review panel affirmed the trial court's (1) running award to Odilon Visoso for temporary total disability, (2) order that Cargill was to pay $1,756 to the Schuyler Clinic, and (3) finding and order that Visoso was entitled to mileage reimbursement of $1,029.27. The review panel reversed the trial court's finding that because of his illegal alien immigrant status, Visoso was not entitled to vocational rehabilitation. We affirm.

FACTUAL BACKGROUND

On May 9, 2006, Visoso, also known as Adam Rodriguez, was working for Cargill in Schuyler, Nebraska. On that date, Visoso sustained injuries to his neck and body when a slab of meat fell from a hook and struck him on the back of the head and shoulder. Visoso sought medical treatment from the time of the injury. Treatment was initially conservative and included physical therapy, chiropractic services, pain medication, and steroid injections. Visoso eventually underwent an anterior cervical interbody diskectomy and arthrodesis surgery on October 4, 2007.

From the time of his May 9, 2006, work accident until his October 4, 2007, surgery, Visoso continued to work at Cargill on light duty. Visoso's employment was terminated in late October 2007 because he was an illegal, undocumented worker. As of the date of trial, January 3, 2008, Visoso testified that he had not been medically released to return to work following his October 2007 surgery.

We note that Visoso went by the name "Adam Rodriguez" when he applied for and obtained employment with Cargill, during the course of his employment with Cargill, while seeking medical treatment for his work-related injuries, and when he originally filed his workers' compensation lawsuit. It is undisputed that during the time of his employment with Cargill

and at the time of trial, Visoso was an illegal, undocumented alien. Visoso testified that he came from Mexico and that he illegally entered the United States in 2002. Cargill claims to have been unaware of Visoso's illegal status until October 2007, although he revealed such status on August 21, 2007, when his deposition was taken in this case.

PROCEDURAL BACKGROUND

Visoso filed his petition on November 22, 2006, alleging that on May 9, he sustained personal injury in an accident arising out of and in the course of his employment by Cargill. Visoso alleged that the neck and body injuries occurred when the slab of meat fell on his head. Visoso alleged that the matters in dispute were as follows: medical costs; temporary total disability; mileage relating to his injury; and, if he had reached maximum medical improvement by the time of trial, the extent of his permanent impairment and disability and his entitlement to vocational rehabilitation.

Cargill filed its answer denying the allegations in Visoso's petition. Cargill alleged that Visoso's disability, if any, did not arise out of or in the course of his employment by Cargill. Cargill further alleged that it has made payment to or on behalf of Visoso of all medical, surgical, and hospital expenses and all compensation benefits to which Visoso may be entitled or for which Cargill may be liable.

The workers' compensation court trial judge's award was filed on April 2, 2008. The judge found that on May 9, 2006, Visoso was employed by Cargill as a laborer, and that while engaged in the duties of his employment, he suffered injuries to his cervical spine as a result of an accident arising out of and in the course of his employment. The judge found that a front quarter of beef fell from a conveyor and struck Visoso on the rear of his head, neck, and shoulders. The judge found that Visoso's injury was initially diagnosed as a cervical strain but later as "annular tears at C4-5, C5-6 and cervical spondylosis." The judge held that Visoso is entitled to benefits as provided under the Nebraska Workers' Compensation Act.

The judge determined that at the time of the accident and injury, Visoso was receiving an average weekly wage of

$514.56 and thus was entitled "to benefits of $343.04 per week from October 4, 2007, through the date of trial and for so long in the future as [Visoso] shall remain temporarily totally disabled and further order of the Court." We assume the last phrase in the foregoing quote from the trial judge's decision was referencing *Davis v. Crete Carrier Corp.*, 274 Neb. 362, 740 N.W.2d 598 (2007) (employer may not unilaterally terminate workers' compensation award of indefinite temporary total disability benefits absent modification of award of benefits). The trial judge stated that he relied upon the opinions of Dr. Ric Jensen regarding Visoso's continuing temporary total disability, as well as Visoso's testimony, in making such finding. Cargill was ordered to pay medical expenses on Visoso's behalf to numerous medical providers, including the Schuyler Clinic ($1,756). Cargill was also ordered to reimburse Visoso for mileage in the amount of $1,029.27. The judge found that Cargill should pay future medical expenses reasonably necessary for evaluation and treatment of Visoso's cervical spine injury. The judge specifically found that Visoso had not reached maximum medical improvement. The judge also found that Visoso will not be entitled to vocational rehabilitation services because he is an illegal, undocumented worker.

On April 16, 2008, Cargill filed its application for review by a three-judge review panel. Cargill's application alleged that the court erred in (1) finding that Visoso was temporarily totally disabled from the date of trial for so long in the future as Visoso shall remain temporarily disabled and until further order of the court, (2) ordering payment of $1,756 to the Schuyler Clinic, and (3) ordering mileage reimbursement of $1,029.27 to Visoso.

In its order filed on February 27, 2009, the review panel noted that Visoso cross-appealed the trial court's finding that Visoso will be ineligible for vocational rehabilitation services upon achieving maximum medical improvement. The review panel affirmed the trial court's award in all respects except for the trial court's determination that Visoso is not entitled to vocational rehabilitation services. The review panel reversed such determination as premature, finding:

> The time to rule on [Visoso's] entitlement to vocational rehabilitation services is after [he] reaches maximum medical recovery, with his impairments and restrictions known, with his then current immigration status known, and with a contemporaneous finding made about whether or not he plans to return to his native country.

Cargill now appeals the review panel's decision.

ASSIGNMENTS OF ERROR

Cargill alleges that (1) the trial court erred in finding, and the review panel erred in affirming, that Visoso was entitled to a running award of temporary total disability; (2) the trial court erred in ordering, and the review panel erred in affirming, payment of $1,756 to the Schuyler Clinic; (3) the trial court erred in ordering, and the review panel erred in affirming, mileage reimbursement of $1,029.27 to Visoso; and (4) the review panel erred in reversing the trial court's finding that Visoso was not entitled to vocational rehabilitation.

STANDARD OF REVIEW

[1] Pursuant to Neb. Rev. Stat. § 48-185 (Reissue 2004), 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 no 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. *Davis v. Crete Carrier Corp.*, 274 Neb. 362, 740 N.W.2d 598 (2007).

[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.*

ANALYSIS

Temporary Total Disability.

Cargill argues it was error to find that Visoso was temporarily totally disabled from the date of trial for so long in the

future as he shall remain temporarily disabled. Cargill argues that temporary disability is available during the period the employee is unable to work because of the accident, and in this case, Visoso is not able to work because he is an illegal immigrant who cannot work legally within the United States. Thus, Cargill argues that Visoso is not entitled to a running award of temporary total disability.

[4,5] Cargill does not claim that Visoso's illegal alien status disqualifies him entirely from benefits under the Nebraska Workers' Compensation Act. Rather, Cargill asserts that such status prevents him from receiving temporary total disability and vocational rehabilitation. Nonetheless, we believe our analysis is advanced by consideration of the scope of the Nebraska Workers' Compensation Act. The Legislature enacted the Nebraska Workers' Compensation Act in order to relieve injured workers from the adverse economic effects caused by a work-related injury or occupational disease. *Foote v. O'Neill Packing*, 262 Neb. 467, 632 N.W.2d 313 (2001). And the Nebraska Supreme Court has consistently given the Nebraska Workers' Compensation Act a liberal construction to "'"carry out justly the spirit of the Nebraska Workers' Compensation Act."'" 262 Neb. at 473, 632 N.W.2d at 320.

[6-9] For purposes of the Nebraska Workers' Compensation Act, the definition of "employee" or "worker" includes: "Every person in the service of an employer who is engaged in any trade, occupation, business, or profession as described in section 48-106 under any contract of hire, expressed or implied, oral or written, *including aliens* and also including minors." Neb. Rev. Stat. § 48-115(2) (Cum. Supp. 2008) (emphasis supplied). However, the Legislature did not further define "alien." "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." *Big John's Billiards v. Balka*, 260 Neb. 702, 707, 619 N.W.2d 444, 448 (2000). Black's Law Dictionary 84 (9th ed. 2009) defines the term "alien" as follows:

> A person who resides within the borders of a country but is not a citizen or subject of that country; a person not

> owing allegiance to a particular nation. . . . In the United States, an alien is a person who was born outside the jurisdiction of the United States, who is subject to some foreign government, and who has not been naturalized under U.S. law.

Thus, under its plain and ordinary meaning, work status is not involved in the definition of "alien." In *Economy Packing v. Illinois Workers' Comp.*, 387 Ill. App. 3d 283, 901 N.E.2d 915, 327 Ill. Dec. 182 (2008), the court held that the plain meaning of "aliens" in the Illinois Workers' Compensation Act includes not only foreign-born citizens that can legally work in the United States, but also those that cannot. After giving § 48-115(2) a liberal construction, we find that although Visoso cannot legally work in the United States because of his immigration status, he is nonetheless an "employee" or "worker" who, as a general proposition, is covered by the Nebraska Workers' Compensation Act. If it was the intent of the Nebraska Legislature to exclude illegal aliens from the definition of covered employees or workers, it could have easily included a modifier doing so in the statute, but the Legislature did not, and has not, done so. We now turn to Visoso's running award of temporarily total disability from the date of trial.

[10,11] The Nebraska Supreme Court has defined temporary disability as "the period during which the employee is submitting to treatment, is convalescing, is suffering from the injury, and is unable to work because of the accident." *Frauendorfer v. Lindsay Mfg. Co.*, 263 Neb. 237, 245, 639 N.W.2d 125, 134-35 (2002). The trial court awarded Visoso temporary total disability benefits from October 4, 2007, the date of surgery, through the date of trial, January 3, 2008, and for so long in the future as Visoso shall remain temporarily totally disabled. In a followup appointment on November 14, 2007, Dr. Jensen ordered that Visoso should remain off work until a followup appointment 6 weeks later, at which time Visoso would be reevaluated. And in a letter to Dr. Thomas Wong dated November 20, 2007, Dr. Jensen stated:

> For now, I will plan to follow up with [Visoso] in approximately 1 month for further assessment and x-ray

> imaging of his cervical spinal fusion construct. In the meantime, [Visoso] will remain in an off work status until he is re-evaluated. At that time I may consider returning him to employment on a limited basis.

Dr. Jensen's opinions are the only expert medical testimony concerning Visoso's postoperative work status contained in the record. Visoso testified that during his final followup appointment on December 19, Dr. Jensen did not release him to perform work of any kind. There is no evidence in the record that Visoso was given a medical release to return to work, and his testimony was that he was not. Thus, on this evidence, the trial judge was not clearly wrong in finding that Visoso's injury was a cause of his inability to work as of the time of trial. Even though Visoso's illegal work status would have prevented him from working, Visoso was nonetheless entitled to temporary total disability benefits because one of the causes of his inability to return to work was his work injury.

Payment to Schuyler Clinic.

[12-14] Cargill argues it was error to order payment of $1,756 to the Schuyler Clinic because Visoso was treated there for a plethora of conditions that were not work related. These bills were received in evidence without objection, and thus the question is simply what did they prove and how did their receipt in evidence affect the burden of proof concerning medical expenses. In *Tomlin v. Densberger Drywall*, 14 Neb. App. 288, 301-02, 706 N.W.2d 595, 608 (2005), we said:

> Neb. Rev. Stat. § 48-120(1) (Reissue 2004) provides: "The employer is liable for all reasonable medical, surgical, and hospital services . . . as and when needed, which are required by the nature of the injury and which will relieve pain or promote and hasten the employee's restoration to health and employment . . . ." "The only limitation on medical benefits set forth in § 48-120 is that the treatment be reasonable and that the compensation court has the authority to determine the necessity, character, and sufficiency of the treatment furnished." *Foote v. O'Neill Packing*, 262 Neb. 467, 474, 632 N.W.2d 313, 320 (2001). . . . [T]he Nebraska Workers' Compensation

> Act is to be broadly construed to accomplish the beneficent purpose of the act, see *Foote, supra* . . . .

And "[w]hen an employee in a workers' compensation case presents evidence of medical expenses resulting from injury, he or she has made out a prima facie case of fairness and reasonableness, causing the burden to shift to the employer to adduce evidence that the expenses are not fair and reasonable." *Dawes v. Wittrock Sandblasting & Painting*, 266 Neb. 526, 547, 667 N.W.2d 167, 187 (2003), *overruled on other grounds, Kimminau v. Uribe Refuse Serv.*, 270 Neb. 682, 707 N.W.2d 229 (2005). See, also, *Tomlin v. Densberger Drywall, supra*. And "'[t]here must, of course, be a causal relationship between the original compensable injury and the medical care.'" *Zitterkopf v. Aulick Indus.*, 16 Neb. App. 829, 832, 753 N.W.2d 370, 374 (2008) (quoting 5 Arthur Larson & Lex K. Larson, Larson's Workers' Compensation Law § 94.03[1] at 94-38 n.2 (2007)).

[15] In *Zitterkopf v. Aulick Indus., supra*, this court found that when viewed in the light most favorable to the successful party—the employee—the evidence showed that the drug Provigil was medically necessary for at least two purposes: (1) to treat the side effects of pain medication necessitated by the compensable injury and (2) to treat the employee's unrelated sleep apnea. This court held that the medication's use was in part for the treatment of the employee's work-related condition and that therefore the trial judge was not clearly wrong in finding that the employer must compensate for its expense. Accordingly, the fact that the disputed doctor visit encompassed medical matters in addition to the work injury does not, by itself, mean that the costs of the visits were not compensable.

The Schuyler Clinic reports were received into evidence without objection. We will address each clinic visit which Cargill claims was not work related.

- 9/11/06: Cargill states that "the doctor assessed diabetes." However, the report stated that Visoso went to the clinic "complaining of back and head pain after 100 lb of meat fell on top of his head." In addition to the diabetes assessment, the doctor also assessed neck pain.

- 9/22/06: Cargill states that Visoso presented for a "follow up with chest pain," also complaining of abdominal pain. However, the report stated that Visoso "continues to have pain in his neck after 100 lb of meat fell on top of his head," and Visoso was assessed with neck pain.
- 9/25/06: Cargill states that Visoso followed up with regard to chest pain, for which he had been admitted to the hospital, and was diagnosed with a nonfunctioning gallbladder. However, that report stated that Visoso was also assessed with neck pain and noted that Visoso had an appointment to see a spine doctor.
- 9/27/06: Cargill states the primary diagnosis was "gallbladder disease." However, the report stated that Visoso followed up with Dr. Wong for "neck pain which is work related." Again, Visoso was assessed with neck pain.
- 10/24/06: Cargill states the primary diagnosis was peptic disease. However, Dr. Wong also assessed Visoso with cervical disk disease. Additionally, Dr. Wong spoke with Visoso about a balance problem which was thought to be related to the cervical disk problem.
- 11/22/06: Cargill states that "the *only* diagnosis was hyperglycemia." However, the visit was also a followup after receiving a steroid injection for his neck injury.
- 5/23/07: Cargill states that the visit primarily concerned Visoso's diabetes and elevated liver enzymes. However, Dr. Wong noted that Visoso continued to have pain in his back and neck and assessed him with "[c]hronic neck pain and low back pain."
- 6/20/07, 7/18/07, and 8/15/07: Cargill states those visits related to Visoso's diabetes. However, in the reports for each of those visits, Dr. Wong stated that Visoso continued to have pain in his neck and back.

[16] Through the medical records from the controverted visits with Dr. Wong, Visoso clearly made out a prima facie case of fairness, reasonableness, and necessity because each visit included evaluation, treatment, or followup from his work injury. Therefore, the burden shifted to Cargill to adduce evidence that the expenses are not fair and reasonable. See *Dawes v. Wittrock Sandblasting & Painting*, 266 Neb. 526, 667 N.W.2d

167 (2003), *overruled on other grounds, Kimminau v. Uribe Refuse Serv.*, 270 Neb. 682, 707 N.W.2d 229 (2005). The trial judge implicitly found that Cargill did not meet its burden. Whether the medical services were reasonably necessary and related to the compensable work-related injury is a question of fact which is to be determined by the trial judge. See *Davis v. Crete Carrier Corp.*, 274 Neb. 362, 740 N.W.2d 598 (2007). The trial judge's decision to order Cargill to make payment of $1,756 to the Schuyler Clinic was not clearly wrong, and thus we affirm such decision.

Mileage Reimbursement.

[17,18] Cargill argues it was error to order mileage reimbursement of $1,029.27 to Visoso, because Visoso had not proved that such expenses were incurred as a result of the work accident. In workers' compensation cases, travel expenses are compensable if they are shown to be reasonably necessary and related to the compensable injury. *Tomlin v. Densberger Drywall*, 14 Neb. App. 288, 706 N.W.2d 595 (2005). Again, whether the travel expenses were reasonably necessary and related to the compensable injury is a question of fact which is to be determined by the trial judge. See *Davis v. Crete Carrier Corp., supra*. After reviewing the mileage expenses in evidence, we find that the trial judge's decision to order Cargill to pay mileage reimbursement of $1,029.27 to Visoso was not clearly wrong, and thus we affirm such decision.

Vocational Rehabilitation.

[19-21] Cargill argues that the review panel erred in reversing the trial court's finding that Visoso, an illegal immigrant, was not entitled to vocational rehabilitation. 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 vocational rehabilitation services. See Neb. Rev. Stat. § 48-162.01(3) (Cum. Supp. 2008). The purpose of vocational rehabilitation under workers' compensation is to restore an injured employee to suitable gainful employment. *Ortiz v. Cement Products*, 270 Neb. 787, 708 N.W.2d 610 (2005). See, also, § 48-162.01(3). In order to effectuate this purpose, the employee must be eligible and willing to return to some form

of employment. *Ortiz v. Cement Products, supra*. It is important to recall that any determination regarding an employee's entitlement to vocational rehabilitation is made at the time of maximum medical improvement. See *Green v. Drivers Mgmt., Inc.*, 263 Neb. 197, 639 N.W.2d 94 (2002) (without finding of permanent medical impairment, there can be no permanent restrictions, and without impairment or restrictions, there can be no disability or labor market access loss; absent permanent impairment or restrictions, worker is fully able to return to any employment for which he or she was fitted before accident, including occupations held before injuries occurred). As § 48-162.01(3) indicates, if one is able to return to work, he or she is not entitled to vocational rehabilitation.

In *Ortiz v. Cement Products*, 270 Neb. at 791, 708 N.W.2d at 613, the only case in Nebraska dealing with vocational rehabilitation benefits for illegal aliens, the Nebraska Supreme Court said:

> At trial, Ortiz testified that he will not be returning to Mexico, but, rather, intended to remain in this country, where he may not be lawfully employed because of his illegal status. See 8 U.S.C. § 1324a (2000). Awarding Ortiz vocational rehabilitation services in light of his avowed intent to remain an unauthorized worker in this country would be contrary to the statutory purpose of returning Ortiz to suitable employment. Therefore, we hold that based upon the facts of this case, Ortiz is not entitled to vocational rehabilitation services.

There was no evidence that Visoso intends to remain an unauthorized worker in this country, and thus the instant case is factually distinguishable from *Ortiz v. Cement Products, supra*.

The trial judge found that Visoso "will not be entitled to vocational rehabilitation services as he is an illegal undocumented worker." The review panel reversed, holding:

> The time to rule on [Visoso's] entitlement to vocational rehabilitation services is after [he] reaches maximum medical recovery, with his impairments and restrictions known, with his then current immigration status known, and with a contemporaneous finding made about whether or not he plans to return to his native country.

Green v. Drivers Mgmt., Inc., 263 Neb. 197, 639 N.W.2d 94 (2002).

We agree with that holding and rationale. The trial judge's finding that Visoso will not be entitled to vocational rehabilitation is premature. See *Green v. Drivers Mgmt., Inc., supra*. Whether illegal alien status prevents an award of vocational rehabilitation because such status prohibits working in this country is a question that we need not reach.

CONCLUSION

For the reasons stated above, we affirm the findings of the three-judge review panel for the Nebraska Workers' Compensation Court.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V.
GREGORY A. BILOFF, APPELLANT.
778 N.W.2d 497

Filed December 1, 2009. No. A-09-175.

This opinion has been ordered permanently published by order of the Court of Appeals dated December 14, 2009.

1. **Criminal Law: Double Jeopardy.** The Double Jeopardy Clause of the Fifth Amendment to the U.S. Constitution protects against three distinct abuses: (1) a second prosecution for the same offense after acquittal, (2) a second prosecution for the same offense after conviction, and (3) multiple punishments for the same offense.
2. **Double Jeopardy: Statutes: Proof.** Where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or one is whether each provision requires proof of a fact which the other does not.
3. **Criminal Law: Double Jeopardy: Sexual Assault.** Because first degree sexual assault on a child and incest each includes at least one element which is not included in the other, they are separate offenses for the purpose of double jeopardy.

Appeal from the District Court for Lancaster County: KAREN B. FLOWERS, Judge. Affirmed.

Calvin D. Hansen for appellant.

Jon Bruning, Attorney General, and Erin E. Tangeman for appellee.

IRWIN, SIEVERS, and CARLSON, Judges.

IRWIN, Judge.

I. INTRODUCTION

Pursuant to this court's authority under Neb. Ct. R. App. P. § 2-111(B)(1) (rev. 2008), this case was ordered submitted without oral argument. Gregory A. Biloff appeals from the district court's dismissal of his motion for postconviction relief without an evidentiary hearing. On appeal, Biloff asserts that the court erred in denying an evidentiary hearing and in denying postconviction relief. For the reasons stated below, we affirm the district court's denial of Biloff's motion.

II. BACKGROUND

In March 2005, Biloff's 10-year-old daughter reported to school officials that Biloff had been sexually abusing her for approximately 5 years. She reported that the incidents of abuse had occurred every other weekend when she and her younger sister would stay with Biloff. As a result of these allegations, Biloff was interviewed by police. Ultimately, Biloff admitted that he had been abusing his daughter since she was 6 years old.

Biloff was charged with one count of first degree sexual assault on a child and one count of incest. Biloff was arraigned, and he entered a plea of not guilty to the charges. At some point prior to trial, Biloff reached a plea agreement with the State. Under the agreement, Biloff agreed to plead guilty to the first degree sexual assault on a child charge, in exchange for which the State agreed to dismiss the incest charge. The court accepted Biloff's plea and found him guilty of first degree sexual assault on a child.

After a presentence investigation was completed, Biloff was sentenced to 20 to 30 years' imprisonment. Biloff appealed his sentence to this court, arguing that it was excessive. This court found that the sentence was within the statutory limits and that, given the seriousness of the offense, there was no abuse of discretion. We summarily affirmed the sentence.

Biloff then filed a motion for postconviction relief on the basis of ineffective assistance of counsel. The district court denied Biloff's motion and denied Biloff an evidentiary hearing on the matter. Biloff appeals here.

III. ASSIGNMENT OF ERROR

Biloff has assigned three errors on appeal, which we consolidate for discussion to one: The district court erred in denying Biloff's motion for postconviction relief without granting an evidentiary hearing.

IV. STANDARD OF REVIEW

An evidentiary hearing on a motion for postconviction relief is not required if the motion alleges only conclusions of fact or law or if the record and files in the case affirmatively establish that the defendant is not entitled to relief. See *State v. Billups*, 263 Neb. 511, 641 N.W.2d 71 (2002).

Appellate review of a claim of ineffective assistance of counsel is a mixed question of law and fact. *State v. Rhodes*, 277 Neb. 316, 761 N.W.2d 907 (2009). When reviewing a claim of ineffective assistance of counsel, an appellate court reviews the factual findings of the lower court for clear error. *Id.* With regard to the questions of counsel's performance or prejudice to the defendant as part of the two-pronged test, an appellate court reviews such legal determinations independently of the lower court's decision. *Id.*

V. ANALYSIS

In his motion for postconviction relief, Biloff made multiple allegations regarding the alleged failures and omissions of his trial counsel. As a result of these alleged failures and omissions, Biloff argues, he was given ineffective counsel. Biloff alleges, "But for the ineffectiveness of counsel, the results of the proceedings would have been different" because Biloff would have demanded his right to trial, rather than pleading guilty to first degree sexual assault on a child. Upon our review of each of the alleged failures of trial counsel, we conclude that the assertions in Biloff's motion lack merit.

One seeking postconviction relief has the burden of establishing the basis for such relief, and the findings of the

district court will not be disturbed on appeal unless clearly erroneous. See *State v. McHenry*, 268 Neb. 219, 682 N.W.2d 212 (2004).

In order to establish a right to postconviction relief based on a claim of ineffective counsel, the defendant has the burden to show that counsel's performance was deficient; that is, counsel's performance did not equal that of a lawyer with ordinary training and skill in criminal law in the area. The defendant must also show that counsel's deficient performance prejudiced the defense in his or her case. The two prongs of this test, deficient performance and prejudice, may be addressed in either order. *Id*.

In determining whether a trial counsel's performance was deficient, there is a strong presumption that such counsel acted reasonably. *Id*. When reviewing a claim of ineffective assistance of counsel, an appellate court will not second-guess reasonable strategic decisions by counsel. *Id*.

In order to show prejudice, the defendant must demonstrate a reasonable probability that but for counsel's deficient performance, the result of the proceeding would have been different. *Id*. When a defendant's conviction involves a guilty plea, the defendant will satisfy the element of prejudice if the defendant can show a reasonable probability that but for the errors of counsel, the defendant would have insisted on going to trial rather than pleading guilty. See *State v. Amaya*, 276 Neb. 818, 758 N.W.2d 22 (2008). In the context of postconviction relief, a reasonable probability is a probability sufficient to undermine confidence in the outcome. See *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

Before addressing the specific arguments Biloff makes on appeal, we note that the issues raised are not procedurally barred. Although a motion for postconviction relief cannot be used to secure review of issues which were or could have been litigated on direct appeal, Biloff was represented both at trial and on direct appeal by the same lawyer. See *State v. Rhodes*, 277 Neb. 316, 761 N.W.2d 907 (2009). As such, his motion for postconviction relief was his first opportunity to assert ineffective assistance of counsel.

1. Failure to Advise During Plea Process

Biloff first alleges that his trial counsel failed to properly advise him during the plea process. Specifically, Biloff alleges that his trial counsel failed to advise him that "a double jeopardy claim was available to him to prevent the state from charging him with [both first degree sexual assault on a child and incest] regarding the same victim on the same date." Biloff further alleges that if he had been advised about the double jeopardy issue, he would not have pled guilty, but would have demanded his right to trial.

Contrary to Biloff's allegations in his motion, first degree sexual assault on a child and incest are not the same offense for purposes of double jeopardy. As such, Biloff's counsel was not ineffective for failing to advise him that he could not be convicted of both crimes.

[1] The Double Jeopardy Clause of the Fifth Amendment to the U.S. Constitution protects against three distinct abuses: (1) a second prosecution for the same offense after acquittal, (2) a second prosecution for the same offense after conviction, and (3) multiple punishments for the same offense. *State v. Winkler*, 266 Neb. 155, 663 N.W.2d 102 (2003). The protection provided by Nebraska's double jeopardy clause is coextensive with that provided by the U.S. Constitution. *State v. Winkler, supra.*

A single transaction can give rise to distinct offenses under separate statutes without violating the Double Jeopardy Clause. See *Albernaz v. U.S.*, 450 U.S. 333, 101 S. Ct. 1137, 67 L. Ed. 2d 275 (1981). The Nebraska Supreme Court has held, "'The test is not whether the defendant has already been tried for the same act, but whether he has been put in jeopardy for the same offense.'" *Warren v. State*, 79 Neb. 526, 531, 113 N.W. 143, 145 (1907).

[2] Under *Blockburger v. U.S.*, 284 U.S. 299, 52 S. Ct. 180, 76 L. Ed. 306 (1932), where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or one is whether each provision requires proof of a fact which the other does not. The *Blockburger* test applies equally to multiple punishment and multiple prosecution cases. *State v. Winkler, supra*. The *Blockburger*, or "same elements," test asks whether

each offense contains an element not contained in the other. *Id*. If not, they are the same offense and double jeopardy bars additional punishment and successive prosecution. *Id.* If so, they are not the same offense and double jeopardy is not a bar to additional punishment or successive prosecution. In applying the *Blockburger* test to separately codified criminal statutes which may be violated in alternative ways, only the elements charged in the case at hand should be compared in determining whether the offenses under consideration are separate or the same for purposes of double jeopardy. *Id.*

Under the *Blockburger* test, if first degree sexual assault on a child and incest each contain an element that is not contained in the other, then they are not the same offense and double jeopardy does not bar conviction or punishment for both offenses. We now compare the elements of first degree sexual assault on a child as defined by Neb. Rev. Stat. § 28-319(1) (Reissue 1995) and incest as defined by Neb. Rev. Stat. § 28-703 (Reissue 2008).

Section 28-319(1) stated: "Any person who subjects another person to sexual penetration . . . when the actor is nineteen years of age or older and the victim is less than sixteen years of age is guilty of sexual assault in the first degree." As such, first degree sexual assault on a child requires proof of (1) sexual penetration, (2) the age of the victim, and (3) the age of the offender.

Section 28-703 states in pertinent part: "Any person who shall knowingly . . . engage in sexual penetration with any person who falls within the degrees of consanguinity set forth in section 28-702 . . . commits incest." As such, incest requires proof of (1) sexual penetration, (2) degree of consanguinity between the two parties, and (3) knowledge of the degree of consanguinity.

[3] Proof of the degree of consanguinity between the parties is not an element of first degree sexual assault on a child. Proof of the age of the victim or the age of the offender is not an element of incest. Because each of the charged offenses includes at least one element which is not included in the other, they are separate offenses for the purpose of double jeopardy. As such, Biloff's counsel was not ineffective for failing to advise him

that he could not be convicted or punished for both crimes. His assertion has no merit.

2. Failure to Investigate

Biloff next alleges that his trial counsel failed to conduct a complete factual investigation of his case, in that his trial counsel failed to investigate, research, and prepare a motion to suppress statements Biloff made to law enforcement; failed to interview witnesses; failed to review the videotaped interviews with the victim; and failed to consult experts. Biloff indicates that this failure to investigate prevented his attorney from adequately preparing for trial or providing him with sound advice about whether to go to trial or accept the plea agreement with the State.

Biloff does not allege facts to demonstrate that the statement he gave to police was subject to suppression because of constitutional violations. Rather, Biloff only alleges that his statements "were not lawfully obtained." In a postconviction motion, the pleading of mere conclusions of fact or of law is not sufficient to require the court to grant an evidentiary hearing. See *State v. Lytle*, 224 Neb. 486, 398 N.W.2d 705 (1987).

Biloff makes no allegations about what his attorney would have uncovered had his attorney interviewed witnesses or examined the evidence. It is not enough to allege that if counsel had properly investigated, the defendant would not have pled guilty. In addition to such an allegation, the defendant must allege facts which tell the court why the result would have been different. See *State v. McHenry*, 268 Neb. 219, 682 N.W.2d 212 (2004).

In addition, the record shows Biloff repeatedly indicated at the plea proceeding that he had sufficient time to discuss his case with his attorney and that he had discussed all available defenses with his attorney. When the court asked Biloff if he was satisfied with his attorney, Biloff responded, "Definitely, yes." Furthermore, during the plea colloquy, the trial court informed Biloff that he had a right to request a suppression hearing concerning any statements he had made to law enforcement officials and that by pleading guilty, he was giving up that

right. Biloff affirmatively indicated that he understood that he was waiving his right to a suppression hearing.

Biloff's assertions concerning his counsel's failure to investigate have no merit.

VI. CONCLUSION

Because Biloff's postconviction motion alleged only conclusions and because the record and files in this case affirmatively establish that Biloff was not entitled to relief, we find that the district court did not err in denying Biloff an evidentiary hearing or in denying his motion. We therefore affirm.

AFFIRMED.

LEVI J. BOWMAN, APPELLANT, V. BEVERLY NETH, DIRECTOR, STATE OF NEBRASKA, DEPARTMENT OF MOTOR VEHICLES, APPELLEE.

778 N.W.2d 751

Filed December 22, 2009. No. A-09-110.

1. **Administrative Law: Motor Vehicles: Licenses and Permits: Revocation: Evidence: Jurisdiction.** The sworn report of the arresting officer is received into the record by the hearing officer as the jurisdictional document of a license revocation hearing, and upon the receipt of the sworn report, the order of revocation by the director of the Department of Motor Vehicles has prima facie validity.
2. **Records: Evidence: Waiver.** When the record does not clearly indicate that an exhibit has been received into evidence, a party objecting to the receipt of the exhibit waived its objection when it did not insist upon a ruling on the objection, and the evidence is in the record for consideration the same as other evidence.
3. **Affidavits: Proof: Public Officers and Employees.** An affidavit must bear on its face, by the certificate of the officer before whom it is taken, evidence that it was duly sworn to by the party making the same.
4. **Administrative Law: Motor Vehicles: Licenses and Permits: Revocation: Evidence: Affidavits.** A sworn report in an administrative license revocation proceeding is, by definition, an affidavit, which must bear on its face, by the certificate of the officer before whom it is taken, evidence that it was duly sworn to by the party making the same.
5. **Affidavits.** The test for proper acknowledgment of an affidavit is whether the certificate of acknowledgment substantially complies with the requirements of Nebraska law.

Appeal from the District Court for Cass County: DANIEL E. BRYAN, JR., Judge. Affirmed.

Julie E. Bear, of Reinsch, Slattery & Bear, P.C., L.L.O., for appellant.

Jon Bruning, Attorney General, and Milissa Johnson-Wiles for appellee.

IRWIN, SIEVERS, and CARLSON, Judges.

CARLSON, Judge.

INTRODUCTION

Pursuant to this court's authority under Neb. Ct. R. App. P. § 2-111(B)(1) (rev. 2008), this case was ordered submitted without oral argument. Levi J. Bowman appeals from an order of the district court for Cass County affirming the order of Beverly Neth, the director of the Department of Motor Vehicles (Department), revoking Bowman's driver's license. On appeal, Bowman argues that the district court erred in finding that the Department had jurisdiction to revoke his license. Specifically, Bowman contends that the court erred in failing to find that the Department failed to properly offer and receive the sworn report, by finding that he waived his objection to the sworn report, by finding that the offer of the sworn report by the Department establishes a prima facie case and shifted the burden of proof to Bowman, and in finding that the sworn report had been properly acknowledged by the notary public. For the reasons set forth below, we affirm.

BACKGROUND

On September 21, 2008, Officer Todd K. Hammond of the Plattsmouth Police Department conducted a traffic stop of Bowman after he failed to stop at a stop sign. Upon contacting Bowman, Hammond noticed an odor of alcohol on Bowman's person. Bowman told Hammond that he had been drinking alcohol. Hammond gave Bowman a preliminary breath test, which Bowman failed. Hammond then arrested Bowman for driving under the influence of alcohol and minor in possession of alcohol.

Bowman then submitted to a chemical test of his breath which indicated that he had a blood alcohol content of .09 of 1 gram per 210 liters of breath. Hammond filled out and signed

the sworn report before a notary and sent the report to the Department. The sworn report contains Hammond's signature, and on a blank line under "Names and Badge Numbers of all Arresting Officers" is handwritten "TODD K HAMMOND #16." (Emphasis omitted.) The sworn report bears the signature and stamp of a general notary and states, "This foregoing instrument was acknowledged before me this 21st day of September, 2008 by Hammond."

On October 21, 2008, an informal hearing was held before an officer of the Department. At the beginning of the hearing, the hearing officer stated, "[T]he only exhibit that I'm marking is the Notice/Sworn Report/Temporary License . . . . So any objection to the Sworn Report?" Bowman objected on foundation. The hearing officer then asked foundational questions of Hammond. At the close of the hearing, the hearing officer asked Bowman if he had any further argument, and Bowman submitted the case.

In the hearing officer's proposed findings of fact and conclusions of law, he stated that the sworn report had been admitted into evidence as "Exhibit 1." On October 28, 2008, the director entered an order revoking Bowman's license. Bowman appealed to the district court, which affirmed the director's order of revocation. Bowman appeals.

ASSIGNMENTS OF ERROR

On appeal, Bowman contends that the district court erred in finding that (1) the Department had jurisdiction to revoke Bowman's driver's license, as the Department failed to properly offer and receive the sworn report; (2) he waived his objection to the sworn report by failing to insist on a ruling after proper objection to the same; (3) the offer of the sworn report by the Department established a prima facie case and shifted the burden of proof to Bowman; and (4) the sworn report had been properly acknowledged by the notary public.

ANALYSIS

Introduction of Sworn Report.

On appeal, Bowman contends that the district court erred in finding that the Department had jurisdiction to revoke his driver's license, as the Department failed to properly offer and

receive the sworn report, and in finding that Bowman waived his objection to the sworn report by failing to insist on a ruling after proper objection to the same. Bowman also argues that the trial court erred in finding that the offer of the sworn report by the Department established a prima facie case and shifted the burden of proof to Bowman.

In affirming the Department's decision to revoke Bowman's license, the district court noted that the hearing officer never stated his ruling on the admission of exhibit 1, the sworn report, at the hearing but that the hearing officer ruled on the admission thereof in his recommendations. The district court found that Bowman's failure to insist on a ruling at the hearing waived his objection to the sworn report and that the sworn report is in evidence for consideration the same as other evidence.

[1] The sworn report of the arresting officer is received into the record by the hearing officer as the jurisdictional document of a license revocation hearing, and upon the receipt of the sworn report, the order of revocation by the director of the Department has prima facie validity. 247 Neb. Admin. Code, ch. 1, § 006.01 (2005); *Barnett v. Department of Motor Vehicles*, 17 Neb. App. 795, 770 N.W.2d 672 (2009); *Yenney v. Nebraska Dept. of Motor Vehicles*, 15 Neb. App. 446, 729 N.W.2d 95 (2007). See, also, Neb. Rev. Stat. § 60-498.01(7) (Reissue 2004), which states in part, "Upon receipt of the arresting peace officer's sworn report, the director's order of revocation has prima facie validity and it becomes the petitioner's burden to establish by a preponderance of the evidence grounds upon which the operator's license revocation should not take effect."

Bowman argues that the Department failed to prove a prima facie case because the sworn report was never received by the hearing officer at the hearing. We disagree. In *Scott v. State*, 13 Neb. App. 867, 703 N.W.2d 266 (2005), we cited the above language in § 60-498.01 and held that the Department created a prima facie case for license revocation by the introduction of the sworn report of the peace officer. See, also, *Morrissey v. Department of Motor Vehicles*, 264 Neb. 456, 647 N.W.2d 644 (2002), *disapproved on other grounds, Hahn v. Neth*,

270 Neb. 164, 699 N.W.2d 32 (2005), and *McPherrin v. Conrad*, 248 Neb. 561, 537 N.W.2d 498 (1995), *disapproved on other grounds, Hahn v. Neth, supra*, which state that as a general rule, the offer by the Department of a sworn report at a license revocation hearing establishes the Department's prima facie case and shifts the burden to the driver to refute such evidence.

In the instant case, the Department clearly offered or introduced the sworn report into evidence at the hearing. At the beginning of the hearing, the hearing officer stated, "[T]he only exhibit that I'm marking is the Notice/Sworn Report/Temporary License . . . . So any objection to the Sworn Report?" Bowman objected on foundation. The hearing officer then asked foundational questions of Hammond. At the close of the hearing, the hearing officer asked Bowman if he had any further argument, and Bowman submitted the case. In the hearing officer's proposed findings of fact and conclusions of law, he stated that the sworn report had been admitted into evidence as exhibit 1.

[2] We note that Bowman failed to insist upon a ruling on his objection. The Nebraska Supreme Court has previously ruled that when the record does not clearly indicate that an exhibit has been received into evidence, a party objecting to the receipt of the exhibit waived its objection when it did not insist upon a ruling on the objection, and the evidence is in the record for consideration the same as other evidence. *Diversified Telecom Servs. v. Clevinger*, 268 Neb. 388, 683 N.W.2d 338 (2004).

Therefore, because the sworn report was received at the hearing, the offer of the sworn report established a prima facie case against Bowman. Bowman's assignments of error relating to introduction of the sworn report are without merit.

Notary Acknowledgment.

[3] Bowman contends that the trial court erred in finding that the sworn report had been properly acknowledged by the notary public. An affidavit must bear on its face, by the certificate of the officer before whom it is taken, evidence that it was

duly sworn to by the party making the same. *Johnson v. Neth*, 276 Neb. 886, 758 N.W.2d 395 (2008).

The sworn report contains Hammond's signature, and on a blank line under "Names and Badge Numbers of all Arresting Officers" in the body of the report is handwritten "TODD K HAMMOND #16." (Emphasis omitted.) In the acknowledgment section, there is a line requesting the "Peace Officer['s] name and badge number." In that line, only Hammond's last name is written and not his first name or badge number. Bowman argues that "[i]t is impossible to know by the words [sic] 'Hammond' who is doing the acknowledging." Brief for appellant at 19.

In support of his position, Bowman cites to *Johnson v. Neth, supra*, where the Supreme Court found that where the acknowledgment section was left entirely blank, the sworn report was ineffective for purposes of conferring jurisdiction on the Department. The court noted that the notary was required to confirm the identity of the officer who signed the report.

In the instant case, it is possible to tell that the name "Hammond" refers to the arresting officer. This is not a case like *Johnson v. Neth*, where the acknowledgment section was left entirely blank. Hammond may not have listed his first name and badge number in the acknowledgment section of the sworn report, but Hammond's first name and badge number are in the report in two other locations.

[4,5] As noted above, a sworn report in an administrative license revocation proceeding is, by definition, an affidavit, which must bear on its face, by the certificate of the officer before whom it is taken, evidence that it was duly sworn to by the party making the same. See *id.* The test is whether the certificate of acknowledgment substantially complies with the requirements of Nebraska law. See *id.* The certificate of acknowledgment in the instant case substantially complies with the requirements of Nebraska law, and the sworn report does show that it was sworn to by Hammond. Therefore, we cannot say that the trial court erred in finding that the sworn report had been properly acknowledged by the notary public.

For this reason, Bowman's last assignment of error is without merit.

CONCLUSION

After reviewing the record, we conclude that the district court did not err in finding that the Department had jurisdiction to revoke Bowman's driver's license. The Department did not fail to properly offer and the hearing officer did not fail to properly receive the sworn report, and Bowman waived his objection to the admission of the sworn report by failing to insist on a ruling on his objection. The offer of the sworn report by the Department established a prima facie case against Bowman which shifted the burden of proof to Bowman. Bowman did not present any evidence to rebut the Department's case. Additionally, the trial court properly found that the sworn report had been properly acknowledged by the notary public. For these reasons, the district court's order affirming the Department's revocation of Bowman's license is affirmed in all respects.

AFFIRMED.

SCOTT A. DAUGHERTY, APPELLEE, V. COUNTY OF DOUGLAS, APPELLANT.

778 N.W.2d 515

Filed January 12, 2010. No. A-09-290.

1. **Workers' Compensation.** A workers' compensation award is in full force and effect, as originally entered, until the award is modified pursuant to the procedure set forth in Neb. Rev. Stat. § 48-141 (Reissue 2004).
2. ____. Employers are prohibited from unilaterally modifying a workers' compensation award; rather, it is up to the compensation court to determine the date of a change in disability.
3. ____. A modification award cannot be applied retroactively beyond the date the application for the modification is filed.
4. **Workers' Compensation: Jurisdiction: Equity.** The Workers' Compensation Court has no equity jurisdiction.
5. **Workers' Compensation: Penalties and Forfeitures.** The 50-percent penalty provision found in Neb. Rev. Stat. § 48-125 (Reissue 2004) applies when there is no reasonable controversy and the employer refuses or neglects to pay compensation.

6. ____: ____. To avoid the payments assessable under Neb. Rev. Stat. § 48-125(1) (Reissue 2004), an employer need not prevail in opposing an employee's claim for compensation, but the employer must have an actual basis, in law or fact, for disputing the employee's claim and refraining from payment or compensation.

Appeal from the Workers' Compensation Court. Affirmed in part, and in part reversed.

Donald W. Kleine, Douglas County Attorney, and Bernard J. Monbouquette for appellant.

Matthew A. Lathrop and Kate E. Placzek for appellee.

IRWIN, SIEVERS, and CARLSON, Judges.

IRWIN, Judge.

I. INTRODUCTION

This case involves the modification of Scott A. Daugherty's workers' compensation benefits. The County of Douglas (the County) filed an application for modification, requesting that a single judge of the workers' compensation court modify Daugherty's benefits both retroactively and prospectively. The trial court granted the County's request to modify Daugherty's benefits prospectively; however, the trial court modified the award retroactive only to the time that the County filed its application to modify. The trial court also awarded Daugherty a 50-percent waiting-time penalty and attorney fees, because the County had discontinued paying Daugherty his workers' compensation benefits without a court-approved or court-ordered modification. The County appealed the trial court's decision to a three-judge review panel of the Nebraska Workers' Compensation Court. The review panel affirmed the decision of the trial court. The County now appeals to this court.

On appeal, the County alleges that the trial court erred in determining that a modification of the original award was required for the periods of time when Daugherty had returned to full-time employment, in modifying the award retroactive only to the time of the filing of the application to modify, in failing to credit the County for wages it paid to Daugherty, and in awarding Daugherty a 50-percent waiting-time penalty. We

affirm the trial court's decision that a modification of the original award was required for periods of time when Daugherty had returned to work. We also affirm the portions of the trial court's order finding that modification of the award could be retroactive only to the time of the filing of the application to modify and finding that the County could not be given credit for the wages it paid to Daugherty. However, we reverse that portion of the trial court's order awarding Daugherty a 50-percent waiting-time penalty.

II. BACKGROUND

On May 1, 2002, Daugherty was employed as a deputy sheriff for the County. On that date, Daugherty suffered a compensable injury while on the job, the details of which are not pertinent to this appeal. On December 17, 2004, the compensation court entered an award for Daugherty. The relevant portions of that award for this appeal are as follows:

> At the time of said accident and injury, the plaintiff was receiving an average weekly wage of $889.20 being sufficient to entitle him to benefits of $528.00 from March 26, 2003 through the date of hearing and for so long thereafter as [Daugherty] shall remain temporarily totally disabled.

In February 2005, Daugherty's doctor informed the County that Daugherty had reached maximum medical improvement and was able to return to work with no restrictions. Daugherty returned to work on February 8. On that date, the County stopped paying Daugherty workers' compensation benefits and began to pay him his regular wages.

On December 5, 2005, Daugherty had surgery as a result of his work-related injury. Daugherty was unable to work from December 5, 2005, into January 2006. As a result of Daugherty's inability to work, the County resumed payment of his workers' compensation benefits. After Daugherty returned to work on January 14, 2006, the County again stopped paying his workers' compensation benefits and began to pay him his regular wages.

On January 23, 2007, Daugherty stopped working as a result of his work-related injury. He has been unable to return

to work since that time. The County resumed payment of his workers' compensation benefits in January 2007.

In August 2006, while Daugherty was still working for the County, he filed a petition for further benefits. In the petition, he alleged that he had received additional medical treatment and had incurred additional medical bills since the entry of his original award. He further alleged that the County had refused to pay for these additional medical expenses.

The trial court issued an order addressing Daugherty's petition in June 2007, after Daugherty had stopped working for the County. In the order, the trial court found that Daugherty was entitled to reimbursement for a portion of his medical expenses. In addition, the court noted that it appeared that the County's decision to discontinue payment of Daugherty's workers' compensation benefits during the times that Daugherty was able to work constituted a unilateral modification of a workers' compensation award. The court indicated that such a modification may not be permissible.

On August 3, 2007, the County filed an application for modification of Daugherty's workers' compensation award. The County requested that the court modify the original award to reflect that "[Daugherty] was not entitled to [temporary total disability] benefits for the period of February 8, 2005 to December 3, 2005, and from January 8, 2006 to January 20, 2007, since he was not disabled from working at his deputy sheriff job." In addition, the County requested that the court examine Daugherty's current entitlement to temporary total disability benefits.

On January 30, 2008, a hearing was held on the matter. After hearing the evidence, the trial court found that a material and substantial change of condition and decrease of incapacity occurred effective March 13, 2006, when Daugherty's doctor opined that Daugherty had reached maximum medical improvement. The court modified the original award to reflect that Daugherty has experienced a 25-percent permanent loss of earning power which entitles him to $148.20 per week in disability benefits. However, the court further determined that any modification of Daugherty's workers' compensation benefits "cannot be applied retroactively beyond the date the

application for modification was filed." As such, the court ordered the County to pay Daugherty his disability benefits for the period of February 8 through December 3, 2005, and from January 14, 2006, through January 21, 2007. The court also awarded Daugherty a 50-percent waiting-time penalty and attorney fees.

The County appealed the order of the trial court to a three-judge review panel. The review panel affirmed the order of the trial court. The County now appeals to this court.

III. ASSIGNMENTS OF ERROR

The County assigns four errors, which we renumber and restate for our review. The County alleges that the trial court erred in determining that a modification of the original award was required for the periods of time when Daugherty had returned to full-time employment, in modifying Daugherty's workers' compensation award retroactive only to the time of filing its application to modify, in failing to credit the County for the wages it paid to Daugherty, and in awarding Daugherty a 50-percent waiting-time penalty.

IV. ANALYSIS

1. Standard of Review

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. *Cruz-Morales v. Swift Beef Co.*, 275 Neb. 407, 746 N.W.2d 698 (2008).

2. Necessity of Modification

The County asserts that the trial court erred in determining that a modification of the original award was required for the periods of time when Daugherty had returned to full-time employment.

[1] The statutory authority for modification of a workers' compensation award is provided by Neb. Rev. Stat. § 48-141 (Reissue 2004). The relevant portion of that section provides as follows:

> [T]he amount of any agreement or award payable periodically may be modified as follows: (1) At any time by agreement of the parties with the approval of the Nebraska Workers' Compensation Court; or (2) if the parties cannot agree, then at any time after six months from the date of the agreement or award, an application may be made by either party . . . .

The Supreme Court has previously stated that "a workers' compensation award is in full force and effect, as originally entered, until the award is modified pursuant to the procedure set forth in § 48-141." *Starks v. Cornhusker Packing Co.*, 254 Neb. 30, 38, 573 N.W.2d 757, 763 (1998).

The County argues that there was no need to modify the award at the time that Daugherty came back to work, because the original award provided that Daugherty was entitled to benefits only for "so long . . . as [Daugherty] shall remain temporarily totally disabled." The County alleges that Daugherty was clearly not temporarily totally disabled at the time he returned to work on a full-time basis.

[2] Even if we were to assume that Daugherty was no longer temporarily totally disabled when he returned to work, the Supreme Court has held that employers are prohibited from unilaterally modifying a workers' compensation award. See *Starks v. Cornhusker Packing Co., supra*. The original award did not set a specific end date for the termination of Daugherty's workers' compensation benefits. Rather, the award indicated that the benefits would terminate when Daugherty was determined to be no longer temporarily totally disabled. It is up to the compensation court to determine the date of a change in disability. See *ITT Hartford v. Rodriguez*, 249 Neb. 445, 543 N.W.2d 740 (1996). As such, Daugherty's award could only be modified by following the procedures found in § 48-141. Pursuant to § 48-141, absent an agreement by the parties, only the court can modify its award.

The County filed its application to modify on August 3, 2007. Prior to that time, Daugherty's workers' compensation award remained in full force and effect. Assuming without deciding that the parties agreed to a modification of the award when Daugherty returned to work at the sheriff's office, there is no evidence that either party brought such an agreement to the attention of the workers' compensation court. As such, there is no evidence that the court approved such an agreement and there is no evidence that the requirements for modification established in § 48-141 were met.

We understand and appreciate the County's arguments that Daugherty enjoys a "windfall" and is unjustly enriched by the County's failure to adhere to the technical provisions of § 48-141. We agree with the comments of the review panel on this topic:

> The review panel appreciates the [County's] argument and agrees that it may seem unjust that one is required to return to court for approval to terminate temporary total disability benefits when all parties are in agreement that the employee is no longer temporarily totally disabled. From an administrative standpoint there must be several hundred if not thousands of awards percolating through the Nebraska Workers' Compensation system where no one has bothered to obtain a court order to terminate benefits to which everyone has agreed the benefits are no longer due and owing because the employee has returned to work.

Ultimately, however, this is a matter for the Legislature to address.

3. Retroactive Modification

The County asserts that if a modification was required for the period when Daugherty had returned to work, then the trial court erred in modifying Daugherty's workers' compensation award retroactive only to the time of the filing of its application to modify.

[3] The Nebraska Supreme Court has clearly stated that "[a] modification award cannot be applied retroactively beyond the date the application for the modification is filed." *Starks v.*

Cornhusker Packing Co., 254 Neb. 30, 38, 573 N.W.2d 575, 763 (1998). As such, the trial court did not have the authority to modify Daugherty's workers' compensation benefits retroactive to a date prior to the County's filing of its application to modify.

4. Credit For Wages Paid

The County also alleges that if the modification of the award cannot be applied retroactively beyond the date of the filing of its application to modify, then the County should receive credit for the wages it paid to Daugherty during the time periods when it discontinued his workers' compensation benefits because he had returned to full-time employment.

[4] The County's argument is one based in equity. However, the Workers' Compensation Court has no equity jurisdiction. See *Risor v. Nebraska Boiler*, 274 Neb. 906, 744 N.W.2d 693 (2008). The Nebraska Workers' Compensation Court has only the "authority to administer and enforce all of the provisions of the Nebraska Workers' Compensation Act, and any amendments thereof, except such as are committed to the courts of appellate jurisdiction." Neb. Rev. Stat. § 48-152 (Reissue 2004). No Nebraska statute grants equity jurisdiction to the Workers' Compensation Court.

5. Waiting-Time Penalty

Finally, the County alleges that the trial court erred in awarding Daugherty a 50-percent waiting-time penalty because the County "had a legitimate reason to refuse to pay [temporary total disability] benefits to [Daugherty] who was working fulltime." Brief for appellant at 17-18.

[5,6] Neb. Rev. Stat. § 48-125 (Reissue 2004) provides, in pertinent part:

> (1) Except as hereinafter provided, all amounts of compensation payable under the Nebraska Workers' Compensation Act shall be payable periodically in accordance with the methods of payment of wages of the employee at the time of the injury or death, except that fifty percent shall be added for waiting time for all delinquent payments after thirty days' notice has been

> given of disability or after thirty days from the entry of a final order, award, or judgment of the compensation court.

The 50-percent penalty provision applies when there is no reasonable controversy and the employer refuses or neglects to pay compensation. See *Briggs v. Consolidated Freightways*, 234 Neb. 410, 451 N.W.2d 278 (1990). To avoid the payments assessable under § 48-125(1), an employer need not prevail in opposing an employee's claim for compensation, but the employer must have an actual basis, in law or fact, for disputing the employee's claim and refraining from payment or compensation. *Musil v. J.A. Baldwin Mfg. Co.*, 233 Neb. 901, 448 N.W.2d 591 (1989).

Upon our review, we conclude that the trial court erred in awarding Daugherty a 50-percent waiting-time penalty. The County had a reasonable basis for refraining from paying Daugherty's workers' compensation benefits during the periods of time when he had returned to work and was receiving his regular wages. The County's belief that it should not have to make "double payments" to Daugherty while he was working is not unreasonable. Until this decision today, no Nebraska precedent has addressed this precise factual circumstance. As such, we reverse that portion of the trial court's order awarding Daugherty a 50-percent waiting-time penalty.

V. CONCLUSION

We affirm the trial court's decision that a modification of the original award was required for periods of time when Daugherty had returned to work. We also affirm the portions of the trial court's order finding that modification of the award could be retroactive only to the time of the filing of the application to modify and that the County could not be given credit for the wages it paid to Daugherty. However, we reverse that portion of the trial court's order awarding Daugherty a 50-percent waiting-time penalty.

AFFIRMED IN PART, AND IN PART REVERSED.

PARKER J. LAW, APPELLEE, V. NEBRASKA DEPARTMENT OF MOTOR VEHICLES, APPELLANT.

777 N.W.2d 586

Filed January 19, 2010. No. A-09-332.

1. **Administrative Law: Judgments: Appeal and Error.** A judgment or 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. 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.
2. **Administrative Law: Motor Vehicles: Jurisdiction: Proof: Appeal and Error.** Whether the sworn report of a law enforcement officer is sufficient to confer jurisdiction on the Department of Motor Vehicles is a question of law, and an appellate court reaches a conclusion independent of that reached by the lower court.
3. **Administrative Law: Motor Vehicles: Licenses and Permits: Revocation: Jurisdiction.** A sworn report that fails to fully comply with the requirements of the administrative license revocation statutes does not confer jurisdiction upon the director of the Department of Motor Vehicles to revoke a motorist's license.
4. ____: ____: ____: ____: ____. In determining whether an omission on a sworn report is a jurisdictional defect, as opposed to a technical one, the test is whether, notwithstanding the omission, the sworn report conveys the information required by the applicable statute.
5. **Administrative Law: Motor Vehicles: Licenses and Permits: Revocation: Jurisdiction: Police Officers and Sheriffs.** Where a sworn report identifies two arresting officers and, as submitted, conveys the information required by the applicable statute, the omission of the second arresting officer's signature on the report is a technical deficiency that does not deprive the Department of Motor Vehicles of jurisdiction.

Appeal from the District Court for Douglas County: J. MICHAEL COFFEY, Judge. Reversed and remanded with directions.

Jon Bruning, Attorney General, and Milissa Johnson-Wiles for appellant.

No appearance for appellee.

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

INBODY, Chief Judge.

INTRODUCTION

The Nebraska Department of Motor Vehicles (DMV) appeals the decision of the district court for Douglas County reversing the DMV's revocation of Parker J. Law's driving privileges for 1 year. The DMV contends that the district court erred in determining that the sworn report was defective because it contained signatures for only one of the two arresting officers listed on the sworn report.

STATEMENT OF FACTS

After Law was arrested for driving under the influence of alcohol, Omaha police officer Joe Eischeid submitted a sworn report to the director of the DMV. The sworn report was submitted within 10 days of Law's arrest and listed Officer Eischeid and another officer as arresting officers; however, only Officer Eischeid's signature appeared on the sworn report. The sworn report set forth that Law had been arrested pursuant to Neb. Rev. Stat. § 60-6,197 (Reissue 2004) and listed the reasons for the arrest as follows: "Subject involved in a domestic disturbance. Subject drove vehicle into victim's vehicle. Subject showed signs of impairment, bloodshot & watery eyes, strong odor of alcohol & unsteady on feet. Refused FST, PBT & chemical test." The sworn report further set forth that Law was directed to submit to a chemical test and refused to submit to the requested test.

Following an administrative hearing, the director of the DMV administratively revoked Law's driving privileges for 1 year. Law appealed to the district court pursuant to the Administrative Procedure Act. The district court determined that the sworn report did not comply with relevant administrative rules and regulations, because it did not contain the notarized signatures of both arresting officers. The court found that the DMV lost the benefit of the sworn report establishing the DMV's prima facie case and that no other admissible evidence established grounds for the revocation of Law's license. Consequently, the court reversed and vacated the order revoking Law's driving privileges. The DMV has appealed to this court.

ASSIGNMENT OF ERROR

The DMV contends, summarized and restated, that the district court erred in finding that the sworn report was defective for failing to have the signatures of both arresting officers listed on the report.

STANDARD OF REVIEW

[1] A judgment or 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. 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. *Thomsen v. Nebraska Dept. of Motor Vehicles*, 16 Neb. App. 44, 741 N.W.2d 682 (2007).

[2] Whether the sworn report of a law enforcement officer is sufficient to confer jurisdiction on the DMV is a question of law, and an appellate court reaches a conclusion independent of that reached by the lower court. *Johnson v. Neth*, 276 Neb. 886, 758 N.W.2d 395 (2008); *Moyer v. Nebraska Dept. of Motor Vehicles*, 275 Neb. 688, 747 N.W.2d 924 (2008).

ANALYSIS

[3] The issue presented to this court deals with the sufficiency of the sworn report where the report identifies two arresting officers, but contains the signature of only one of those officers. This question is important because a sworn report that fails to fully comply with the requirements of the administrative license revocation statutes does not confer jurisdiction upon the director of the DMV to revoke a motorist's license. *Johnson v. Neth, supra*.

Neb. Rev. Stat. § 60-498.01(2) (Reissue 2004) provides, in part, that if an officer arrests an individual for driving under the influence and the individual refuses to submit to the required chemical test of blood, breath, or urine,

> [t]he arresting peace officer shall within ten days forward to the director a sworn report stating (a) that the person

> was arrested as described in subsection (2) of section 60-6,197 and the reasons for such arrest, (b) that the person was requested to submit to the required test, and (c) that the person refused to submit to the required test.

The State argues that § 60-498.01(2) does not require the signatures of all officers listed on the sworn report. The State contends that such a statutory construction imposes a jurisdictional requirement which is not mandated by the statutory language.

Although the Nebraska Supreme Court has not addressed the particular issue of whether all arresting officers listed on a sworn report must sign the report, the court has held that an arresting officer is an officer who is present at the scene of the arrest for purposes of assisting in it; consequently, more than one officer can qualify as an "arresting" officer. See *Betterman v. Department of Motor Vehicles*, 273 Neb. 178, 728 N.W.2d 570 (2007). For example, in *Betterman*, three officers were identified as arresting officers and each signed the sworn report. However, the issue was not raised whether having all three arresting officers identified on the report sign the report was a jurisdictional requirement.

[4] Clearly, when two arresting officers are identified on the sworn report and only one arresting officer signs the report, a deficiency or omission is present. However, the question is whether the omission on the sworn report constitutes a jurisdictional defect or a mere technical defect. See, *Betterman, supra*; *Hahn v. Neth*, 270 Neb. 164, 699 N.W.2d 32 (2005). In determining whether an omission on a sworn report is a jurisdictional defect, as opposed to a technical one, the test is whether, notwithstanding the omission, the sworn report conveys the information required by the applicable statute. *Betterman, supra*; *Hahn, supra*.

[5] In this case, the sworn report completed and signed by Officer Eischeid, who is identified as one of the arresting officers, contained the information required by § 60-498.01(2): that Law was arrested as described in § 60-6,197 and the reasons for such arrest, that Law was requested to submit to the required test, and that Law refused to submit to the required test. Since the sworn report, as submitted, conveys

that information required by the applicable statute—in this case, § 60-498.01(2)—we find that the omission of the second arresting officer's signature on the report is a technical deficiency that did not deprive the DMV of jurisdiction.

CONCLUSION

We conclude that the sworn report in this case complied with the statutory requirements of § 60-498.01(2) and that thus, the omission of the second arresting officer's signature on the sworn report was a technical defect and the sworn report conferred jurisdiction on the DMV. Therefore, the decision of the district court is reversed and the cause is remanded with directions to the district court to enter an order affirming the decision of the DMV in all respects as originally entered by the DMV.

REVERSED AND REMANDED WITH DIRECTIONS.

STATE OF NEBRASKA, APPELLEE, V. ALFREDO RAMIREZ, ALSO KNOWN AS ALFREDO STRONG, ALSO KNOWN AS FAST FREDDY, APPELLANT.

777 N.W.2d 337

Filed January 19, 2010. No. A-09-537.

1. **Convictions: Evidence: Appeal and Error.** Regardless of whether the evidence is direct, circumstantial, or a combination thereof, and regardless of whether the issue is labeled as a failure to direct a verdict, insufficiency of the evidence, or failure to prove a prima facie case, the standard is the same: 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 evidence admitted at trial, viewed and construed most favorably to the State, is sufficient to support the conviction.
2. **Directed Verdict: Evidence: Appeal and Error.** When a motion for directed verdict made at the close of all the evidence is overruled by the trial court, appellate review is controlled by the rule that a directed verdict is proper only where reasonable minds cannot differ and can draw but one conclusion from the evidence, and the issues should be decided as a matter of law.
3. **Criminal Law: Directed Verdict.** In a criminal case, a court can direct a verdict only when there is a complete failure of evidence to establish an essential element of the crime charged or the evidence is so doubtful in character, lacking probative value, that a finding of guilt based on such evidence cannot be sustained.

4. **Directed Verdict.** If there is any evidence which will sustain a finding for the party against whom a motion for directed verdict is made, the case may not be decided as a matter of law, and a verdict may not be directed.

Appeal from the District Court for Hall County: JAMES D. LIVINGSTON, Judge. Affirmed.

Gerard A. Piccolo, Hall County Public Defender, for appellant.

Jon Bruning, Attorney General, and George R. Love for appellee.

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

INBODY, Chief Judge.

INTRODUCTION

Alfredo Ramirez, also known as Alfredo Strong or Fast Freddy, appeals the decision of the district court for Hall County overruling his motion for a directed verdict at the close of all evidence, subsequently to which a jury convicted Ramirez of failure to stop following personal injury accident and willful reckless driving.

STATEMENT OF FACTS

In the early morning hours of October 7, 2007, Officer Tony Keiper, a police officer with the city of Grand Island, was on patrol in a marked police vehicle in an area which included several bars and businesses. The traffic along the street was moving very slowly, and Keiper was patrolling the vehicles for possible alcohol violations. Keiper was patrolling in the westbound lane when he recognized Ramirez driving a white Ford Explorer toward him in the eastbound lane. Keiper recognized Ramirez from numerous direct and indirect contacts over the previous 10 years and began to monitor Ramirez through his rearview mirrors because as Ramirez passed Keiper, Ramirez had turned up the stereo in the Explorer to a very high level. Keiper slowed to a stop and made a U-turn into the eastbound lane in order to follow Ramirez and monitor the volume of the stereo when he observed Ramirez roll through a stop sign and accelerate quickly onto another street. Keiper lost sight of the

Explorer, at which time a group of individuals outside another bar shouted out to Keiper in which direction the Explorer was traveling.

Keiper accelerated into a primarily residential area and located the Explorer, after he had lost sight of the Explorer for approximately 60 seconds or less when the Explorer accelerated through the stop sign. The Explorer rested against a tree, after having hit several parked vehicles, and sustained severe damage which included the engine pushed into the floorboard, both right wheels' tires pulled off the rims, and extensive damage to the passenger side.

Upon arrival at the scene, Keiper did not see Ramirez in the Explorer or anywhere in the immediate area of the accident, and Ramirez did not return to the scene of the accident anytime thereafter. There were two other passengers in the car, Izaia Alvarez and Julio Chamul. Alvarez exited the back seat of the Explorer, having sustained a scrape and a small, open wound on his head which was bleeding. Alvarez had helped Ramirez out of the driver's seat and then gone around to the front passenger side of the Explorer in an attempt to help Chamul, who was unconscious, bleeding, and hanging from the waist up out of the passenger-side window frame. Keiper instructed Alvarez not to move Chamul in order to prevent further injury to Chamul and called for an ambulance. The ambulance arrived approximately 5 minutes later, just as Chamul started to regain consciousness. Ambulance personnel treated Chamul at the scene, but he was not transported to a hospital for further medical assistance.

Various individuals not involved in the accident started to crowd around the scene, including Ramirez' mother, who was looking for Ramirez. Neither Alvarez nor Chamul indicated to Keiper the driver's identity or location; however, at trial, Alvarez indicated that he had been drinking at a bar with both Ramirez and Chamul and had left the bar with them, with Ramirez driving the Explorer. Alvarez testified that Ramirez was also driving the Explorer when it crashed into the tree.

Alvarez explained that once the Explorer came to a rest, he got out of the back seat and helped Ramirez out of the Explorer and that he did not see Ramirez again that night. Alvarez then

helped Chamul, but was instructed by Keiper, who had arrived on the scene, not to move Chamul. Alvarez testified that he became upset with Keiper because he would not help Alvarez provide assistance to Chamul and Alvarez ended up handcuffed in the back of the police vehicle. Chamul also testified that he had been drinking with Ramirez and Alvarez that evening and that the Explorer belonged to Ramirez. Chamul testified that the Explorer was registered in Ramirez' mother's name but Ramirez made the car payments on the Explorer and drove it all the time. However, Chamul testified that an individual named "Creeper" had gotten in the Explorer at some point and was driving it at the time of the accident, although he did not really remember because he had blacked out as soon as he got in the Explorer after leaving the bar.

Ramirez was eventually charged with failure to stop following personal injury accident and willful reckless driving. As indicated above, a jury trial was held on the matter, and at the close of all of the evidence, Ramirez moved for a directed verdict. The trial court denied Ramirez' motion, and the jury convicted him on both counts. Ramirez has timely appealed to this court.

ASSIGNMENT OF ERROR

Ramirez' sole assignment of error is that the trial court erred in overruling his motion for a directed verdict made at the close of all evidence.

STANDARD OF REVIEW

[1] Regardless of whether the evidence is direct, circumstantial, or a combination thereof, and regardless of whether the issue is labeled as a failure to direct a verdict, insufficiency of the evidence, or failure to prove a prima facie case, the standard is the same: 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 evidence admitted at trial, viewed and construed most favorably to the State, is sufficient to support the conviction. *State v. Banks*, 278 Neb. 342,

771 N.W.2d 75 (2009); *State v. McGhee*, 274 Neb. 660, 742 N.W.2d 497 (2007).

ANALYSIS

[2] Ramirez argues that the trial court erred in overruling his motion for a directed verdict made at the close of all the evidence. When a motion for directed verdict made at the close of all the evidence is overruled by the trial court, appellate review is controlled by the rule that a directed verdict is proper only where reasonable minds cannot differ and can draw but one conclusion from the evidence, and the issues should be decided as a matter of law. *McClure v. Forsman*, 266 Neb. 90, 662 N.W.2d 566 (2003); *Moyer v. Nebraska City Airport Auth.*, 265 Neb. 201, 655 N.W.2d 855 (2003).

[3,4] In a criminal case, a court can direct a verdict only when there is a complete failure of evidence to establish an essential element of the crime charged or the evidence is so doubtful in character, lacking probative value, that a finding of guilt based on such evidence cannot be sustained. *State v. Segura*, 265 Neb. 903, 660 N.W.2d 512 (2003); *State v. Canady*, 263 Neb. 552, 641 N.W.2d 43 (2002). If there is any evidence which will sustain a finding for the party against whom a motion for directed verdict is made, the case may not be decided as a matter of law, and a verdict may not be directed. *Id.*

Neb. Rev. Stat. § 60-697 (Cum. Supp. 2008) provides, in part:

> The driver of any vehicle involved in an accident upon either a public highway, private road, or private drive, resulting in injury or death to any person, shall (1) immediately stop such vehicle at the scene of such accident and ascertain the identity of all persons involved, (2) give his or her name and address and the license number of the vehicle and exhibit his or her operator's license to the person struck or the occupants of any vehicle collided with, and (3) render to any person injured in such accident reasonable assistance, including the carrying of such person to a physician or surgeon for medical or surgical treatment if it is apparent that such treatment is necessary or is requested by the injured person.

Ramirez contends that the evidence was insufficient to sustain the third requirement of the statute because "reasonable assistance" is not defined in Nebraska statutes or case law and that because Keiper instructed Alvarez not to move Chamul, Ramirez would not have been able to further assist Chamul in any way, essentially rendering Ramirez' duty to give "reasonable assistance" moot. See § 60-697.

The record in this case indicates that Ramirez, Alvarez, and Chamul were drinking together at a bar on the evening of the accident. The three individuals left the bar in Ramirez' Explorer, driven by Ramirez. Keiper recognized Ramirez driving the Explorer and lost visual contact momentarily with the Explorer after it rolled through a stop sign and accelerated onto another street. Shortly thereafter, the Explorer hit several parked cars and made impact with a tree, whereupon it came to a rest. Alvarez helped Ramirez out of the driver's seat, and that was the last time Ramirez was seen by Alvarez that evening. Meanwhile, Chamul was hanging from the waist up out of the passenger-side window frame of the Explorer, bleeding and unconscious. Alvarez attempted to remove Chamul from the Explorer, but was instructed by Keiper not to move Chamul and that an ambulance was on the way.

After viewing all of the evidence in the light most favorable to the State, any rational trier of fact could have found the essential elements of the statute beyond a reasonable doubt, and we need not address Ramirez' contention that the term "reasonable assistance" in § 60-697 is undefined because not only did Ramirez render no assistance, but under these circumstances, it would not have been reasonable for Ramirez to believe he could leave the scene even if a police officer later instructed that no assistance be given to Chamul. The evidence is sufficient to support Ramirez' convictions, and the trial court did not err in overruling his motion for a directed verdict at the close of all the evidence. Ramirez' assignment of error is wholly without merit, and therefore, we affirm.

AFFIRMED.

CITY OF OMAHA, NEBRASKA, A MUNICIPAL CORPORATION, APPELLEE, V. TRACT NO. 1, ALSO KNOWN AS 1318, 1320, AND 1322 S. 72D STREET, ET AL., APPELLEES, AND JOHN V. HALTOM, APPELLANT.

778 N.W.2d 122

Filed January 26, 2010. No. A-09-323.

1. **Summary Judgment.** Summary judgment is proper when the pleadings and evidence admitted at the hearing disclose no genuine issue regarding any material fact or 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. **Moot Question.** A case becomes moot when the issues initially presented in litigation cease to exist or the litigants lack a legally cognizable interest in the litigation's outcome.
4. **Moot Question: Jurisdiction: Appeal and Error.** Although mootness does not prevent appellate jurisdiction, it is a justiciability doctrine that can prevent courts from exercising jurisdiction.
5. **Moot Question: Appeal and Error.** Under the public interest exception, an appellate court may review an otherwise moot case if it involves a matter affecting the public interest or when other rights or liabilities may be affected by its determination.
6. ____: ____. When determining whether a case involves a matter of public interest, an appellate court considers (1) the public or private nature of the question presented, (2) the desirability of an authoritative adjudication for future guidance of public officials, and (3) the likelihood of future recurrence of the same or a similar problem.
7. **Constitutional Law: Eminent Domain.** The Constitution of Nebraska and legislative enactments pursuant thereto are in no sense a grant of power, but are and should be treated as a limitation of the power of eminent domain.
8. **Eminent Domain.** Neb. Rev. Stat. § 76-710.04(1) (Reissue 2009) prohibits the use of eminent domain powers where the taking is primarily for an economic development purpose.
9. **Statutes.** Absent anything to the contrary, statutory language is to be given its plain meaning, and a court will not look beyond the statute or interpret it when the meaning of its words is plain, direct, and unambiguous.
10. **Eminent Domain: Public Purpose: Right-of-Way.** Neb. Rev. Stat. § 76-710.04(1) (Reissue 2009) does not apply to projects that make all or a major portion of the property available for use by the general public or for use as a right-of-way.

Appeal from the District Court for Douglas County, THOMAS A. OTEPKA, Judge, on appeal thereto from the County Court

for Douglas County, EDNA ATKINS, Judge. Judgment of District Court affirmed.

Brian B. Vakulskas, of Vakulskas Law Firm, P.C., for appellant.

Paul D. Kratz, Omaha City Attorney, and Bernard J. in den Bosch for appellee City of Omaha.

SIEVERS, MOORE, and CASSEL, Judges.

CASSEL, Judge.

INTRODUCTION

John V. Haltom claims that Neb. Rev. Stat. § 76-710.04 (Reissue 2009) prohibits the City of Omaha, Nebraska (the City), from using its eminent domain powers to acquire land for the purpose of constructing a deceleration lane on an existing public street, because the deceleration lane leads to an access to a well-known national retailer of consumer goods. Because, as a matter of law, such construction for traffic control and safety purposes does not constitute an "economic development purpose," we affirm the district court's decision rejecting Haltom's claim.

BACKGROUND

This is an appeal from a condemnation action. The City negotiated with property owners to acquire a strip of land for the purpose of installing a deceleration lane for traffic that would access a new development which included a building to be occupied by the retailer. The City also sought temporary easements for the purpose of constructing the deceleration lane. After initial negotiations to acquire the real property failed, the City filed a petition in county court to condemn the property. The "Report of Appraisers" awarded Haltom and another property owner a collective total of $55,300.

Haltom filed a "Complaint on Appeal" to appeal this matter to the district court. Haltom alleged four separate causes of action, only one of which is the subject of the instant appeal. In the relevant cause of action, Haltom alleged that § 76-710.04 prevented the City from acquiring the property, because the

proposed use of the property constituted an "economic and development purpose."

The City then filed a motion for partial summary judgment on three of the four causes of action, including the one pertinent to this appeal.

At the summary judgment hearing, the City adduced evidence regarding the purpose for which the condemned property would be used. This included an affidavit by Charlie Krajicek, the city engineer. His affidavit stated that in his review of the retailer's development plans, he determined that a deceleration lane was necessary for traffic. His specific reasoning was as follows:

> [A]s a result of the anticipated increased traffic on 72nd Street as time elapses and the potential for the slowing of traffic on 72nd Street accessing the new [commercial] facility as traffic proceeded southbound, I determined that it was necessary that a deceleration lane be constructed to handle southbound traffic that would be accessing the new development. . . . [T]he purpose of requiring the deceleration lane was to allow traffic on 72nd Street to proceed in an orderly and efficient fashion and to limit the potential collisions as a result of cars decelerating on the right-of-way.

Krajicek also explained that the decision to acquire the land "was solely the decision of the City . . . and was made by [Krajicek] and those individuals under [his] direct supervision." Krajicek's affidavit also stated that the construction of the deceleration lane had been completed. Haltom did not offer any responsive evidence.

The district court granted the City's motion for partial summary judgment. Later, at the parties' request, the district court dismissed the remaining cause of action.

Haltom timely appeals.

ASSIGNMENT OF ERROR

Haltom assigns, as restated, that the district court erred in failing to determine that the City condemned his property for an economic development purpose. In its brief, the City

addressed Haltom's argument but also asserted that Haltom's claim was moot.

STANDARD OF REVIEW

[1,2] Summary judgment is proper when the pleadings and evidence admitted at the hearing disclose no genuine issue regarding any material fact or the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law. *Lamar Co. v. City of Fremont*, 278 Neb. 485, 771 N.W.2d 894 (2009). 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. *Id.*

ANALYSIS

Mootness.

The City argues that the appeal is moot because the City has already installed the deceleration lane. At oral argument, Haltom's counsel conceded that the deceleration lane had been constructed and that it would make no sense to demolish it, but urged the court to consider the issue under the public interest exception to the mootness doctrine.

[3,4] A case becomes moot when the issues initially presented in litigation cease to exist or the litigants lack a legally cognizable interest in the litigation's outcome. *Evertson v. City of Kimball*, 278 Neb. 1, 767 N.W.2d 751 (2009). Although mootness does not prevent appellate jurisdiction, it is a justiciability doctrine that can prevent courts from exercising jurisdiction. *Id.*

[5,6] But under the public interest exception, an appellate court may review an otherwise moot case if it involves a matter affecting the public interest or when other rights or liabilities may be affected by its determination. See *id.* And when determining whether a case involves a matter of public interest, the appellate court considers (1) the public or private nature of the question presented, (2) the desirability of an authoritative adjudication for future guidance of public officials, and (3) the likelihood of future recurrence of the same or a similar problem. *Id.*

Considering these factors, the public interest exception clearly applies. We confront a recent legislative enactment limiting the use of the sovereign power of eminent domain, which presents a public question. Municipal authorities desiring to condemn real estate for street improvements adjoining commercial development would rely upon an authoritative adjudication for guidance in future proceedings. Such condemnation proceedings frequently occur under nearly identical circumstances. Thus, the case falls within the public interest exception and we turn to the substantive question before us.

Effect of § 76-710.04.

Haltom's sole argument is that § 76-710.04 prevents the City from using its eminent domain powers in the instant case.

[7] We first summarize the nature of eminent domain. Eminent domain is defined generally as the power of the nation or a state, or authorized public agency, to take or to authorize the taking of private property for a public use without the owner's consent, conditioned upon the payment of just compensation. *Krambeck v. City of Gretna*, 198 Neb. 608, 254 N.W.2d 691 (1977). The power of eminent domain is a sovereign power which exists independent of the Constitution of Nebraska. *Burger v. City of Beatrice*, 181 Neb. 213, 147 N.W.2d 784 (1967). The Legislature may delegate the power of eminent domain. See *Burlington Northern Santa Fe Ry. Co. v. Chaulk*, 262 Neb. 235, 631 N.W.2d 131 (2001). The Constitution of Nebraska and legislative enactments pursuant thereto are in no sense a grant of power, but are and should be treated as a limitation of the power of eminent domain. *Burger v. City of Beatrice, supra*.

The Legislature has delegated the power of eminent domain to cities of the metropolitan class, including the City, to acquire property for use as part of a public street pursuant to Neb. Rev. Stat. § 14-366 (Reissue 2007). Section 14-366 provides as follows in this regard:

> The city may purchase or acquire by the exercise of the power of eminent domain private property or public property which is not at the time devoted to a specific public use, for the following purposes and uses: (1) For

> streets, alleys, avenues, parks, recreational areas, parkways, playgrounds, boulevards, sewers, public squares, market places, and for other needed public uses or purposes authorized by this act, and for adding to, enlarging, widening, or extending any of the foregoing; and (2) for constructing or enlarging waterworks, gas plants, or other municipal utility purposes or enterprises authorized by this act.

Thus, § 14-366 specifically allows the City to condemn private property for use as a public street.

However, the Legislature recently subjected the power of eminent domain to an additional limitation. In 2006, after the U.S. Supreme Court determined in *Kelo v. New London*, 545 U.S. 469, 125 S. Ct. 2655, 162 L. Ed. 2d 439 (2005), that the transfer of land to a third party for the purpose of furthering a city's economic development plan was a sufficiently public use to permit the exercise of eminent domain, the Nebraska Legislature passed 2006 Neb. Laws, L.B. 924, to prohibit the use of eminent domain "if the taking is primarily for an economic development purpose." This is now codified at § 76-710.04.

In pertinent part, § 76-710.04 provides as follows:

> (1) A condemner may not take property through the use of eminent domain . . . if the taking is primarily for an economic development purpose.
>
> (2) For purposes of this section, economic development purpose means taking property for subsequent use by a commercial for-profit enterprise or to increase tax revenue, tax base, employment, or general economic conditions.
>
> (3) This section does not affect the use of eminent domain for:
>
> (a) Public projects or private projects that make all or a major portion of the property available for use by the general public or for use as a right-of-way, aqueduct, pipeline, or similar use.

Haltom argues that the deceleration lane primarily served the "economic development purpose" of providing vehicles access to the retailer. He argues that the addition of the deceleration

lane will ultimately cause the expansion of the City's property and sales tax bases through providing the retailer's customers easier access to the retailer's parking lot.

[8,9] However, we conclude that the plain language of § 76-710.04 does not prevent the City from acquiring private property for use as a deceleration lane on an existing public road, even though the deceleration lane is contiguous to access to the retailer. Section 76-710.04(1) prohibits the use of eminent domain powers where the taking is "*primarily* for an economic development purpose." (Emphasis supplied.) Absent anything to the contrary, statutory language is to be given its plain meaning, and a court will not look beyond the statute or interpret it when the meaning of its words is plain, direct, and unambiguous. *State ex rel. Parks v. Council of City of Omaha*, 277 Neb. 919, 766 N.W.2d 134 (2009). Although the collateral consequences of the addition of a deceleration lane may include some enhancement to economic development, the primary purpose of the deceleration lane clearly is to promote traffic safety and the efficient flow of traffic on the City's streets.

Based on the undisputed evidence, there are four reasons sufficient to dispel Haltom's argument that the deceleration lane was primarily intended to fulfill an "economic development purpose" as defined by § 76-710.04(2). First, the City did not take the property primarily "for subsequent use by a commercial for-profit enterprise." The real property was not acquired for the "use" of a commercial enterprise in any traditional sense. The City will be the owner of title to the land, and, because the land will be used as part of a public street, the primary users will be members of the public at large. Second, the City's acquisition of the real property at issue will not serve the primary purpose of "increas[ing] tax revenue" or "tax base." The land acquired by the City will not contain any entity that will generate sales or property taxes. Property taxes cannot be assessed on the property in question due to the City's ownership of the land for public use. See Neb. Rev. Stat. § 77-202(1)(a) (Reissue 2009). Third, the City's acquisition of the land cannot be construed as primarily serving the purpose of increasing employment. While the construction of

a deceleration lane will require the temporary use of labor, the purpose of a deceleration lane is unrelated to the creation of additional jobs; instead, it is directly related to traffic control. Finally, the use of the property cannot be construed as primarily related to "general economic conditions," because there is no evidence that this affected the City's exercise of its eminent domain powers. The City's engineering department, which decided to acquire the property at issue, did so for reasons entirely unrelated to economic conditions. In his affidavit, Krajicek stated that the purpose of the deceleration lane "was to allow traffic . . . to proceed in an orderly and efficient fashion and to limit the potential collisions as a result of cars decelerating on the right-of-way." Haltom offered no evidence to rebut Krajicek's affidavit. There is no evidence that the retailer used economic pressure to convince the City to install the deceleration lane.

[10] In addition, § 76-710.04(3)(a) clarifies that § 76-710.04(1) does not apply to "projects that make all or a major portion of the property available for use by the general public or for use as a right-of-way." In the instant case, the deceleration lane will be available for general public use and constitutes a right-of-way. In this context, a right-of-way is defined as "land covered by a public road." Webster's Encyclopedic Unabridged Dictionary of the English Language 1234 (1989). Thus, the deceleration lane serves no economic development purpose under the terms of § 76-710.04.

We acknowledge that the City's use of eminent domain to acquire land for a deceleration lane may provide an incidental and indirect benefit to the retailer. However, the plain language of § 76-710.04 prohibits the exercise of eminent domain only where its *primary* purpose is economic development—not where economic development may be a collateral benefit. Many permissible uses of eminent domain provide collateral benefits to private industry. For example, when land is acquired by eminent domain for the purpose of a public building such as a school, nearby private enterprises, such as convenience stores or restaurants, may also benefit. The use of eminent domain to install utilities can provide collateral benefits to surrounding businesses. There are countless other instances where

the exercise of eminent domain indirectly enhances economic development. Therefore, Haltom's argument—which focuses on a collateral consequence of eminent domain as opposed to its primary purpose—is without merit.

CONCLUSION

We first conclude that although the deceleration lane has been constructed, we may consider Haltom's appeal on its merits because the public interest exception to the mootness doctrine applies. We also conclude that the district court did not err in granting the City's motion for partial summary judgment, because § 76-710.04 does not, as a matter of law, prohibit the City from using its eminent domain powers to acquire property for the purpose of constructing a deceleration lane on an existing public road for traffic control and safety purposes.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V.
HENRY E. PATTERSON, JR., APPELLANT.
778 N.W.2d 756

Filed February 9, 2010. No. A-09-385.

1. **Statutes: Appeal and Error.** Statutory interpretation presents a question of law, in connection with which an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below.
2. **Costs: Appeal and Error: Words and Phrases.** The words "on appeal" in Neb. Rev. Stat. § 25-2307 (Reissue 2008) follow the requirement that a party be permitted to proceed in forma pauperis and precede the requirement that the county pay for printing of the appellate briefs; therefore, the logical interpretation is that the expense of printing of appellate briefs is to be reimbursed to a party who is allowed to proceed in forma pauperis on appeal.
3. **Jurisdiction: Costs: Appeal and Error.** A district court has jurisdiction to hear a motion for reimbursement of costs sought under Neb. Rev. Stat. § 25-2307 (Reissue 2008), and an order entered thereon is appealable as a summary application in an action after judgment.

Appeal from the District Court for Douglas County: J. MICHAEL COFFEY, Judge. Reversed and remanded for further proceedings.

Henry E. Patterson, Jr., pro se.

Jon Bruning, Attorney General, and Kimberly A. Klein for appellee.

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

MOORE, Judge.

INTRODUCTION

This appeal arises from the denial of a motion for reimbursement of costs sought by Henry E. Patterson, Jr., under Neb. Rev. Stat. § 25-2307 (Reissue 2008). Because the district court had jurisdiction to hear the motion, we reverse the order denying the motion and remand the cause for an evidentiary hearing.

BACKGROUND

Patterson filed a motion for postconviction relief in the district court on October 25, 2004. Following a hearing, the court denied Patterson's motion, which denial was affirmed by this court in a memorandum opinion filed on June 26, 2008, in case No. A-07-809. The Nebraska Supreme Court denied Patterson's petition for further review on August 27. On September 5, Patterson filed a motion in the district court seeking reimbursement in the total sum of $96.19 for photocopies and postage in connection with his brief and petition for further review, citing a duty by the State to pay the costs under § 25-2307. On January 23, 2009, Patterson filed an "Application and Notice for Default Judgment," asserting that the State had failed to file a timely response. On March 9, the district court entered an order overruling the motion, finding that both the motion for reimbursement and the application for default judgment were without merit and failed to state a cause of action. The court further found that it did not have jurisdiction over the pleadings. The order does not indicate the presence of either party or that any evidence was adduced at the hearing. There is no bill of exceptions from the March 9 hearing. On March 17, Patterson filed a motion for reconsideration, which motion was denied by the court in an order entered April 1. Patterson's notice of appeal was filed April 8.

ASSIGNMENT OF ERROR

Patterson asserts, restated, that the district court erred in determining that it did not have jurisdiction to award reimbursement for expenses associated with the appeal process and in denying Patterson's application under § 25-2307.

STANDARD OF REVIEW

[1] Statutory interpretation presents a question of law, in connection with which an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below. *Heathman v. Kenney*, 263 Neb. 966, 644 N.W.2d 558 (2002).

ANALYSIS

The district court did not elaborate on why it determined that it did not have jurisdiction over the motion for reimbursement. Section 25-2307 provides:

> In any civil or criminal case in which a party is permitted to proceed in forma pauperis, on appeal the court shall direct that the expense of printing of the appellate briefs, if such printing is required by the court, be paid by the county in the same manner as other claims are paid.

The State argues that the words "on appeal" contained in the statute mean the motion for reimbursement must be filed while the appeal is pending and that because the motion was not filed until after the petition for further review had been denied, and the mandate issued, the district court was without jurisdiction to enter an order granting reimbursement.

The State relies on the case of *Heathman v. Kenney, supra*, as partial support for its argument. In *Heathman*, the appellant, who had been granted in forma pauperis status, filed a request for reimbursement of photocopying expenses for the appellate briefs during the pendency of the appeal. The district court denied the request, finding that the statute covered only printing briefs, not the cost of photocopies. On appeal, the Supreme Court first discussed the issue of jurisdiction as the appellee had questioned whether the appellant's request for reimbursement was filed at the appropriate stage of the proceedings. The appellee suggested that the conclusion of litigation would be

a more appropriate time to seek reimbursement of expenses, although conceding that the in forma pauperis statutes do not indicate the appropriate time to seek reimbursement. The court concluded that it had jurisdiction of the matter, finding that the order denying the request for reimbursement was an order affecting a substantial right made upon a summary application in an action after judgment. The court also concluded that the expense of photocopying is included in the expense of "printing" under the statute and reversed the district court's denial of the request for reimbursement.

[2,3] We conclude that neither § 25-2307 nor the *Heathman* decision supports a conclusion that a request for reimbursement of printing costs must be made during the pendency of the appeal. The words "on appeal" in the statute follow the requirement that a party be permitted to proceed in forma pauperis and precede the requirement that the county pay for printing of the appellate briefs. The logical interpretation is that the expense of printing of appellate briefs is to be reimbursed to a party who is allowed to proceed in forma pauperis on appeal. The statute does not contain any direction as to the procedure for requesting reimbursement, or any specification as to the time for such action. Further, *Heathman v. Kenney*, 263 Neb. 966, 644 N.W.2d 558 (2002), implies that there is not a specific timeframe for a request for reimbursement under this statute. We conclude that the district court had jurisdiction to hear Patterson's motion. As the court in *Heathman* concluded, we find that the district court's order in this case is appealable as a summary application in an action after judgment.

The State argues alternatively that the district court was correct in denying Patterson's motion because it was accompanied only by copies of prison "kites" which purport to detail Patterson's expenses, which are not sworn or otherwise reliable documents. The State also argues that Patterson includes expenses for postage and supplies for mailing which are not covered expenses under the statute.

From our review of the record, it appears that the district court's order was entered sua sponte, without notice to the parties, without the presence of the parties, without the receipt of

evidence, and without a record being made. Accordingly, we reverse the order of the district court which denied the motion for reimbursement and remand the cause for further evidentiary proceedings.

CONCLUSION

The district court had jurisdiction to determine Patterson's motion for reimbursement of expenses. The order denying the motion is reversed, and the cause is remanded for further evidentiary proceedings.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

IN RE INTEREST OF PRESTEN O., A CHILD UNDER 18 YEARS OF AGE. STATE OF NEBRASKA, APPELLEE, V. CRYSTAL W., APPELLANT.

IN RE INTEREST OF PORSHA O., A CHILD UNDER 18 YEARS OF AGE. STATE OF NEBRASKA, APPELLEE, V. CRYSTAL W., APPELLANT.

778 N.W.2d 759

Filed February 9, 2010. Nos. A-09-623, A-09-624.

1. **Juvenile Courts: Parental Rights: Guardians Ad Litem: Appeal and Error.** Appointment of a guardian ad litem for a parent that is allegedly incompetent because of mental illness or mental deficiency is mandatory, and the failure to appoint a guardian ad litem is plain error which requires reversal of the order terminating the parent's rights.

Appeal from the County Court for Deuel County: RANDIN ROLAND, Judge. Reversed and remanded for further proceedings.

Joel B. Jay for appellant.

Douglas D. Palik, Deuel County Attorney, for appellee.

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

PER CURIAM.

I. INTRODUCTION

The county court for Deuel County, Nebraska, sitting as a juvenile court, entered orders terminating Crystal W.'s parental rights to her minor children. The court found that termination of Crystal's parental rights was warranted because she was unable to discharge her parental responsibilities due to her mental condition, because she had failed to comply with ordered plans of rehabilitation, and because her children had been in an out-of-home placement for 15 or more months of the most recent 22 months. The court also found that termination of Crystal's parental rights was in the children's best interests. Crystal appeals the court's order. On appeal, Crystal is challenging the statutory grounds for termination of her parental rights and the county court's finding that termination of her parental rights is in the children's best interests.

Upon our de novo review of the record, we find that the county court erred in failing to appoint Crystal a guardian ad litem for the court proceedings pursuant to Neb. Rev. Stat. § 43-292.01 (Reissue 2008). While Crystal does not raise this issue in her appeal to this court, we conclude that the court's failure to appoint a guardian ad litem is plain error. We reverse the county court's orders terminating Crystal's parental rights and remand the matter for further proceedings.

II. BACKGROUND

These proceedings involve two children: Presten O. (also referred to as "Preston" in the record), born in December 2005, and Porsha O. (also referred to as "Portia" in the record), born in May 2007. Crystal is the biological mother of both Presten and Porsha.

In April 2007, Presten was removed from Crystal's care after Presten was diagnosed for the second time with failure to thrive. Crystal became upset about the diagnosis and began to clutch Presten so tightly that she left red marks on his abdomen. Crystal then locked herself and Presten in a hospital bathroom until police arrived.

At the time Presten was removed, Crystal was pregnant with Porsha. She gave birth to Porsha in May 2007. Because of the incident surrounding Presten's removal and because of concerns

regarding Crystal's mental health, Porsha was immediately removed from Crystal's care. Presten and Porsha have not been returned to Crystal's care since they were removed.

Our record does not include any filings prior to the State's motions for termination of parental rights. However, there is an indication in the record that in June and September 2007, respectively, Presten and Porsha were adjudicated as children within the meaning of Neb. Rev. Stat. § 43-247(3)(a) (Cum. Supp. 2006). There is also an indication in the record that the county court adopted the rehabilitation plans recommended by the Department of Health and Human Services and ordered Crystal to comply with the tenets of the rehabilitation plans. As a part of the plans, Crystal was required to submit to a psychological examination and a parenting assessment, to manage her psychotropic medication, to participate in supervised visitations with the children and a family support worker, and to attend individual therapy.

In addition, Crystal was ordered to submit to a competency evaluation. The competency evaluation revealed that Crystal was competent to understand the legal proceedings and indicated that Crystal should have consequences for any failure to act appropriately in the courtroom. Based on the findings and conclusions of the competency evaluation, the county court did not appoint a guardian ad litem for Crystal.

On January 7, 2009, the State filed motions to terminate Crystal's parental rights to Presten and Porsha. In the motions, the State alleged that Presten and Porsha were children within the meaning of Neb. Rev. Stat. § 43-292(5), (6), and (7) (Reissue 2008). The State also alleged that it would be in the children's best interests if Crystal's parental rights were terminated.

On April 28 and May 20, 2009, a hearing was held on the State's motions for termination of parental rights. While we have reviewed the bill of exceptions from this hearing in its entirety, we do not detail the extensive evidence offered here. We will set forth the specific facts as presented at the hearing as necessary in our analysis below.

At the conclusion of the termination hearing, the county court found that the State had proved by clear and convincing

evidence that Presten and Porsha were children within the meaning of § 43-292(5), (6), and (7). The court also found that it would be in the children's best interests if Crystal's parental rights were terminated. The court then entered orders terminating Crystal's parental rights to Presten and Porsha.

Crystal appeals from the county court's orders here.

III. ASSIGNMENTS OF ERROR

On appeal, Crystal alleges that the county court erred in finding that the State proved the statutory factors for termination of her parental rights under § 43-292(5), (6), and (7) and finding that termination of her parental rights was in the children's best interests.

IV. ANALYSIS

1. Standard of Review

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 Jagger L.*, 270 Neb. 828, 708 N.W.2d 802 (2006). 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. *Id.*

For a juvenile court to terminate parental rights under § 43-292, it must find that one or more of the statutory grounds listed in this section have been satisfied and that termination is in the child's best interests. See *In re Interest of Jagger L., supra*. The State must prove these facts by clear and convincing evidence. *Id.* Clear and convincing evidence is that amount of evidence which produces in the trier of fact a firm belief or conviction about the existence of the fact to be proven. *Id.*

2. Appointment of Guardian Ad Litem

Crystal's assignments of error on appeal focus on the sufficiency of the evidence to prove the statutory factors warranting termination of her parental rights and to prove that termination of her parental rights is in the children's best interests. Although an appellate court ordinarily considers only those

errors assigned and discussed in the briefs, the appellate court may, at its option, notice plain error. *In Interest of D.W.*, 249 Neb. 133, 542 N.W.2d 407 (1996). Plain error is error plainly evident from the record and of such a nature that to leave it uncorrected would result in damage to the integrity, reputation, or fairness of the judicial process. *In re Interest of Markice M.*, 275 Neb. 908, 750 N.W.2d 345 (2008); *In re Interest of Mainor T. & Estela T.*, 267 Neb. 232, 674 N.W.2d 442 (2004); *In Interest of D.W., supra*. Upon our de novo review of the record, we find that the county court's failure to appoint a guardian ad litem for Crystal is plain error.

The State alleged and the county court found that termination of Crystal's parental rights was warranted because she was unable to discharge her parental responsibilities due to her mental condition, pursuant to § 43-292(5); because she had failed to comply with ordered plans of rehabilitation, pursuant to § 43-292(6); and because her children had been in an out-of-home placement for 15 or more months of the most recent 22 months, pursuant to § 43-292(7).

[1] Section 43-292.01 provides, in part, "When termination of the parent-juvenile relationship is sought under subdivision (5) of section 43-292, the court shall appoint a guardian ad litem for the alleged incompetent parent." The Nebraska Supreme Court has previously held that the language in § 43-292.01 requiring appointment of a guardian ad litem is mandatory and that the failure to appoint a guardian ad litem is plain error which requires reversal of the order terminating the parent's rights. See *In re Interest of M.M., C.M., and D.M.*, 230 Neb. 388, 431 N.W.2d 611 (1988) (analyzing language in § 43-292 (Reissue 1984), which is virtually identical to language in § 43-292.01).

Here, the State sought termination of Crystal's parental rights based, in part, on her mental condition and § 43-292(5). As a result, the appointment of a guardian ad litem for Crystal was mandatory. The county court did not appoint Crystal a guardian ad litem, and such omission constitutes plain error. We reverse the county court's orders terminating Crystal's parental rights and remand the matter for further proceedings.

V. CONCLUSION

Because the county court failed to appoint a guardian ad litem for Crystal pursuant to § 43-292.01, we reverse the orders terminating Crystal's parental rights to her minor children and remand the matter for further proceedings.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

IRWIN, Judge, concurring.

I concur with the conclusion of the majority that the county court's failure to appoint Crystal a guardian ad litem pursuant to Neb. Rev. Stat. § 43-292.01 (Reissue 2008) constitutes plain error. I do not agree that such error prejudiced Crystal in any way, but I am compelled to concur in the majority's ultimate decision to reverse the orders terminating Crystal's parental rights because the Nebraska Supreme Court held in *In re Interest of M.M., C.M, and D.M.*, 230 Neb. 388, 431 N.W.2d 611 (1988), that the failure to appoint a guardian ad litem pursuant to § 43-292.01 is plain error which requires reversal, implying that such failure constitutes prejudice per se.

In *In re Interest of M.M., C.M., and D.M.*, the Nebraska Supreme Court found that "'the duties and responsibilities of a guardian ad litem . . . are not coextensive with those of an attorney . . . .'" 230 Neb. at 390, 431 N.W.2d at 612-13 (emphasis omitted). The court went on to find that although the parent was represented by appointed counsel throughout the court proceedings, "the appointment of a guardian ad litem . . . is mandatory and . . . the failure to appoint a guardian ad litem for [a parent] in these cases is plain error which requires that the judgments be reversed." *Id.* at 390, 431 N.W.2d at 613.

The court in *In re Interest of M.M., C.M., and D.M.* did not discuss whether the parent had been prejudiced by the failure to appoint a guardian ad litem. The omission of this discussion, together with the court's finding that a guardian ad litem's duties and responsibilities are distinct from those of an attorney representing a parent in a termination proceeding, implies that the failure to appoint a guardian ad litem constitutes prejudice per se.

Contrary to the implication in *In re Interest of M.M., C.M., and D.M.*, there are circumstances, such as those present in this case, where a parent is not prejudiced by the failure to appoint a guardian ad litem. Here, Crystal was represented by competent counsel throughout the court proceedings. In addition, she submitted to a competency evaluation which revealed that she was fully capable of understanding the legal proceedings and the ultimate implication of those proceedings. Under the circumstances of this case, there is no indication that Crystal would have benefited in any way by the appointment of a guardian ad litem.

While I do not agree that the failure to appoint a guardian ad litem constitutes prejudice per se or that Crystal was prejudiced in this case, I join in the majority's opinion because of the principle of vertical stare decisis, which compels lower courts to follow strictly the decisions rendered by higher courts within the same judicial system. See *State v. Hausmann*, 277 Neb. 819, 765 N.W.2d 219 (2009).

STATE OF NEBRASKA, APPELLEE, V. LUIS CARLOS VASQUEZ-ARENIVAR, APPELLANT.

779 N.W.2d 117

Filed February 16, 2010. No. A-09-437.

1. **Motions to Suppress: Probable Cause: Appeal and Error.** In reviewing a trial court's ruling on a motion to suppress, we review the ultimate determination of probable cause de novo and review the findings of fact made by the trial court for clear error, giving due weight to the inferences drawn from those facts by the trial court.
2. **Investigative Stops: Motor Vehicles: Probable Cause.** A traffic violation, no matter how minor, creates probable cause to stop the driver of the vehicle.
3. **Investigative Stops: Police Officers and Sheriffs: Probable Cause: Warrantless Searches: Weapons.** In addition to an investigatory stop pursuant to *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968), an officer is entitled, for the protection of himself or herself and others in the area, to conduct a carefully limited search of the outer clothing of persons stopped on *Terry* grounds to discover weapons which might be used to assault the officer.

4. **Investigative Stops: Police Officers and Sheriffs: Probable Cause.** In determining whether an officer acted reasonably, it is not the officer's inchoate or unparticularized suspicion or hunch that is given due weight, but the specific reasonable inferences which the officer is entitled to draw from the facts in light of his or her experience.
5. ____: ____: ____. Whether a police officer has a reasonable suspicion based on sufficient articulable facts requires taking into account the totality of the circumstances.
6. ____: ____: ____. As part of the totality of the circumstances, a court can consider an officer's knowledge of a defendant's drug-related criminal history.
7. **Investigative Stops: Motor Vehicles: Police Officers and Sheriffs: Probable Cause.** A fellow passenger's prior drug, weapon, or criminal history may properly be considered in the totality of the circumstances of whether reasonable suspicion existed to conduct a pat-down search of a defendant for weapons.
8. **Controlled Substances: Search and Seizure.** Drugs which are abandoned by a defendant prior to being seized by law enforcement may be lawfully recovered.
9. **Search and Seizure.** When individuals voluntarily abandon property, they forfeit any expectation of privacy in the property that they might otherwise have had.
10. **Constitutional Law: Search and Seizure.** The Fourth Amendment does not protect voluntarily abandoned property.
11. ____: ____. A warrantless search or seizure of abandoned property does not violate the Fourth Amendment.
12. **Controlled Substances: Search and Seizure.** When a defendant has been legally detained prior to voluntarily abandoning drugs or other property, the drugs or property may be lawfully recovered.
13. **Evidence: Police Officers and Sheriffs.** When a defendant merely drops, throws down, or abandons evidence in the presence of law enforcement, such conduct will not sustain a conviction for tampering with physical evidence.
14. **Criminal Law: Convictions: Evidence: Trial.** When the evidence adduced at trial is legally insufficient to sustain the conviction, a criminal charge may not be retried, but must be dismissed.

Appeal from the District Court for Hall County: JAMES D. LIVINGSTON, Judge. Affirmed in part, and in part vacated.

Jeff E. Loeffler, Deputy Hall County Public Defender, for appellant.

Jon Bruning, Attorney General, and George R. Love for appellee.

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

INBODY, Chief Judge.

INTRODUCTION

A jury convicted Luis Carlos Vasquez-Arenivar of possession of a controlled substance with the intent to distribute and

tampering with physical evidence. Following his sentencing, Vasquez-Arenivar appealed to this court alleging that the district court erred in denying his motion to suppress on the basis that he was subjected to an unconstitutional pat-down search for weapons. We disagree with Vasquez-Arenivar, finding that the pat-down search of his person was constitutional and that Vasquez-Arenivar, who was being legally detained, abandoned a bag of drugs in the presence of an officer. We find that although insufficient evidence was not assigned as error by Vasquez-Arenivar, the evidence is insufficient, as a matter of law, to support Vasquez-Arenivar's conviction for tampering with physical evidence.

STATEMENT OF FACTS

Vasquez-Arenivar was one of two passengers in a vehicle stopped for driving the wrong way down a one-way street. The driver admitted to consuming alcohol, and the investigating officer conducted an investigation to determine if the driver was driving while intoxicated, while Sgt. Tony Keiper and two officers arrived to assist. The officers were concerned because the other passenger, Lisia Pacheco, had been implicated in the distribution of methamphetamine and had been convicted on firearm charges and because the vehicle had an extremely dark tint on the windows, making it difficult to see inside the vehicle. Vasquez-Arenivar, who was able to speak English, told Keiper he was on the way to meet his wife, he was getting a ride, and he worked for a construction company. However, when Keiper asked Vasquez-Arenivar about drugs and firearms, Vasquez-Arenivar looked away and delayed his responses, and the issue arose of whether Vasquez-Arenivar could understand Keiper's questions.

Keiper asked Vasquez-Arenivar and Pacheco to exit the vehicle and conducted a pat-down search for weapons of both passengers for officer safety; however, prior to conducting the pat-down search of Vasquez-Arenivar, Keiper noticed a large bulge in Vasquez-Arenivar's left front pocket. Keiper testified that as he conducted the pat-down search, the bulge felt like "a larger, soft cylinder-shaped bunch" and felt "slightly mushy." The pat-down search confirmed that Vasquez-Arenivar was not

concealing any weapons on his person, so Keiper had Vasquez-Arenivar sit on the curb near Pacheco. However, since Keiper suspected that the bulge was drugs, he requested consent to search Vasquez-Arenivar's person, which request was refused. Keiper then conferred with one of the officers, and while the officers were talking, Vasquez-Arenivar stood up and turned his left side away from the officers, putting himself between the officers and Pacheco. The officers then saw what appeared to be a large Ziploc bag lying on the ground between Pacheco's feet. Keiper knew the area of the curb where Pacheco and Vasquez-Arenivar were sitting was clear of objects prior to the two individuals' sitting down, and Pacheco denied knowing anything about the bag.

Keiper conducted another pat-down search of Vasquez-Arenivar, which search confirmed that the bulge was no longer present. Upon examination of the Ziploc bag, it was determined that the bag contained controlled substances, and Vasquez-Arenivar was arrested. During booking, another officer informed Vasquez-Arenivar that he was going to be subjected to a search, at which point Vasquez-Arenivar pointed to his pocket and said, "[T]hat is all I have, it's in here." The officer looked in the coin pocket of Vasquez-Arenivar's pants and found a sandwich bag containing what appeared to be methamphetamine. Vasquez-Arenivar then stated that "he was stupid, he made a mistake, that it was the first time, and he needed the money." The contents of the bags were tested and found to contain a total of 53.74 grams, or approximately 1.9 ounces, of methamphetamine, with a street retail value of $5,300. The Ziploc bag seized at the scene contained four knotted plastic baggies each containing between 13.02 and 13.30 grams of methamphetamine. The knotted plastic bag found on Vasquez-Arenivar's person contained 1.28 grams of methamphetamine. Keiper testified that both the amount of methamphetamine seized and the manner in which the drugs were packaged indicated that the methamphetamine was intended for resale, not personal use.

Vasquez-Arenivar was charged with possession of a controlled substance (methamphetamine) with the intent to distribute and tampering with physical evidence. Vasquez-Arenivar

filed a motion to suppress, contending that his arrest, search, seizure, and questioning were in violation of his constitutional rights and that thus, all evidence obtained as a result thereof should be suppressed, which motion was denied. A jury trial was held, and the jury convicted Vasquez-Arenivar of the charged offenses. Following his sentencing, Vasquez-Arenivar appealed to this court, alleging that the district court erred in denying his motion to suppress.

ASSIGNMENT OF ERROR

Vasquez-Arenivar's sole assignment of error is that the district court erred in denying his motion to suppress.

STANDARD OF REVIEW

[1] In reviewing a trial court's ruling on a motion to suppress, we review the ultimate determination of probable cause de novo and review the findings of fact made by the trial court for clear error, giving due weight to the inferences drawn from those facts by the trial court. *State v. Wenke*, 276 Neb. 901, 758 N.W.2d 405 (2008).

ANALYSIS

Denial of Motion to Suppress.

Vasquez-Arenivar's sole assignment of error is that the district court erred in denying his motion to suppress which asserted the pat-down search for weapons was unconstitutional for the reason that the officer did not have reasonable suspicion, based on articulable facts, that Vasquez-Arenivar was armed and dangerous.

[2] Vasquez-Arenivar does not contest the initial stop of the vehicle in this case. The stop, for driving the wrong way down a one-way street, clearly was proper. See Neb. Rev. Stat. § 60-6,138 (Reissue 2004). A traffic violation, no matter how minor, creates probable cause to stop the driver of the vehicle. *State v. Royer*, 276 Neb. 173, 753 N.W.2d 333 (2008). Officers could also clearly order Vasquez-Arenivar out of the vehicle pending completion of the stop. See *State v. Gutierrez*, 9 Neb. App. 325, 611 N.W.2d 853 (2000) (officer making traffic stop may order driver and passengers to get out of vehicle, pending completion of stop). See, also, *Maryland v. Wilson*, 519 U.S.

408, 117 S. Ct. 882, 137 L. Ed. 2d 41 (1997). This brings us to the question posed by Vasquez-Arenivar: Did the officer who conducted the pat-down search of Vasquez-Arenivar have reasonable suspicion, based on articulable facts, that Vasquez-Arenivar was armed and dangerous?

[3-5] In addition to an investigatory stop pursuant to *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968), an officer is entitled, for the protection of himself or herself and others in the area, to conduct a carefully limited search of the outer clothing of persons stopped on *Terry* grounds to discover weapons which might be used to assault the officer. *State v. Coleman*, 10 Neb. App. 337, 630 N.W.2d 686 (2001); *State v. Gutierrez, supra*. In determining whether an officer acted reasonably, it is not the officer's inchoate or unparticularized suspicion or hunch that is given due weight, but the specific reasonable inferences which the officer is entitled to draw from the facts in light of his or her experience. *State v. Ellington*, 242 Neb. 554, 495 N.W.2d 915 (1993); *State v. Coleman, supra*. Whether a police officer has a reasonable suspicion based on sufficient articulable facts requires taking into account the totality of the circumstances. *State v. Ellington, supra*; *State v. Coleman, supra*.

[6] The law is well settled in Nebraska that, as part of the totality of the circumstances, a court can consider an officer's knowledge of the defendant's drug-related criminal history. See, *State v. Draganescu*, 276 Neb. 448, 755 N.W.2d 57 (2008); *State v. Lee*, 265 Neb. 663, 658 N.W.2d 669 (2003). However, we have not directly considered whether an officer's knowledge of another passenger's drug- or weapon-related criminal history may be considered as part of the totality of the circumstances justifying a pat-down search of the defendant. In *State v. Coleman, supra*, we did cite with approval to *U.S. v. Menard*, 898 F. Supp. 1317 (N.D. Iowa 1995), which was subsequently affirmed by the Eighth Circuit at *U.S. v. Menard*, 95 F.3d 9 (8th Cir. 1996). The Eighth Circuit held that, in considering the totality of the circumstances of whether reasonable suspicion existed to pat down a back seat passenger, the trial court could consider an officer's reminder to a fellow officer of the "'Officer Safety Warning'" posted at the police department

which specifically stated the front seat passenger was believed to be armed with an automatic pistol. *U.S. v. Menard*, 95 F.3d at 10.

Other courts have likewise held that a fellow passenger's criminal history is a valid factor to be considered as part of the totality of the circumstances in assessing reasonable suspicion. See, *U.S. v. Mathurin*, 561 F.3d 170 (3d Cir. 2009) (defendant acknowledged that codefendant's criminal history, involving arrests for possession of drugs, aggravated assault, and another arrest resulting in seizure of large sums of cash from his person, was valid factor for court to consider, under totality of circumstances, when it assessed reasonable suspicion that defendant had been engaged in criminal activity); *State v. Sprinkle*, 106 F.3d 613 (1997) (fellow passenger's previous criminal record was factor to be considered in totality of circumstances to support reasonable suspicion of criminal activity); *State v. Malone*, 274 Wis. 2d 540, 683 N.W.2d 1 (2004) (fellow passenger's volunteered statement that he was on probation for drug-related offenses was properly considered in totality of circumstances analysis regarding whether trooper had reasonable suspicion that occupants of vehicle, including defendant, were involved in illegal conduct involving narcotics); *Powell v. State*, 5 S.W.3d 369 (Tex. App. 1999) (fellow passenger's prior drug possession offense was factor considered in determining whether defendant's postcitation detention was reasonable). Cf., *State v. Jones*, 179 N.J. 377, 846 A.2d 569 (2004) (accomplice's drug convictions were factor that could be considered in totality of circumstances for probable cause to issue search warrant of residence and its occupants); *State v. Gray*, 307 Mont. 124, 38 P.3d 775 (2001) (criminal history of defendant's brother, involving illegal drugs, was one factor that could be considered in totality of circumstances for probable cause to issue search warrant).

[7] We agree that a fellow passenger's criminal history is a valid factor to be considered as part of the totality of the circumstances in assessing reasonable suspicion, especially since the relationship between the occupants of a house or a car differs from that of persons in a public place. See *U.S. v. Menard, supra*. Therefore, we hold that a fellow passenger's prior drug,

weapon, or criminal history may properly be considered in the totality of the circumstances of whether reasonable suspicion existed to conduct a pat-down search of a defendant for weapons. Thus, Keiper's knowledge of Pacheco's weapons conviction and implication in drug distribution was within the totality of the circumstances that could be considered in determining whether reasonable suspicion existed to support a pat-down search of Vasquez-Arenivar for weapons.

Prior to conducting the pat-down search of Vasquez-Arenivar, Keiper knew that the stopped vehicle had darkly tinted windows. Then, when asked about drugs and firearms, Vasquez-Arenivar looked away and delayed his responses, and the issue arose of whether Vasquez-Arenivar could understand Keiper's questions, even though Vasquez-Arenivar could converse in English immediately prior. Keiper also noticed a large bulge in Vasquez-Arenivar's left front pocket, and Keiper knew that Pacheco had been implicated in the distribution of methamphetamine and had been convicted on firearm charges. Based upon the totality of these circumstances, Keiper had reasonable suspicion based on articulable facts to justify a pat-down search of Vasquez-Arenivar for weapons. Although the pat-down search of Vasquez-Arenivar for officer safety was constitutional, officers did not seize, and could not have seized, the suspected drugs on Vasquez-Arenivar's person during the pat-down search for weapons; the drugs were recovered on the ground by officers after Vasquez-Arenivar abandoned the bag.

[8] This court has considered whether drugs which are abandoned by a defendant may be lawfully recovered. In *State v. Cronin*, 2 Neb. App. 368, 509 N.W.2d 673 (1993), the defendant was being chased by the police when he discarded a bag of cocaine which the police recovered and used as a basis for a criminal charge. The issue presented in that case was whether the defendant was illegally seized prior to discarding the drugs he was carrying. We concluded that the defendant was not seized before he discarded the drugs and found that drugs which are abandoned by a defendant prior to being seized by law enforcement may be lawfully recovered. See *id*.

The instant case presents a different factual situation in that Vasquez-Arenivar was legally seized prior to his abandonment of the drugs on the side of a public street. However, we do not consider this distinction to be determinative. Other courts have upheld a defendant's voluntary abandonment of property after the defendant's lawful seizure by law enforcement. For example, abandonment has been found in the following situations: where a defendant discarded drugs on the hood of a police cruiser after a lawful investigatory stop and just before officers were about to conduct a lawful frisk, *State v. Sam*, 988 So. 2d 765 (La. App. 2008); where, after his lawful arrest, a defendant dropped drugs in the presence of an officer, *State v. Mitchell*, 722 So. 2d 814 (Ala. Crim. App. 1998); where a defendant tossed drugs to the floor while officers were lawfully searching his mouth for contraband, *State v. Dupree*, 319 S.C. 454, 462 S.E.2d 279 (1995); where a defendant threw a pouch containing crack cocaine over a fence following his legal arrest, *State v. Bumpus*, 459 N.W.2d 619 (Iowa 1990); where a defendant abandoned drugs by dropping them out the window of the vehicle on the roadside of a public street after the lawful stop of vehicle in which he was a passenger, *Morrison v. State*, 71 S.W.3d 821 (Tex. App. 2002); and where a defendant dropped cocaine during a valid investigatory stop, *State v. Abdullah*, 730 A.2d 1074 (R.I. 1999).

[9-12] When individuals voluntarily abandon property, they forfeit any expectation of privacy in it that they might otherwise have had. *U.S. v. Thomas*, 864 F.2d 843 (D.C. Cir. 1989); *U.S. v. Jones*, 707 F.2d 1169 (10th Cir. 1983). The Fourth Amendment does not protect property that has been voluntarily abandoned. *Abel v. United States*, 362 U.S. 217, 80 S. Ct. 683, 4 L. Ed. 2d 668 (1960); *State v. Grant*, 614 N.W.2d 848 (Iowa App. 2000). Thus, a warrantless search or seizure of abandoned property does not violate the Fourth Amendment. *U.S. v. Thomas, supra*. Thus, we hold that when a defendant has been legally detained prior to voluntarily abandoning drugs or other property, the drugs or property may be lawfully recovered.

Since Vasquez-Arenivar was legally detained prior to discarding the drugs, he voluntarily abandoned the bag of drugs,

thereby forfeiting any expectation of privacy that he may have had in it, and the resulting seizure and search of the bag did not violate the Fourth Amendment.

Tampering With Physical Evidence Conviction.

Although the district court properly denied Vasquez-Arenivar's motion to suppress, the State confessed at oral arguments, and our review of the record confirms, that the evidence is insufficient to support Vasquez-Arenivar's conviction for tampering with physical evidence as a matter of law. Vasquez-Arenivar was convicted by a jury of tampering with physical evidence. This means that the jury determined that Vasquez-Arenivar, believing that an official proceeding was pending or about to be instituted and acting without legal right or authority, destroyed, mutilated, concealed, removed, or altered physical evidence with the intent to impair its verity or availability in the pending or prospective official proceeding. See Neb. Rev. Stat. § 28-922(1)(a) (Reissue 2008).

During the pendency of this appeal, the Nebraska Supreme Court decided *State v. Lasu*, 278 Neb. 180, 768 N.W.2d 447 (2009), wherein the court considered whether an individual commits the offense of tampering with physical evidence if he discards contraband without making an active attempt to conceal or destroy it. In *Lasu*, the defendant, in the vicinity of a police officer, threw a bag of marijuana into a large cardboard bin of snack foods, where it landed on top and was likely to be discovered. The defendant did not remove the drugs from the scene of the possessory offense or attempt to conceal the bag and actually placed the evidence where it was quite likely to be discovered, even if he hoped that the drugs might be less associated with him.

[13] In considering the issue of whether the defendant in *Lasu* had committed the offense of tampering with evidence, the Nebraska Supreme Court noted that other courts had drawn a distinction between concealing evidence and merely abandoning it and that those courts that had considered "effectively identical statutory language . . . uniformly concluded that when a defendant merely drops, throws down, or abandons evidence in the presence of law enforcement, such conduct will not

sustain a conviction for tampering with physical evidence." 278 Neb. at 184, 768 N.W.2d at 451. The court declined to extend the language of Nebraska's tampering with physical evidence statute regarding concealing or removing physical evidence to cover circumstances where the evidence at issue was made more apparent, not less, holding that the offense "does not include mere abandonment of physical evidence in the presence of law enforcement." *Id.* at 185, 768 N.W.2d at 451. See § 28-922(1)(a).

Applying the dictates set forth in *State v. Lasu, supra*, to the instant case, we find similar facts presented. The evidence in support of Vasquez-Arenivar's conviction is that he discarded a Ziploc bag containing methamphetamine on the ground with several police officers in close proximity. There is no question that Vasquez-Arenivar was without legal right or authority to dispose of physical evidence and that the methamphetamine was physical evidence within the meaning of § 28-922(1)(a). There also is no question that Vasquez-Arenivar did not destroy, mutilate, or alter the evidence when he discarded it, or otherwise do anything that would affect the veracity of the evidence. Like the defendant in *Lasu*, Vasquez-Arenivar "may have abandoned physical evidence, intending to prevent it from being found on his person—but he neither concealed nor removed it from the scene of the crime, nor did he do anything that would prevent its recovery." 278 Neb. at 186, 768 N.W.2d at 452.

[14] Therefore, the evidence is insufficient, as a matter of law, to support Vasquez-Arenivar's conviction for tampering with physical evidence. When the evidence adduced at trial is legally insufficient to sustain the conviction, a criminal charge may not be retried, but must be dismissed. *State v. Garza*, 256 Neb. 752, 592 N.W.2d 485 (1999); *State v. Jimenez*, 248 Neb. 255, 533 N.W.2d 913 (1995). Consequently, we vacate Vasquez-Arenivar's conviction and sentence for tampering with physical evidence.

CONCLUSION

We find that the district court properly denied Vasquez-Arenivar's motion to suppress; however, the evidence was insufficient, as a matter of law, to support his conviction

for tampering with physical evidence. Therefore, we affirm Vasquez-Arenivar's conviction and sentence for possession of a controlled substance with the intent to deliver, and we vacate his conviction and sentence for tampering with physical evidence.

AFFIRMED IN PART, AND IN PART VACATED.

IN RE INTEREST OF CHRISTIAN L., A CHILD UNDER 18 YEARS OF AGE. STATE OF NEBRASKA, APPELLEE, V. PEGGY L., APPELLANT.

780 N.W.2d 39

Filed February 16, 2010. No. A-09-670.

1. **Parental Rights: Constitutional Law: Due Process.** In the context of both adjudication and termination of parental rights hearings, procedural due process includes notice to the person whose right is affected by the proceeding; reasonable opportunity to refute or defend against the charge or accusation; reasonable opportunity to confront and cross-examine adverse witnesses and present evidence on the charge or accusation; representation by counsel, when such representation is required by the Constitution or statutes; and a hearing before an impartial decisionmaker.
2. **Juvenile Courts: Trial: Proof.** An adjudication hearing is the trial stage of a juvenile proceeding, in which the State must prove its allegations in the petition by a preponderance of the evidence.
3. **Parental Rights.** Adjudication is a crucial step in proceedings possibly leading to the termination of parental rights.
4. **Parental Rights: Constitutional Law: Due Process.** Parents have a fundamental liberty interest at stake, and the State cannot adjudicate a child except by procedures which meet the requisites of the Due Process Clause.
5. **Parental Rights.** Courts should be reluctant to accept any finding of a fact which is based upon the premise that if a person suffers from recognized medical conditions, such as manic depression, major depression, and seizures, then that parent is not going to give his or her children proper care.

Appeal from the Separate Juvenile Court of Douglas County: ELIZABETH CRNKOVICH, Judge. Reversed and remanded with directions to dismiss.

Julie A. Frank, of Frank & Gryva, P.C., L.L.O., for appellant.

Donald W. Kleine, Douglas County Attorney, and Paulette Merrell for appellee.

Regina T. Makaitis, guardian ad litem for appellant.

IRWIN, SIEVERS, and CARLSON, Judges.

IRWIN, Judge.

I. INTRODUCTION

Peggy L. is appealing the order adjudicating her minor child, Christian L., to be a child within the jurisdiction of the juvenile court. The State's petition alleged specifically that Christian lacked proper parental care through the fault or habits of Peggy and that Christian was at risk of harm. The only factual grounds necessitating adjudication, as stated in the petition, were that the home was in a "filthy, unwholesome condition" and that the home "did not contain enough food" for Christian. There was no mention in the petition of Peggy's mental health.

Peggy argues that her due process rights were violated when the juvenile court adjudicated Christian based on substantial evidence and testimony concerning her mental health, an issue not raised by the operative petition. The State's position on appeal is that given the above allegation in the petition, "[Peggy] had sufficient notice that her mental health was a potential issue at the adjudication since it was a possible cause for the dirty home and it potentially placed Christian at risk for harm." Brief for appellee at 13.

We conclude that the State made Peggy's mental health status a focus of its attempt to prove the allegation that Christian was at risk and lacked proper parental care through the fault of Peggy. The allegations of the petition, however, concerned only the condition of the house and the lack of appropriate food in the house, and did not place Peggy on notice that her mental health was going to be an issue. We conclude that an allegation that Christian was at risk because of Peggy's "fault" did not sufficiently encompass an assertion that a mental health condition she may have suffered from constituted fault-based conduct on her part requiring adjudication of

Christian. We reverse, and remand with directions to dismiss without prejudice.

II. BACKGROUND

The events giving rise to this action occurred in January 2009, when a Douglas County sheriff's deputy was dispatched to Peggy's residence. The officer discovered that the house "was in total disarray." The officer's testimony and photographic evidence received by the court indicate that "the house was just totally cluttered." The officer testified that there was an area in the living room set off with a series of "baby gates," and the photographs reveal that such area generally contained toys and items for Christian, who was at the time approximately 16 months of age. The officer also testified that he did not observe "any baby food in the house or any food that was readily available to a child."

The officer had Peggy transported to a hospital for a mental health observation. Christian was placed in "emergency protective custody" because of a belief that it was not safe for Christian to be in the house. The officer testified that "[d]ue to the conditions of the house" and "due to [Peggy's] mental capacity that day," there was a risk for harm to the child.

On January 2, 2009, a petition was filed seeking to have Christian adjudicated as a child within the meaning of Neb. Rev. Stat. § 43-247(3)(a) (Reissue 2008). The petition specifically alleged that Christian lacked proper parental care through the fault or habits of Peggy and that Christian was at risk of harm. The petition indicated, as factual grounds for the allegations, the filthy condition of the house and the lack of appropriate food for Christian in the house. There was no mention in the petition of Peggy's mental health.

The adjudication hearing was held on March 31 and June 26, 2009. During the course of the hearing, the court received testimony from the officer who responded to Peggy's residence, a caseworker, and a social worker from the hospital who conducted a psychological evaluation of Peggy. More specific details concerning the testimony of these witnesses will be set forth in the discussion section of this opinion, below. As noted more fully below, substantial testimony was provided, over

repeated objections of Peggy's counsel, concerning Peggy's mental health and its impact on whether Christian was at risk of harm.

At the conclusion of the adjudication hearing, the juvenile court made a finding on the record that the allegations of the petition were true. The court noted that Peggy's mental health may have contributed to the condition of the house, but also acknowledged that there had been no evidence presented in that regard. On June 30, 2009, the court entered an adjudication order finding the allegations of the petition to be true. This appeal followed.

III. ASSIGNMENTS OF ERROR

Peggy asserts, among her assignments of error, that her due process rights were violated when the juvenile court allowed substantial evidence and testimony concerning her mental health, an issue not raised by the operative petition, and that absent the evidence and testimony concerning her mental health, there was insufficient evidence to support the adjudication order. Because our discussion of these assertions resolves the appeal, we will not further or more specifically address her remaining assignments of error.

IV. ANALYSIS

Peggy asserts that the juvenile court erred in receiving, over objection, testimony concerning Peggy's mental health. Peggy asserts that the operative petition made no mention of her mental health as an issue or a ground for the sought-after adjudication and that allowing her mental health to become a focal point of the adjudication hearing violated her due process rights. She also asserts that, absent the testimony concerning her mental health, there was insufficient evidence to support the adjudication order. We agree.

[1-4] In the context of both adjudication and termination hearings, procedural due process includes notice to the person whose right is affected by the proceeding; reasonable opportunity to refute or defend against the charge or accusation; reasonable opportunity to confront and cross-examine adverse witnesses and present evidence on the charge or accusation;

representation by counsel, when such representation is required by the Constitution or statutes; and a hearing before an impartial decisionmaker. *In re Interest of Heather R. et al.*, 269 Neb. 653, 694 N.W.2d 659 (2005); *In re Interest of Mainor T. & Estela T.*, 267 Neb. 232, 674 N.W.2d 442 (2004). An adjudication hearing is the trial stage of a juvenile proceeding, in which the State must prove its allegations in the petition by a preponderance of the evidence. *In re Interest of Mainor T. & Estela T., supra*. Adjudication is a crucial step in proceedings possibly leading to the termination of parental rights. *Id.* Parents have a fundamental liberty interest at stake, and the State cannot adjudicate a child except by procedures which meet the requisites of the Due Process Clause. *In re Interest of Mainor T. & Estela T., supra*.

In this case, the operative petition indicated that the grounds for adjudicating Christian were that the condition of the house and the lack of appropriate food in the house placed him at risk of harm and were the fault of Peggy. As a result, Peggy was on notice that the condition of her house and the appropriateness of food in the house and those items' impact on Christian's well-being would be at issue, and she was on notice to be prepared to defend against those assertions.

A review of the record presented to the juvenile court, however, reveals that the bulk of the evidence presented by the State was concerned with Peggy's mental health, not with the condition of the house, the appropriateness of food available in the house, or either's relationship to Christian's well-being.

The officer who responded to Peggy's house testified about the condition of the house and described it as cluttered. He also testified that he did not observe any baby food in the house. A series of photographs was also received depicting the clutter throughout the house. His testimony, however, did not indicate that Christian was in any danger of harm because of the condition of the house or the food available in the house. Although he testified that Christian was placed in emergency custody, he testified that this was done because of "the conditions of the house . . . and due to [Peggy's] mental capacity that day."

The officer did not testify that the child was physically in the cluttered portion of the house or near any dangerous items depicted in the photographs. The testimony of the caseworker, for example, indicated that Christian generally remained in the play area (which the officer testified was set apart from the rest of the house by baby gates) and that the report the caseworker received stated the play area was "clean." One photograph depicts a pair of scissors lying on the floor in the play area, but there was no testimony concerning whether the scissors were sharp and dangerous or safety scissors, and there was no testimony to indicate that the child was ever in the play area at the same time as the scissors. Another photograph depicts an open hunting-style knife somewhere in the house, but there is no testimony concerning where the knife was or whether it was located anywhere that Christian ever had access; the testimony that Christian generally remained in the play area would suggest it was not within his reach.

Additionally, although the officer testified that he did not observe any baby food in the house and even though the petition specifically alleged the lack of appropriate food in the house as a basis for adjudication, there was no testimony offered concerning whether Christian lacked proper nutrition. Indeed, the officer acknowledged on cross-examination that, although he did not observe baby food, he did observe other food in the house and, further, that he did not have children of his own and was unaware of when children stopped using formula or eating baby food. Other than the officer's observation that there was no baby food in the house, there was no other evidence presented concerning food or proper nutrition for Christian.

The caseworker testified at length, over repeated objections, about discussions with Peggy concerning Peggy's mental health problems. She testified that Peggy left her numerous messages concerning "FBI cases," conspiracies, and allegations that neighbors were pointing shotguns at Peggy when she was in her backyard. The caseworker testified that she had an opinion about whether Christian was at risk of harm if returned to Peggy, and she testified that her opinion was based on her "meeting with Peggy, the conversations that [she] held with

Peggy, and the voice mails that Peggy has left for" her. On that foundation, the caseworker opined that Christian was at risk of harm. When Peggy's counsel objected that the opinion was being offered on a basis that did not "include anything to do with the allegations . . . which were the condition of the home," the court overruled the objection and stated that the allegation was that "the child lacks proper parental care."

The caseworker acknowledged that Christian, when taken from Peggy's care, was clean and properly clothed and appeared to be in good health. She testified that there was nothing to indicate a lack of proper nutrition. She also testified concerning the condition of the house and, as noted above, testified that Peggy had indicated that Christian generally remained in the home's play area, which was clean. When the State asked questions on redirect, over objections, they were exclusively concerned with additional testimony about Peggy's mental health status.

Finally, the State adduced testimony from a social worker from the hospital where Peggy was transported after the officer's response to her house. The social worker testified that she provided a psychological evaluation of Peggy. Her testimony, over objections, was exclusively concerning Peggy's mental health status. She testified that she filled out a "Board of Mental Health Petition" concerning Peggy's mental health status. On cross-examination, she acknowledged that Peggy's interactions with Christian were appropriate and that she did not observe any behaviors by Peggy that posed a danger to Christian.

[5] Our review of this record leads us to conclude that the State made Peggy's mental health status a focus of attempting to prove the allegation that Christian was at risk and lacked proper parental care through the fault of Peggy. The allegations of the petition, however, concerned only the condition of the house and the lack of appropriate food in the house, and did not place Peggy on notice that her mental health was going to be an issue. We also note that in *In re Interest of Amanda H.*, 4 Neb. App. 293, 306, 542 N.W.2d 79, 88 (1996), this court indicated that it was "loath to accept any finding of a fact which is based upon the premise that if a person suffers

from recognized medical conditions, such as manic depression, major depression, and seizures, then that parent is not going to give his or her children proper care," and we specifically questioned whether "a particular mental condition is the fault of the person suffering from it," such that an allegation concerning the mental health of a parent can properly be based on an assertion that the child lacks proper care through the fault of that parent.

We conclude that Peggy was not properly placed on notice that her mental health would be a basis for seeking to prove the allegation that Christian lacked proper parental care and was at risk of harm through Peggy's fault. This is both because the specific factual allegations made in the petition concerned only the condition of the house and the lack of appropriate food for Christian and did not mention anything concerning Peggy's mental health and because an allegation that Christian was at risk because of Peggy's "fault" did not sufficiently encompass an assertion that a mental health condition she may have suffered from constituted fault-based conduct on her part.

When reviewing the record de novo, we conclude that the remaining evidence in the record was not sufficient to demonstrate that Christian was at risk of harm based on the condition of the house or the lack of appropriate food. The testimony indicates only that Christian had access to the play area depicted in the photographs, which area was not cluttered, filthy, or otherwise in dangerous disarray. There was no evidence that Christian had access to or was in the cluttered and filthy portions of the house depicted in the other photographs. Although the evidence included photographs of both a pair of scissors and an open hunting-style knife, there was no testimony about whether Christian was able to access either, there was no testimony about the scissors and whether they were dangerous and sharp or merely safety scissors, there was no testimony about whether the scissors were present in the play area at any time when Christian was, and there was no testimony about the location of the knife or Christian's access to it. With respect to the food in the house, the only evidence was that although there was no baby food, there was other food,

and that Christian did not show any indications of lacking any proper nutrition.

A review of the record in this case makes it clear the State focused on demonstrating that Peggy had an extremely cluttered house and suffered from some mental health issues and that Christian was, accordingly, at risk of harm. The State failed to prove by a preponderance of the evidence that Christian was at risk or lacked proper parental care through Peggy's fault. We therefore direct that the juvenile court dismiss the proceedings, but that such dismissal shall be without prejudice to any new proceedings if the facts at the time of the filing of new proceedings justify such proceedings and if the allegations properly provide Peggy with due process.

REVERSED AND REMANDED WITH DIRECTIONS TO DISMISS.

STATE OF NEBRASKA, APPELLEE, V.
JOSHUA CURRY, APPELLANT.
790 N.W.2d 441

Filed February 23, 2010. No. A-09-536.

1. **Judgments: Speedy Trial: Appeal and Error.** As a general rule, a trial court's determination as to whether charges should be dismissed on speedy trial grounds is a factual question which will be affirmed on appeal unless clearly erroneous.
2. **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.
3. **Speedy Trial: Proof.** The State has the burden of proving that one or more of the excluded periods of time under Neb. Rev. Stat. § 29-1207(4) (Reissue 1995) are applicable if the defendant is not tried within 6 months of the filing of the information in a criminal action.
4. **Speedy Trial: Indictments and Informations: Time.** Nebraska's speedy trial statutes provide in part that every person indicted or informed against for any offense shall be brought to trial within 6 months, and such time shall be computed as provided in those statutes.
5. **Speedy Trial: Indictments and Informations.** Where a felony offense is involved, the 6-month speedy trial period commences to run from the date the indictment is returned or the information filed, and not from the time the complaint is filed.
6. **Speedy Trial.** Certain periods of delay are excluded from the speedy trial computation, including (1) the period of delay resulting from other proceedings

concerning the defendant, including but not limited to the time from filing until final disposition of pretrial motions of the defendant, including motions to suppress evidence, motions to quash the indictment or information, demurrers, and pleas in abatement, and (2) the period of delay resulting from a continuance granted at the request or with the consent of the defendant or his counsel.

7. ____. To calculate the time for speedy trial purposes, a court must exclude the day the information was filed, count forward 6 months, back up 1 day, and then add any time excluded under Neb. Rev. Stat. § 29-1207(4) (Reissue 1995) to determine the last day the defendant can be tried.
8. **Speedy Trial: Pretrial Procedure.** The plain terms of Neb. Rev. Stat. § 29-1207(4)(a) (Reissue 1995) exclude all time between the time of the filing of a defendant's pretrial motions and their final disposition, regardless of the promptness or reasonableness of the delay. Such motions include a defendant's motion to suppress evidence and a motion for discovery filed by the defendant.
9. ____: ____. In a speedy trial analysis under Neb. Rev. Stat. § 29-1207(4)(a) (Reissue 1995), the excludable period commences on the day immediately after the filing of a defendant's pretrial motion.
10. ____: ____. Final disposition under Neb. Rev. Stat. § 29-1207(4)(a) (Reissue 1995) occurs on the date the defendant's motion is granted or denied.
11. **Speedy Trial: Pretrial Procedure: Presumptions.** Pursuant to Neb. Rev. Stat. § 29-1207(4)(a) (Reissue 1995), it is presumed that a delay in hearing defense pretrial motions is attributable to the defendant unless the record affirmatively indicates otherwise.
12. **Speedy Trial: Indictments and Informations: Time.** The time chargeable to the State ceases to run or is tolled during the interval between the State's dismissal of an initial information and the filing of a second information charging the defendant with the same crime as alleged in the dismissed information.
13. ____: ____: ____. When two successive informations charge a defendant with the same crime, the time which runs on the speedy trial clock while the first information is pending must be combined with the calculations of includable and excludable time during the pendency of the second information, before the motion to discharge is filed, in order to determine whether the allowable time under the speedy trial act has run.
14. **Speedy Trial: Waiver.** The statutory right to a speedy trial is not a personal right that can be waived only by a defendant.
15. **Speedy Trial: Pretrial Procedure: Attorneys at Law.** Defense counsel's motions to withdraw are pretrial motions tolling the speedy trial clock; the speedy trial clock is tolled from when a motion to withdraw is made until new counsel is appointed.
16. **Courts: Speedy Trial.** Trial courts are to make specific findings in order to facilitate appellate review of all determinations of excludable periods under Neb. Rev. Stat. § 29-1207(4) (Reissue 1995).
17. **Speedy Trial: Indictments and Informations: Dismissal and Nonsuit.** The speedy trial clock cannot run past the date that the information was dismissed.
18. **Speedy Trial: Appeal and Error.** The speedy trial clock remains tolled until a motion to discharge is finally resolved, including during an appeal until action is taken on the appellate court's mandate.

Appeal from the District Court for Cheyenne County: DEREK C. WEIMER, Judge. Affirmed as modified.

James R. Mowbray and Kelly S. Breen, of Nebraska Commission on Public Advocacy, for appellant.

Jon Bruning, Attorney General, and Stacy M. Foust for appellee.

SIEVERS, CARLSON, and MOORE, Judges.

SIEVERS, Judge.

I. INTRODUCTION

On February 27, 2007, Joshua Curry was charged with first degree sexual assault under Neb. Rev. Stat. § 28-319(1)(c) (Reissue 1995), a Class II felony. The information alleged that Curry, being more than 19 years of age, did subject K.B., who was less than 16 years of age, to sexual penetration on July 1, 2006, in Cheyenne County, Nebraska. Upon the State's motion, this information was dismissed without prejudice on July 25, 2007. For convenience, this information shall be referred to hereinafter as the "first information."

On January 8, 2009, a complaint was filed in Cheyenne County Court charging Curry with the same offense as charged in the first information. On January 15, a preliminary hearing was held. Curry was bound over to the Cheyenne County District Court, and an information was filed on January 20. This information shall hereinafter be referred to as the "second information." On March 6, Curry filed a motion to discharge under Nebraska's speedy trial act, which motion the district court denied on May 27. Two days later, Curry filed a notice of appeal to this court from the denial of his motion to discharge.

The ultimate question in this appeal is whether the 6 months in which to bring Curry to trial on the charge of first degree sexual assault had run when he filed his motion to discharge on March 6, 2009, after excludable time periods and periods in which the speedy trial statutes were tolled are calculated. We find that the time in which to bring Curry to trial had not run,

and thus, we affirm the district court's denial of the motion to discharge, but we modify the calculation of the days remaining on the speedy trial clock as explained below.

II. ASSIGNMENT OF ERROR

Curry's single assignment of error is that "the [district] court erred in finding that time periods which caused no delay should count against [him] and be excluded from the statutory speedy trial computation" by application of Neb. Rev. Stat. § 29-1207(4)(a) and (b) (Reissue 1995).

III. STANDARD OF REVIEW

[1,2] As a general rule, a trial court's determination as to whether charges should be dismissed on speedy trial grounds is a factual question which will be affirmed on appeal unless clearly erroneous. *State v. Williams*, 277 Neb. 133, 761 N.W.2d 514 (2009). On a question of law, an appellate court is obligated to reach a conclusion independent of the determination reached by the court below. *State v. Molina*, 271 Neb. 488, 713 N.W.2d 412 (2006).

IV. PROCEDURAL AND FACTUAL BACKGROUND

This case, like most speedy trial appeals, involves the detailing of a variety of procedural events and motions during the course of the prosecution of a case and application of largely well-established principles under Nebraska's speedy trial act to determine periods of time which are excluded from the speedy trial clock. This case is somewhat more involved because the first information was dismissed, and then a second information alleging the same crime was refiled. We believe that it is most efficient to recite the pertinent procedural events in the analysis section of our opinion.

V. ANALYSIS

1. General Principles of Law for Speedy Trial Analysis

[3-11] We begin by first setting forth the fundamental principles of law which govern our analysis, the first of which is

that the State has the burden of proving that one or more of the excluded periods of time under § 29-1207(4) are applicable if the defendant is not tried within 6 months of the filing of the information in a criminal action. *State v. Groves*, 238 Neb. 137, 469 N.W.2d 364 (1991). The Nebraska Supreme Court has conveniently set forth additional applicable principles in its recent opinion in *State v. Williams*, which we quote:

> Nebraska's speedy trial statutes provide in part that "[e]very person indicted or informed against for any offense shall be brought to trial within six months, and such time shall be computed as provided in this section." Where a felony offense is involved, the 6-month speedy trial period commences to run from the date the indictment is returned or the information filed, and not from the time the complaint is filed. Certain periods of delay are excluded from the speedy trial computation, including: "(a) The period of delay resulting from other proceedings concerning the defendant, including but not limited to . . . the time from filing until final disposition of pretrial motions of the defendant, including motions to suppress evidence, motions to quash the indictment or information, demurrers and pleas in abatement . . . . (b) The period of delay resulting from a continuance granted at the request or with the consent of the defendant or his counsel." To calculate the time for speedy trial purposes, a court must exclude the day the information was filed, count forward 6 months, back up 1 day, and then add any time excluded under § 29-1207(4) to determine the last day the defendant can be tried.
>
> The plain terms of § 29-1207(4)(a) exclude all time between the time of the filing of a defendant's pretrial motions and their final disposition, regardless of the promptness or reasonableness of the delay. Such motions include a defendant's motion to suppress evidence and a motion for discovery filed by the defendant. The excludable period commences on the day immediately after the filing of a defendant's pretrial motion. Final disposition under § 29-1207(4)(a) occurs on the date the motion is "'"granted or denied."'" Pursuant to § 29-1207(4)(a), it is

> presumed that a delay in hearing defense pretrial motions is attributable to the defendant unless the record affirmatively indicates otherwise.

277 Neb. at 140-41, 761 N.W.2d at 522.

2. Treatment of Successive Informations Charging Same Crime

[12,13] This case involves a dismissed information, followed by a lapse of nearly 18 months before the filing of the second information charging Curry with the identical crime. It is clear that the time chargeable to the State ceases to run or is tolled during the interval between the State's dismissal of the initial information and the filing of the second information charging the defendant with the same crime as alleged in the dismissed information. See *State v. French*, 262 Neb. 664, 633 N.W.2d 908 (2001). Thus, when the first information against Curry was dismissed without prejudice on July 25, 2007, and a second information charging the same crime was filed on January 20, 2009, the running of the speedy trial clock between those two dates was tolled, and this timeframe is not chargeable to the State. However, *French, supra*, makes it clear that the time which ran on the speedy trial clock while the first information was pending must be combined with the calculations of includable and excludable time during the pendency of the second information, before the motion to discharge was filed, in order to determine whether the allowable time under the speedy trial act has run.

The original information in this case was filed on February 27, 2007. For speedy trial calculation purposes, we exclude the day the information was filed, count forward 6 months, and back up 1 day. *State v. Williams*, 277 Neb. 133, 761 N.W.2d 514 (2009). Therefore, under the first information, Curry had to be tried by August 27. However, the first information was dismissed on July 25, ending that prosecution. Thus, ignoring excluded time periods for the moment, it is clear that the speedy trial clock had not run when the second information charging the same offense was filed January 20, 2009. Therefore, the time period between the dismissal of the first information on July 25, 2007, and the filing of the second information, using

January 19, 2009, as the last day, produces a total of 544 excluded days—and we have included in our calculation the fact that 2008 was a leap year.

The trial court determined that there were 24 days excluded from the speedy trial clock during the pendency of the first information, plus 32 days remaining on the speedy trial clock when the first information was dismissed on July 25, 2007. Therefore, the trial court found that there were 56 days left on the speedy trial clock when the second information was filed on January 20, 2009.

3. First Information and Speedy Trial Clock

(a) Are Days Excluded Because of First Counsel's Motion to Withdraw?

While Curry's single assignment of error can be seen as overly generalized because it does not specify exactly how he claims the trial court went astray in its calculation, the argument section of Curry's brief does inform us of the portions of the trial court's calculation he alleges were error. With respect to the first information, Curry argues that the trial court erred when it found that 8 days were excludable due to the first attorney's motion to withdraw as counsel. We address this argument first.

The record shows that Curry's first attorney filed a motion to withdraw on April 26, 2007, alleging simply that he "has a conflict of interest in representing [Curry]." The trial court's journal entry of May 7 recites that a hearing was held on this motion on May 4; that Curry was present, as was a deputy county attorney; and that the first attorney appeared telephonically. The journal entry recites that the attorney represented both Curry and another individual, that the two clients were "involved in an altercation in jail," and that as a result, the attorney "believe[d] that he ha[d] a conflict in representing either party, and wishe[d] to avoid any appearance of impropriety due to representing either or both part[ies]." The trial court granted the motion to withdraw. There is no record of what was said at the hearing on May 4, beyond what can be gleaned from the journal entry of May 7. On May 10, the trial court appointed another lawyer to represent Curry.

[14] Curry's basis for his claim that these 8 days were wrongfully excluded by the trial court is that he "was without counsel once counsel pursued motions to withdraw without [a] sound basis." Brief for appellant at 6 (emphasis omitted). In support of this claim, Curry cites us to *State v. McHenry*, 268 Neb. 219, 682 N.W.2d 212 (2004). In that case, the Supreme Court cited *Townsend v. Superior Court*, 15 Cal. 3d 774, 543 P.2d 619, 126 Cal. Rptr. 251 (1975), in support of its finding that it has been recognized that defense counsel's authority to waive a defendant's statutory right to a speedy trial cannot extend to excuse "'"representation [that] is so ineffective that it can be described as a 'farce and a sham.'"'" *McHenry*, 268 Neb. at 232, 682 N.W.2d 225**.** Initially, we point out the fact that obviously distinguishes *Townsend, supra*, from the instant case—there is no waiver of the right to a speedy trial in Curry's case, and a waiver is different from calculating excluded time periods. *McHenry, supra*, was a postconviction case in which it was asserted that defense counsel was ineffective for filing a motion that resulted in a 2-month continuance even though the defendant refused to sign a waiver of speedy trial rights as his trial counsel had requested. The Supreme Court, as a predicate to the finding of no deficient performance of counsel, said it is clear that the statutory right to a speedy trial is not a personal right that can be waived only by a defendant. The Supreme Court reasoned that the request for a continuance, despite defendant's objection to seeking such, was not the sort of "farce or sham" representation that would result in the continuance time's not being excluded from the speedy trial clock, given that the continuance was for only 2 months in a complex murder trial involving two codefendants.

We understand Curry's application of *McHenry, supra*, to his case to be that the motion of first defense counsel to withdraw, for which the trial court found 8 excludable days, was a "farce or sham" such that no excludable time should be charged to Curry. We have set forth above what the record reveals about the motion of Curry's first attorney to withdraw. Curry argues, as we understand it, that because the motion to withdraw was without a sound basis and was a sham, Curry was without counsel from the time the motion was made.

We reject the argument for several reasons. First, there is no record of the hearing at which the motion was taken up, and it is incumbent on Curry as the appellant to present a record supporting his claim of error. Absent such, as a general rule, the decision of the lower court will be affirmed. *State v. Back*, 241 Neb. 301, 488 N.W.2d 26 (1992). Second, the district court's recital of the reason for counsel's request to withdraw certainly does not allow us to conclude that the motion to withdraw was a farce or sham such that the time for the resolution of the motion should not have been charged to Curry and excluded from the speedy trial clock. The issue then becomes simply whether a motion of defense counsel to withdraw is a "period of delay resulting from other proceedings concerning the defendant" under § 29-1207(4)(a) and is excluded from the speedy trial clock.

In *State v. Rieger*, 13 Neb. App. 444, 695 N.W.2d 678 (2005), we noted that the question of whether a motion of counsel to withdraw because of a conflict should stop the running of the speedy trial clock, and how any time would be calculated, had not been addressed by either appellate court. While our *Rieger* decision was rendered under the interstate Agreement on Detainers requiring trial within 180 days, ultimately *Rieger* helps answer the question posed above. In our *Rieger* decision, we found as follows:

> We now hold that such a motion does toll the running of the 180 days under the [interstate Agreement on Detainers]. We think it obvious that as a matter of fundamental fairness, when a motion to withdraw is filed on the ground that the defendant's lawyer has a conflict of interest, no action of consequence to the defendant can occur in the pending case until the motion is resolved. Other jurisdictions have held that counsel's motions to withdraw are pretrial motions tolling the speedy trial clock. See *U.S. v. Hammad*, 902 F.2d 1062 (2nd Cir. 1990) (delay, occasioned when court was informed by defense counsel that he intended to withdraw as counsel, was excludable under self-executing provision of federal speedy trial act for delay resulting from pretrial motion). See, also, *U.S. v. Joost*, 133 F.3d 125 (1st Cir. 1998); *U.S. v. Parker*, 30

F.3d 542 (4th Cir. 1994); *U.S. v. Driver*, 945 F.2d 1410 (8th Cir. 1991).

13 Neb. App. at 454-55, 695 N.W.2d at 687-88.

[15] The Nebraska Supreme Court granted a petition for further review of our *Rieger* decision. In *State v. Rieger*, 270 Neb. 904, 708 N.W.2d 630 (2006), the Supreme Court reversed our decision on the basis that our use of the 6 months provided in Nebraska's speedy trial act was incorrect when the interstate Agreement on Detainers provided that the defendant shall be brought to trial within 180 days after the prosecutor and court with jurisdiction receive the defendant's proper request for disposition of untried charges. However, because the 5 days we had excluded from the running of the time in which to bring the defendant to trial because of his attorney's motion to withdraw did not impact the result, the Supreme Court declined to address the defendant's claim that we had erroneously excluded time attributable to his counsel's motion to withdraw. Thus, at this juncture, the only published Nebraska appellate court decision on whether time attributable to defense counsel's motion to withdraw is still our holding in *State v. Rieger*, 13 Neb. App. 444, 695 N.W.2d 678 (2005). We believe that our rationale from our *Rieger* decision for excluding the time for the resolution of defense counsel's motion to withdraw is still sound. Plus, we note additional authority from other jurisdictions, not cited in our *Rieger* opinion, that holds that the speedy trial clock is tolled from when a motion to withdraw is made until new counsel is appointed. See, *U.S. v. Oberoi*, 295 F. Supp. 2d 286 (W.D.N.Y. 2003); *Linden v. State*, 598 P.2d 960 (Alaska 1979); *State v. Brown*, 157 N.H. 555, 953 A.2d 1174 (2008); *State v. Younker*, No. 07CA18, 2008 Ohio App. LEXIS 5736 (Ohio App. Dec. 16, 2008).

Accordingly, we hold that the speedy trial clock is stopped on the day following the filing of counsel's motion to withdraw—in this case, April 27, 2007. While the general rule is that the excluded time period for a defendant's motion ends on the day the motion is granted or denied, see *State v. Williams*, 277 Neb. 133, 761 N.W.2d 514 (2009), we find that in the case of a motion of counsel to withdraw, the clock does not start again until new counsel has been appointed. See, *Oberoi,*

supra; *Brown, supra*; *Younker, supra.* This exception to the general rule from *Williams, supra*, that the excluded time for defendants' motions ends when such are granted or denied is consistent with our rationale in *Rieger* that the prosecution is essentially halted by the motion to withdraw and cannot effectively resume until new counsel is in place.

In this case, the trial court granted the motion to withdraw on May 7, 2007, but the court did not appoint new counsel until its order of May 10 that recites: "On the basis of the financial affidavit presented to the Court the application for court appointed counsel is approved." Although our record does not contain such application from Curry, it is a fair inference that it was filed at or about the time of the court's order of May 7 allowing the withdrawal of Curry's first attorney. Thus, the motion to withdraw was not completely resolved until the trial court's order appointing substitute counsel on May 10. Therefore, we find, as a matter of law, that the timeframe that is excluded from the speedy trial clock with regard to the first information for the motion of Curry's first counsel to withdraw began April 27 and ended May 10—a total of 14 days, not 8 days as found by the trial court.

(b) Additional Excludable Days
Regarding First Information

With reference to the first information, the trial court found that there were, in addition to the 8 days it excluded for the motion of counsel to withdraw, "[t]welve (12) days for 2nd Motion to take Depositions" and "[t]wo (2) days for Motion in Limine and other pre-trial motions" excluded from the running of the speedy trial clock. Curry makes no complaint of such exclusions, and we find that such were properly excluded.

Next, Curry asserts that the trial court did not properly deal with the State's motion to continue in its speedy trial calculation, because the trial court made "no finding that the continuance was granted upon good cause shown." Brief for appellant at 7. While we ultimately conclude that the treatment of the continuance does not involve whether there was good cause for such, the fact is that the trial court did not address this motion for continuance in its order. The record shows that on June 20,

2007, the State moved "to continue the Jury Trial . . . for the reason that court reporters [were] unavailable for depositions at [that] time" and "[a]dditional time [was] needed to obtain depositions prior to trial." In a journal entry file stamped June 28, the court recited that a hearing with all counsel had occurred on June 26; the journal entry stated, "The Court, being duly advised, finds that the motion is granted and that the Jury Trial is continued to [the] 8th day of August 2007 . . . ." In the trial court's rather detailed order overruling the motion to discharge, there is no mention whatsoever of this motion to continue; thus, in the trial court's order, the speedy trial clock was not tolled for the State's motion to continue. Defense counsel asserted at oral argument that there was no showing of "good cause" and that as a result, no time could be excluded for the State's motion for continuance.

[16] The "catchall" provision of § 29-1207(4)(f) provides for excludable time for "[o]ther periods of delay not specifically enumerated [in § 29-1207(4)], but only if the court finds that they are for good cause." It is clear that trial courts are to make specific findings in order to facilitate appellate review of all determinations of excludable periods under § 29-1207(4). See *State v. Williams*, 277 Neb. 133, 761 N.W.2d 514 (2009). Therefore, the trial court's order is deficient in its failure to make findings regarding this motion—but the record shows that the motion for continuance is not properly resolved under the "catchall" provision quoted above.

The record before us includes the hearing on the State's motion that occurred on June 26, 2007, with both counsel as well as Curry present. The record of this proceeding covers seven pages; thus, we summarize what occurred. Both counsel were in agreement on the need to take depositions of the alleged victim and another witness and that the earliest a court reporter was available was July 11—the then-set trial date being July 18. Both counsel were of the view that such trial date was too close to the July 11 depositions, such that additional time would be needed to study the results of the depositions, plus of the view that it was possible that other issues would be generated by the depositions that could not be taken until July 11. After these statements by counsel, an

extensive discussion followed about finding a new trial date in early August. It is clear from his responses when questioned by the trial court that Curry understood the need for the continuance. Moreover, a fact finder could easily conclude from the record of this hearing that Curry was knowingly agreeable to the proposed continuance. The matter was left, at the conclusion of the hearing on June 26, that counsel would jointly discuss the status of other pending cases on the docket and that they would meet the next day informally with the trial judge about what they had concluded regarding a trial date. There is no record of that informal meeting, but on June 28, the court filed a journal entry granting the continuance and setting the matter for trial on August 8. We find that it is beyond dispute that Curry's counsel, if not Curry personally, consented to the granting of the State's motion for continuance. However, on July 25, the State filed a motion to dismiss "due to witness unavailability" which was granted "without prejudice" on that same date.

As we have outlined above, such dismissal tolled the speedy trial clock on July 25, 2007. However, Curry argues that trial was set for July 5 and that "any period of delay after July 5 . . . was attributable to the State's motion to continue." Brief for appellant at 8. Curry's argument that such time is chargeable to the State is based on a lack of a finding of good cause for the continuance under § 29-1207(4), but it ignores the transcript of the hearing at which the defense consented to the continuance. Initially, we note that in an order of March 6, the court had set July 5 as the last day to tender "any negotiated plea" and decreed that "a Jury Trial [was thereby] set for the 18th day of July." In the final analysis, Curry's argument ignores § 29-1207(4)(b), which provides for the exclusion of "[t]he period of delay resulting from a continuance granted at the request or with the consent of the defendant or his counsel." After examination of the proceedings of June 26, it is clear that the State's motion for continuance was granted with the consent of Curry's counsel, if not also by Curry himself. Thus, we turn to how much time is excluded from the speedy trial clock because of the mutually agreed-upon continuance.

The State's motion for continuance was filed June 20, 2007, and while such was ultimately granted and the trial was reset for August 8, the first information under which the case was proceeding was dismissed on July 25. *State v. Turner*, 252 Neb. 620, 564 N.W.2d 231 (1997), teaches that ordinarily, the period of time from the filing of a motion to continue until the new trial date would be excluded under either § 29-1207(4)(c)(i) or § 29-1207(4)(b). In *Turner, supra*, the court dealt first with the State's motion for a continuance because results from the testing of sperm samples for DNA were not yet available. Section 29-1207(4)(c)(i), providing for tolling of the speedy trial clock when necessary evidence is unavailable despite the State's due diligence, was used in *Turner, supra*, to exclude the 74 days from the day after the filing of the motion until the new trial date—January 5 to March 20, 1995. Helpfully, *Turner, supra*, also dealt with the defendant's motion to continue filed May 11 to secure an independent DNA analysis and a second such motion from the defendant filed July 11, which resulted in a trial date of November 13, when the trial actually began. The *Turner* court relied on § 29-1207(4)(b), noting that a period of delay resulting from a continuance granted at the request or with the consent of the defendant or his counsel is excluded from the speedy trial calculation. Thus, the court found, "[T]he entire period from the date of the first motion for continuance (May 11) until the time of trial (November 13) is properly excluded. This totals 186 days." *Turner*, 252 Neb. at 632, 564 N.W.2d at 239. (Since the *Turner* decision, there has been a change in that the count for excluded days now is to begin with the day following the filing of the motion, rather than with the date the motion was filed as was done in *Turner.* See *State v. Baker*, 264 Neb. 867, 652 N.W.2d 612 (2002). See, also, *State v. Feldhacker*, 11 Neb. App. 608, 657 N.W.2d 655 (2003), *affirmed as modified* 267 Neb. 145, 672 N.W.2d 627 (2004).)

[17] Accordingly, applying *Turner, supra*, we would begin the count of excluded days for the mutually agreed-upon continuance under § 29-1207(4)(b) from the day after the State's motion to continue was filed, June 21, 2007, and continue to exclude days until the new trial date, August 8—except for the

fact that the information was dismissed on July 25. Clearly, the speedy trial clock cannot run past the date that the information was dismissed, as there was then no prosecution pending. See *State v. French*, 262 Neb. 664, 633 N.W.2d 908 (2001). As a result, there were 35 days attributable to the motion for continuance during which the speedy trial clock was tolled, from June 21 to July 25, and we include those days in our final calculation, remembering that a correct result (overruling the motion to discharge) will not be reversed when the trial court's reasoning is incorrect (trial court's speedy trial count was incorrect). See *State v. Tlamka*, 244 Neb. 670, 508 N.W.2d 846 (1993), *abrogated on other grounds, State v. Morris*, 251 Neb. 23, 554 N.W.2d 627 (1996).

4. Second Information and Speedy Trial Clock

As previously outlined, the law is that when a second information is filed charging the defendant with the same crime as was charged in the first information, the speedy trial clock is tolled between the dismissal of the first information and the filing of the second information. Nonetheless, there is only one 6-month period of time in which the State must bring the defendant to trial under the speedy trial act. Thus, the excluded timeframes during the pendency of both informations are added together to determine whether the speedy trial clock has run on the second information. We now turn to the procedure and facts surrounding the second information.

Curry asserts that when there is a complaint in county court followed by a bindover to district court, "foregoing [sic] a direct filing [in district court] would be a delay attributable to the State." Brief for appellant at 8. Curry cites us to *State v. Gingrich*, 211 Neb. 786, 320 N.W.2d 445 (1982), for his proposition that "unreasonable delay occurring prior to the filing of an information will be considered in determining whether [a] defendant has been denied speedy trial." Brief for appellant at 9. Admittedly, a portion of the quoted proposition is found in *Gingrich, supra.* But, it is set forth only for the purpose of determining whether there had been a denial of the constitutional right to a speedy trial, not with respect to the statutory right. In this case, Curry asserts only his statutory

rights under Nebraska's speedy trial act. Thus, *Gingrich, supra*, and similar cases are not on point. Our analysis is undertaken only with respect to excludable timeframes under § 29-1207, as it was with respect to the first information, as no constitutional speedy trial issue has been raised in the court below or on appeal. As said earlier, we hold that the speedy trial clock is tolled for the timeframe between the dismissal of the first information and the filing of the second information. Curry concludes his brief with the statement that "[p]eriods of delay attributable to [Curry] total only thirty-four (34) days" and the assertion that as a result, the speedy trial clock had run when he filed his motion to discharge on March 6, 2009; we assume Curry's 34 days encompass both informations. We have already dealt with excludable time periods for the first information.

With regard to the second information, the trial court found only 4 days excludable due to Curry's motion to review bond filed January 26, 2009, that was noticed for hearing on January 30. The trial court said that no order could be found on such motion showing that Curry was heard on the motion. The trial court "[found] it improper to impute any further time to [Curry] for purposes of calculation of speedy trial time than that time that would otherwise have been properly imputed to him assuming that he had been heard on January 30." Thus, the court limited the excludable time to the 4 days beginning on January 27 and ending on January 30. While it is correct that there is no order in our record evidencing a ruling on such motion, the court's rationale for limiting the excludable time to 4 days is incorrect. The final disposition under § 29-1207(4)(a) of a defendant's motion occurs on the date the motion is "'"'granted or denied,'"'" see *State v. Williams*, 277 Neb. 133, 141, 761 N.W.2d 514, 522 (2009), not when the motion is heard. Thus, the trial court was clearly wrong as a matter of law in using the date that the motion to review bond was to be heard as the end of the excludable time.

[18] In the end, the record before the district court, as well as before us, fails to show that the motion was granted or denied. This means that on the record produced by the parties,

the motion to review bond had not been finally determined when Curry filed his motion to discharge on March 6, 2009. Consequently, the speedy trial clock was tolled from January 27 through March 6, when the motion to discharge was filed, a total of 39 days. And the speedy trial clock remains tolled until the motion to discharge is finally resolved, including during the appeal until action is taken on our mandate, see *State v. Miller*, 9 Neb. App. 617, 616 N.W.2d 75 (2000).

5. Final Speedy Trial Clock Calculation

We have proceeded to this point by narrative, and from such we have constructed the following timeline:

First Information	
February 27, 2007	First information filed
August 27, 2007	Last day, without excludable days
March 6, 2007	Curry's motion for disclosure filed
March 8, 2007	Motion ruled on: *1 day excluded*
April 26, 2007	First lawyer moves to withdraw
May 7, 2007	Motion to withdraw granted
May 10, 2007	Second lawyer appointed: *14 days excluded*
June 20, 2007	State files motion to continue
June 28, 2007	Continuance granted, by agreement; new trial date set for August 8
July 25, 2007	State moves to dismiss; granted same day; *35 days excluded for continuance* (June 21 to July 25), *plus 33 days left on speedy trial clock when information dismissed* (July 26 to August 27)
	Days left at dismissal: 1 + 14 + 35 + 33 = *83 days excluded*
July 25, 2007	Speedy trial clock tolled
Second Information	
January 20, 2009	Second information filed; speedy trial clock begins again; add 83 days to January 20—last day to begin trial is April 12, 2009

January 26, 2009	Curry files motion to review bond; not granted or denied
January 27, 2009	Excluded days begin for motion to review bond
March 6, 2009	Motion to discharge filed; 39 days excluded due to motion to review bond (January 27 to March 6)
As of March 6, 2009	Last day to begin trial is April 12, 2009, plus 39 days for motion to review bond; last day to begin trial is May 21

VI. CONCLUSION

The trial court found that as of the filing of the motion to discharge on March 9, 2009, the State had 11 days, or until March 20, in which to bring Curry to trial. Initially, we note the court's error in stating that March 9 was the date of the motion to discharge when it was actually March 6. Regardless, we find that such calculation was in error in that the State had until April 12, plus 39 excluded days for the motion to review bond, or until May 21, in which to bring Curry to trial, given that his motion to discharge was filed on March 6. Thus, there are 76 days remaining on the speedy trial clock when the district court takes action on our mandate. Accordingly, the trial court did not err in overruling the motion for discharge, but we modify its decision to add additional days to the speedy trial clock as outlined herein. The time during which a defendant's motion is on appeal to an appellate court is excludable time for speedy trial purposes. *State v. Hayes*, 10 Neb. App. 833, 639 N.W.2d 418 (2002).

AFFIRMED AS MODIFIED.

TED THIEMAN, AN INDIVIDUAL, APPELLEE, V.
CEDAR VALLEY FEEDING COMPANY, INC.,
A NEBRASKA CORPORATION,
ET AL., APPELLANTS.
789 N.W.2d 714

Filed February 23, 2010. No. A-09-639.

1. **Injunction: Equity: Appeal and Error.** An action for injunction sounds in equity. In an appeal of an equity action, an appellate court tries the factual questions de novo on the record and reaches a conclusion independent of the findings of the trial court.
2. **Zoning: Ordinances.** A zoning regulation may not operate retroactively to deprive a property owner of his previously vested rights.
3. **Zoning: Ordinances: Proof: Time.** The burden is upon the landowner asserting a right of nonconforming use to prove that his use existed prior to the effective date of the ordinance.
4. **Zoning: Ordinances.** Ordinances which limit and plan for the elimination of nonconforming uses are generally considered a proper exercise of a municipality's power.
5. ____: ____. Zoning laws should be given a fair and reasonable construction in light of the manifest intention of the legislative body, the objects sought to be attained, the natural import of the words used in common and accepted usage, the setting in which they are employed, and the general structure of the law as a whole.
6. ____: ____. Where the provisions of a zoning ordinance are expressed in common words of everyday use, without enlargement, restriction, or definition, they are to be interpreted and enforced according to their generally accepted meaning.
7. **Judgments: Appeal and Error.** Where the record adequately demonstrates that the decision of the trial court is correct, although such correctness is based on a ground or reason different from that assigned by the trial court, an appellate court will affirm.

Appeal from the District Court for Boone County: MICHAEL J. OWENS, Judge. Affirmed.

Jeffery T. Peetz and Monica L. Freeman, of Woods & Aitken, L.L.P., for appellants.

Gregory D. Barton, of Harding & Schultz, P.C., L.L.O., for appellee.

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

CASSEL, Judge.

INTRODUCTION

In this appeal from a permanent injunction enforcing zoning regulations against a livestock feeding operation, we first consider whether the scope of a nonconforming use is dictated by the physical capacity of the premises or the actual number of cattle confined. We conclude that under the specific language of the regulations, actual usage controls. We then review the evidence de novo to determine whether such usage is limited to 5,000 cattle, as the district court concluded, or a greater number, as advocated by the operation. We find the evidence supporting the lesser number more persuasive, and accordingly, we affirm.

BACKGROUND

Richard Van Ackeren is part owner and manages the operations of Cedar Valley Feeding Company, Inc., and Van Ackeren Farms, Ltd. Van Ackeren's siblings own the remaining shares of these two entities. The first entity is a cattle feeding company. The second owns and leases the land on which the feeding operation is located. We refer to Van Ackeren and the two entities collectively as "Cedar Valley."

Ted Thieman owns real property in Boone County, where Cedar Valley's operations are located. Thieman filed a complaint pursuant to Neb. Rev. Stat. § 23-114.05 (Reissue 2007) as an "owner . . . of real estate within the district affected by the [zoning] regulations" to request that Cedar Valley be enjoined from violating the Boone County zoning regulations. Thieman claimed that the regulations prohibit Cedar Valley from having more than 5,000 cattle on its premises.

The zoning regulations, which became effective on October 1, 1999, included regulations governing livestock feeding operations. The regulations classified livestock feeding operations based on the number of animal units in the operation and contained setback requirements. Where a livestock owner could not comply with the setback requirements, the regulations required that the owner obtain a conditional use permit. The regulations also required the owner to obtain a waiver of

the setback requirements in order to receive the conditional use permit.

The regulations additionally provided for the nonconforming use of land where the use was in existence prior to the effective date of the zoning regulations. Article 11 of the applicable regulations, in pertinent part, provided as follows:

> Section 2. Non-Conforming Uses of Land.
>
> Where at the effective date of adoption or amendment of these regulations, lawful use of land exists that is made no longer permissible under the terms of this resolution as enacted or amended, such use may be continued so long as it remains otherwise lawful, subject to the following provisions:
>
> 2.1 No such non-conforming use shall be enlarged or increased, nor extended to occupy a greater area of land than was occupied at the effective date of adoption or amendment of these regulations;
>
> . . . .
>
> 2.3 If any such non-conforming use of land ceases for any reason for a period of more than twelve (12) months, any subsequent use of such land shall conform to the regulations specified by this resolution for the district in which such land is located.

The "Rules and Definitions" section of the index defined the term "enlargement" as "the expansion of a building, structure[,] or use in volume, size, area, height, length, width, depth, capacity, ground coverage, or in number." The regulations also required any livestock feeding operation "expanding to the next level" which did not meet the new setback requirements to obtain a conditional use permit. Under the regulations, an operation with 5,000 animal units is at a different level than an operation with more than 5,000 animal units.

The zoning administrator sent out a questionnaire to determine the extent of nonconforming uses in the context of livestock feeding operations. Not all operations received this questionnaire, and the questionnaires were sent to different operations at different times. The questionnaire, which the parties also described as the "no-fee" form, as completed and returned by Cedar Valley, stated as follows:

Date 9-26-00

. . . .

To protect residents, farms and livestock operations of Boone County, the Boone County Zoning Regulations, adopted on _____, 1999, requires any size livestock or poultry operation (confinement or open lot) to complete a no-fee registration permit.

Do you own any livestock or poultry? YES or NO [YES was circled.]

If yes, enter an average number of the livestock or poultry you have had in your operation at any one time.

Beef Cattle 5,000

Horses 7

. . . .

/s/ Richard Van Ackeren

Signature of Registrant

In 2007, Cedar Valley filed an application for a conditional use permit to construct waste control facilities and to expand its operation to 8,000 cattle, at least in part, by building additional pens. The Boone County Planning Commission and Board of Commissioners approved the application on the condition that Cedar Valley obtain a waiver of the distance requirements. Cedar Valley was not able to do so and withdrew the application. However, at trial, Van Ackeren testified that at the time of the application, Cedar Valley's facilities had a grandfathered capacity of 7,500 cattle. The 2007 application for a conditional use permit does not state the operation's existing capacity.

In 2008, Cedar Valley applied for a conditional use permit for the purpose of constructing waste control facilities only. The application specified that Cedar Valley no longer sought to construct additional pens but specifically reserved the right to "maintain the present animal capacity of such operations that existed on September 13, 1999, the date of enactment of the Boone County Zoning Regulations." The permit was granted.

The evidence adduced at trial indicated that Cedar Valley's confinement pens had a physical capacity in excess of 5,000 cattle but were not normally filled to capacity. Van Ackeren

testified that the first 17 pens were installed in 1978. In 1988, 14 additional pens were installed. According to a 1988 letter Van Ackeren wrote to the other owners of Cedar Valley, the new pens (then yet to be built) would increase the operation's capacity to "5,000 head." Ten additional pens were installed in 1997, and no new pens were constructed thereafter.

Van Ackeren testified that he calculated the maximum capacity of all these pens at 7,500 cattle. Van Ackeren stated that he determined the capacity of his pens based on industry standards by calculating the total amount of "fence line bunk" (5,650 feet) and dividing it by 9 to 10 inches per head of cattle. By our calculations, this would provide Cedar Valley with a maximum capacity of 6,780 to 7,533 head of cattle. Cedar Valley also provided an exhibit which showed 5,582.5 "feet of bunk" and which, based upon 9 inches per animal, stated a capacity of "7444" animals.

The parties disputed the actual number of cattle that were on the property immediately before the zoning regulations took effect and thereafter. Van Ackeren was not able to provide any records kept by Cedar Valley regarding the number of cattle that were on the property immediately prior to when the zoning regulations went into effect or at any other time in the surrounding years. Van Ackeren testified that he had stored these records electronically but that an employee had deleted them. Van Ackeren also testified that in general, the number of cattle in a pen depended on how many cattle a particular customer would place in a pen, that not all customers filled their pens to capacity, and that he would not place the cattle of two separate customers in the same pen. Van Ackeren also explained that the number of cattle in the operation fluctuated by season.

In addition to the "no-fee" form, the evidence included records from the Nebraska Department of Environmental Quality (DEQ) which list the number of cattle on the property as specified by Cedar Valley. In the DEQ's initial inspection of Cedar Valley on May 19, 1999, the data sheet stated that the total number of animal units on the property consisted of 5,000 feeder cattle. The DEQ inspector stated that this information was provided by Cedar Valley and that this number was carried forward to subsequent inspections. The inspector explained that

if Cedar Valley had wished to increase the number of cattle in the operation, it would have had to submit an application for a construction and operating permit. In an October 11, 2000, inspection, Cedar Valley proposed to add 2,500 more cattle to existing pens and expand to include 2,500 additional cattle but did not ultimately expand at that time. In three separate documents signed by Van Ackeren and submitted to the DEQ after the zoning regulations went into effect, the number of existing cattle was listed as 5,000. One of these documents is a 2007 application for construction approval in which Cedar Valley requested to increase its capacity from 5,000 cattle to 8,000 cattle, which application was approved by the DEQ. In a fourth document received by the DEQ on November 16, 2000, and signed by Van Ackeren, the "maximum number of Livestock" was listed as 5,000.

Van Ackeren testified that he did not know who told the DEQ that Cedar Valley had a capacity of 5,000 cattle. However, he admitted that he had never told the DEQ Cedar Valley actually had a capacity of 7,500 cattle and that he had signed the documents which stated Cedar Valley had a capacity of 5,000 cattle. Van Ackeren testified that he believed Cedar Valley would not have to get a permit from the DEQ to have a capacity of 7,500 cattle unless the DEQ found that Cedar Valley was otherwise in violation of the DEQ regulations. Van Ackeren also testified that he believed that the DEQ's use of the number 5,000 was incorrect and that his 2007 request to expand Cedar Valley was actually a correction.

The district court determined that at the time the zoning regulations went into effect on October 1, 1999, the existing use of Cedar Valley was "a maximum of 5,000-head feeder cattle operation" and enjoined Cedar Valley from maintaining more than 5,000 head of cattle on its premises as a nonconforming use.

This timely appeal followed.

ASSIGNMENTS OF ERROR

Cedar Valley assigns, reordered and restated, that the district court erred in (1) finding that Cedar Valley failed to prove that the grandfathered capacity of its cattle feeding operation was

7,500 head of cattle when the zoning regulations went into effect; (2) finding that Cedar Valley's cattle feeding operation had a grandfathered maximum of 5,000 head of cattle; (3) interpreting and applying the zoning regulations to require identification of a specific number of cattle on the premises on the date the zoning regulations went into effect; (4) making a finding of fact that when the zoning administrator accepted Van Ackeren's claim that Cedar Valley was operating at an average maximum capacity of 5,000 at the time the zoning regulations were passed, Cedar Valley received a grandfathered capacity of 5,000; and (5) basing its judgment on forms from the DEQ, because they are not probative of Cedar Valley's grandfathered capacity.

STANDARD OF REVIEW

[1] An action for injunction sounds in equity. In an appeal of an equity action, an appellate court tries the factual questions de novo on the record and reaches a conclusion independent of the findings of the trial court. *Conley v. Brazer*, 278 Neb. 508, 772 N.W.2d 545 (2009).

ANALYSIS

The sole issue we must address in this appeal is the extent of Cedar Valley's right to a nonconforming use of its real property stemming from its use of the property before the zoning regulations went into effect. We briefly recount the general rules that govern nonconforming uses.

[2,3] It is fundamental that a zoning regulation may not operate retroactively to deprive a property owner of his previously vested rights, that is, a zoning regulation cannot deprive the owner of a use to which his property was put before the zoning regulation became effective. *Board of Commissioners v. Petsch*, 172 Neb. 263, 109 N.W.2d 388 (1961). The burden is upon the landowner asserting a right of nonconforming use to prove that his use existed prior to the effective date of the ordinance. *Hanchera v. Board of Adjustment*, 269 Neb. 623, 694 N.W.2d 641 (2005).

In order to determine the nature of Cedar Valley's right to a nonconforming use, we must first determine whether the actual

physical capacity of the facility or the extent of its use controls the extent of the nonconforming use that is exempted from the zoning regulations. We must answer this question because, from our review of the evidentiary record, it is apparent that the actual capacity of the facility was different from the number of animals that were placed in confinement.

Zoning regulations can limit the extent of the nonconforming use to the scale of operations existing at the time the regulation was enacted and, in the instant case, limit the use to the number of cattle actually utilized in the operation. An ordinance which "confine[s] a nonconforming use to its scale of operations at the time of the enactment of the restrictive ordinance . . . will prohibit an extension or an increase in intensity of a nonconforming use." 101A C.J.S. *Zoning and Land Planning* § 186 at 268 (2005).

[4-6] While no published Nebraska case has addressed this precise question, the general principles explained in several Nebraska cases focus our attention on the language of the zoning regulations and require us to enforce the plain meaning of the regulations. The right to maintain a legal nonconforming use "runs with the land," meaning it is an incident of ownership of the land, and is not a personal right. *Lamar Co. v. City of Fremont*, 278 Neb. 485, 771 N.W.2d 894 (2009). Ordinances which limit and plan for the elimination of nonconforming uses are generally considered a proper exercise of a municipality's power. *Mossman v. City of Columbus*, 234 Neb. 78, 449 N.W.2d 214 (1989). Zoning laws should be given a fair and reasonable construction in light of the manifest intention of the legislative body, the objects sought to be attained, the natural import of the words used in common and accepted usage, the setting in which they are employed, and the general structure of the law as a whole. *City of Lincoln v. Bruce*, 221 Neb. 61, 375 N.W.2d 118 (1985). Where the provisions of a zoning ordinance are expressed in common words of everyday use, without enlargement, restriction, or definition, they are to be interpreted and enforced according to their generally accepted meaning. *Id.* As the Supreme Court of Indiana explained in *Ragucci v. Metropolitan Development Com'n*, 702 N.E.2d 677 (Ind. 1998), drawing conclusions from the cases

is dangerous because the zoning regulations governing nonconforming uses vary widely, both from state to state and also from municipality to municipality within a state. Thus, the *Ragucci* court held that the interpretation of ordinances that restrict the expansion of nonconforming uses turns in the first instance on the specific language of the relevant ordinance, giving its words their plain, ordinary, and usual meaning. The Indiana court's holding seems to us entirely consistent with the Nebraska case law.

The plain language of the zoning regulations in the instant case definitively limits nonconforming uses of land. One regulation specifies that "[n]o . . . non-conforming use shall be enlarged or increased . . . ." Another defines the term "enlargement" to include an "expansion . . . in number." When read in the context of zoning regulations that specifically limit the permissible number of animals that may be kept on the premises of a particular livestock feeding operation, this provision prevents the addition of livestock beyond the extent of the nonconforming use in existence when the zoning regulations went into effect.

Two cases cited by Cedar Valley illustrate the danger in comparing cases, which was recognized by the Indiana court. To support the argument that the facility's capacity controls, Cedar Valley cites *City of Central City v. Knowlton*, 265 N.W.2d 749 (Iowa 1978), and *Jahnigen v. Staley*, 245 Md. 130, 225 A.2d 277 (1967). However, the ordinances in these cases differ significantly from the regulations in the case before us. In *Knowlton*, the ordinance did not define "enlarged" in terms of numbers. In *Jahnigen*, the code defined nonconforming use solely in terms of area. On the other hand, the unpublished case cited by Thieman, *Gem City Metal Spinning Co. v. Dayton Bd. of Zoning Appeals*, No. 22083, 2008 WL 185535 (Ohio App. Jan. 18, 2008), involved ordinances regulating both "area" as well as "use." The latter case more aptly compares to the case before us than those cited by Cedar Valley.

Cedar Valley also argues that the Nebraska Supreme Court's decision in *Board of Commissioners v. Petsch*, 172 Neb. 263, 109 N.W.2d 388 (1961), requires us to conclude that capacity, as opposed to actual use, determines the extent of the

nonconforming use. We distinguish *Petsch* because it decides an entirely separate issue—the extent to which a property owner has an interest in a nonconforming use resulting from an improvement which is partially completed at the time the zoning regulation becomes effective. In *Petsch*, at the time a zoning regulation went into effect which prohibited the use of real property as a trailer court, a property owner had completed substantial work on a trailer court and it was partially occupied. The district court limited the nonconforming use to the use of those trailer spaces that were already in use. The Nebraska Supreme Court reversed this decision based on its determination that the property owner had a vested interest in the nonconforming use of the entire trailer park, which was not fully constructed. The court explained that "where a trailer-court project is partially completed when zoning regulations become effective, and the evidence is clear as to the extent of the project, the completed project will ordinarily determine the scope of the nonconforming use." *Id.* at 268, 109 N.W.2d at 391-92. In the instant case, however, all construction had been completed more than a year prior to when the zoning regulations became effective. Thus, Cedar Valley had the opportunity to use its property as it wished but did not fill the property to what Cedar Valley now claims is its full capacity. In addition, there is no evidence that Cedar Valley was in the process of expanding its operation at the time the zoning regulations became effective but was prevented from doing so. Therefore, the extent of Cedar Valley's nonconforming use is limited by the number of livestock in its operation at the time the zoning ordinance was enacted.

Thus, the remaining question is the extent of the nonconforming use which existed at the time the zoning regulations went into effect. We conclude that the nonconforming use consisted of the confinement of 5,000 cattle.

We first base our conclusion, in part, on the information provided in the "no-fee" form that the average number of cattle in Cedar Valley's operation was 5,000 as of September 26, 2000. Cedar Valley has argued, and we agree, that this form has no legal effect on the extent of the grandfathered exemption. However, this evidence is probative of the number of

cattle in the operation at the time the zoning regulations went into effect.

Second, we base this conclusion on the numerous documents on file with the DEQ, some of which were signed by Van Ackeren, which state that Cedar Valley had 5,000 head of cattle. Cedar Valley insists that these documents are not probative of its grandfathered capacity, because the DEQ has nothing to do with zoning. It is true that the documents were not generated for this purpose. However, the information contained in the documents is relevant to our present inquiry, which is the number of cattle on Cedar Valley's property at the time the zoning regulations went into effect. It reflects that Cedar Valley reported 5,000 cattle in 1999, that Cedar Valley never requested that this number be corrected, and that Cedar Valley did not increase the number until 2007.

While we have weighed Van Ackeren's trial testimony, we find the documentary evidence more persuasive. Cedar Valley consistently reported having 5,000 cattle both before and after the zoning regulations went into effect. Therefore, the evidentiary record leads us to the conclusion that Cedar Valley's nonconforming use of the property is limited to the confinement of 5,000 cattle and that the district court did not err in granting an injunction recognizing that Cedar Valley's nonconforming use was limited to this number.

Resolution of the instant case does not require us to determine how the extent of nonconforming use would be calculated if more precise records showed seasonal and yearly fluctuations in the number of cattle.

Although we have considered Cedar Valley's other arguments in our review of the evidence, we need not address its remaining assignments of error. The third assignment of error pertains to the district court's interpretation of the zoning regulations. As an appellate court, we review questions of law independently of the lower court's conclusion. See *R & D Properties v. Altech Constr. Co.*, 279 Neb. 74, 776 N.W.2d 493 (2009). The fourth and fifth assignments of error relate to the district court's evidentiary findings and the weight it accorded to specific portions of the evidentiary record. Because we review the case de novo on the record, we do not review

the district court's findings in this regard and reach our own conclusions. See *Conley v. Brazer*, 278 Neb. 508, 772 N.W.2d 545 (2009).

[7] While our analysis differs to some degree from that of the district court, we ultimately reach the same conclusion. Where the record adequately demonstrates that the decision of the trial court is correct, although such correctness is based on a ground or reason different from that assigned by the trial court, an appellate court will affirm. *Corona de Camargo v. Schon*, 278 Neb. 1045, 776 N.W.2d 1 (2009).

CONCLUSION

We conclude that under the applicable zoning regulations, the extent of the grandfathered nonconforming use of a livestock feeding operation is based on the actual use, and not capacity. Because Cedar Valley consistently reported that there were 5,000 cattle on its premises, we affirm the district court's decision to grant an injunction prohibiting Cedar Valley from maintaining in excess of 5,000 cattle on its premises as a nonconforming use.

AFFIRMED.

SUZANNE KAY TROGDON, APPELLEE, V.
BRADLY DAVID TROGDON, APPELLANT.
780 N.W.2d 45

Filed March 2, 2010. No. A-08-1323.

1. **Statutes: Appeal and Error.** Statutory interpretation presents a matter of law which an appellate court determines independent of the conclusions reached by a lower court.
2. **Jurisdiction: Words and Phrases.** Personal jurisdiction is the power of a tribunal to subject and bind a particular entity to its decisions.
3. **Jurisdiction: Waiver.** Personal jurisdiction may be conferred by the conduct of the parties.
4. **Foreign Judgments.** Pursuant to the Uniform Interstate Family Support Act, once a support order is confirmed, a party is precluded from further contesting the order with respect to any matter that could have been asserted at the time the order was registered.
5. **Foreign Judgments: Estoppel.** When an equitable estoppel defense could have been raised prior to confirmation of a support order under the Uniform

Interstate Family Support Act, such defense is precluded after confirmation of the order.

Appeal from the District Court for Douglas County: MARLON A. POLK, Judge. Affirmed.

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

Douglas R. Switzer, of Hathaway Switzer, L.L.C., for appellee.

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

IRWIN, Judge.

I. INTRODUCTION

This appeal involves a California divorce decree ordering child support and spousal support. Pursuant to the Uniform Interstate Family Support Act, Suzanne Kay Trogdon initiated a proceeding to register and enforce that decree in Nebraska. In her accompanying affidavit, Suzanne alleged that Bradly David Trogdon had not been paying child support or spousal support and indicated that Bradly owed $249,558.58 in accrued arrearages.

After a hearing, the district court entered an order "confirming" the child support and spousal support orders from the California decree (referred to as the "support orders"). The court subsequently held additional hearings and ultimately entered an order consolidating the support orders and prohibiting Bradly from contesting the previously confirmed support orders. Then the parties entered into an agreement regarding the amount of arrearages. The court accepted the parties' agreement and ordered Bradly to pay $211,444.62 in accrued, consolidated arrearages.

On appeal, Bradly alleges that the district court erred in determining that it had personal jurisdiction over him and erred in not permitting him to raise the defense of equitable estoppel.

Upon our review, we find that the district court had personal jurisdiction over Bradly because Bradly filed a request for hearing requesting affirmative relief prior to asserting that the district court lacked personal jurisdiction over him. We also

find that pursuant to Neb. Rev. Stat. § 42-743 (Reissue 2008), Bradly was precluded from raising an estoppel argument to contest the previously confirmed support orders. As such, we affirm the confirmation of the foreign support orders.

II. BACKGROUND

Sometime after the parties' 1993 California divorce, Suzanne moved to Nebraska with the parties' minor child and Bradly moved to Washington. On March 10, 2008, Suzanne initiated a proceeding in the district court to register the California support orders pursuant to the Uniform Interstate Family Support Act, Neb. Rev. Stat. §§ 42-701 through 42-751 (Reissue 2008). As a part of her request, Suzanne filed an affidavit alleging that Bradly owed $249,558.58 in accrued arrearages.

Also on March 10, 2008, the district court sent Bradly notice that Suzanne had registered the California support orders in Nebraska. Pursuant to § 42-740, the court notified Bradly that he had 20 days to contest the registration of the orders and that if he did not contest the registration within the 20-day period, "the Court [would] confirm the Order[s] and enforce [them] against [him]."

On April 4, 2008, Bradly filed a request for a hearing concerning the registration of the orders. Bradly indicated that he "dispute[d] the amounts set forth in [Suzanne's] affidavit and respectfully request[ed] the court to require strict proof on her claim of what support amounts are owed."

On June 19, 2008, a hearing was held. Bradly did not appear at the hearing, but he was represented by counsel. At the start of the hearing, Bradly's counsel indicated that she was "appearing for the sole purpose of objecting to the personal jurisdiction over Bradly." After hearing arguments from both parties, the court found that it had personal jurisdiction over Bradly.

After the court determined that it had personal jurisdiction over Bradly, Bradly's counsel argued against registration of the California support orders because Bradly had made direct payments to Suzanne which were not included in Suzanne's calculations of the accrued arrearages. Counsel indicated that the direct payments exceeded $5,000.

Despite counsel's assertions, the court confirmed the registration of the California support orders pursuant to § 42-742(c). In its written order, the court found that Bradly did not establish a valid defense to the validity or enforcement of the registered support orders under § 42-742(a). The court indicated, "[T]he [support] orders . . . are hereby confirmed as orders enforceable in the same manner and subject to the same procedures as orders issued by a tribunal of the state of Nebraska."

After the entry of the confirmation order, Suzanne filed a motion to consolidate the support orders and calculate the total arrearages owed by Bradly and filed a motion requesting that Bradly be ordered to appear and submit to a debtor's examination. Bradly filed a motion to stop enforcement for past support arrearages. Bradly indicated that Suzanne was equitably estopped from collecting support arrearages or accumulated interest. This was the first time this defense had been raised.

In November 2008, a hearing was held on the parties' motions. Bradly appeared personally at the hearing and requested to testify concerning his estoppel defense. The court did not permit Bradly to offer evidence in support of the estoppel defense after determining that he was precluded from contesting the previously confirmed support orders because he could have raised the estoppel defense at the June 2008 confirmation hearing. In reaching its conclusion, the court relied on § 42-743, which states that a confirmed support order cannot be contested with respect to any matter that could have been asserted at the confirmation hearing. The parties then reached an agreement concerning the total amount of arrearages owed by Bradly, and the court entered an order reflecting this agreement. The court ordered Bradly to pay $211,444.62 in accrued, consolidated arrearages.

Bradly appeals here.

III. ASSIGNMENTS OF ERROR

On appeal, Bradly assigns two errors. First, he alleges that the district court erred in determining that it had personal jurisdiction over him. Second, he alleges that the court erred in not permitting him to raise the defense of equitable estoppel.

IV. ANALYSIS

1. Standard of Review

A jurisdictional question which does not involve a factual dispute is determined by an appellate court as a matter of law, which requires the appellate court to reach a conclusion independent of the lower court's decision. *Steven S. v. Mary S.*, 277 Neb. 124, 760 N.W.2d 28 (2009); *VanHorn v. Nebraska State Racing Comm.*, 273 Neb. 737, 732 N.W.2d 651 (2007).

[1] Statutory interpretation presents a matter of law which an appellate court determines independent of the conclusions reached by a lower court. *Groseth v. Groseth*, 257 Neb. 525, 600 N.W.2d 159 (1999). See, also, *Wills v. Wills*, 16 Neb. App. 559, 745 N.W.2d 924 (2008).

2. Personal Jurisdiction

[2,3] Bradly first asserts that the district court erred in determining that it had personal jurisdiction over him. Personal jurisdiction is the power of a tribunal to subject and bind a particular entity to its decisions. *Hunt v. Trackwell*, 262 Neb. 688, 635 N.W.2d 106 (2001). Lack of personal jurisdiction may be waived and such jurisdiction conferred by the conduct of the parties. *Id.* For example, a party that files an answer generally denying the allegations of a petition invokes the court's power on an issue other than personal jurisdiction and confers on the court personal jurisdiction. See *id.* Similarly, a party who does more than call a court's attention to the lack of personal jurisdiction by asking for affirmative relief will not later be heard to claim that the court lacked jurisdiction over that party. *Glass v. Nebraska Dept. of Motor Vehicles*, 248 Neb. 501, 536 N.W.2d 344 (1995).

On April 4, 2008, Bradly filed a request for hearing in response to receiving notice that Suzanne was seeking to register the California support orders. In the request for hearing, Bradly did not raise the issue of personal jurisdiction. Rather, he requested a hearing because he "dispute[d] the amounts set forth in [Suzanne's] affidavit and respectfully request[ed] the court to require strict proof on her claim of what support amounts are owed." Bradly did not assert that the court lacked personal jurisdiction over him until the June 2008 hearing.

Bradly's first filing with the court did more than call the court's attention to the lack of personal jurisdiction. In fact, Bradly's first filing did not even mention the potential jurisdictional issue. Instead, the filing requested affirmative relief in the form of a hearing to determine the exact amount of arrearages owed. Because this filing requested such affirmative relief, Bradly was precluded from claiming at the June 2008 hearing that the court lacked jurisdiction over him. As a result of Bradly's conduct, he waived his right to assert that the court lacked personal jurisdiction over him. Accordingly, this assignment of error has no merit.

3. Equitable Estoppel Defense

Bradly also asserts that the court erred in precluding him from raising an equitable estoppel defense at the November 2008 hearing. Specifically, he alleges that his defense related not to the validity of the support orders, but to the calculation of the amount of arrearages owed. Bradly asserts that he did not have an opportunity to contest the amount of arrearages owed at the June 2008 hearing where the order was confirmed.

Bradly raised the equitable estoppel defense for the first time in his motion to stop enforcement for past support arrearages. This motion was filed on October 15, 2008, approximately 3 months after the court entered an order confirming the registration of the California support orders. Based on § 42-473, the district court did not permit Bradly to raise the equitable estoppel defense at the November 2008 hearing. Section 42-743 states: "Confirmation of a registered order, whether by operation of law or after notice and hearing, precludes further contest of the order with respect to any matter that could have been asserted at the time of registration." Essentially, the court found that Bradly's defense was untimely raised because it could have been asserted at the June 2008 confirmation hearing.

In order to address Bradly's assertions, we must examine certain provisions of the Uniform Interstate Family Support Act to determine whether Bradly could have raised the estoppel defense at the June 2008 hearing when he was contesting registration and confirmation of the California support orders.

Section 42-741 provides the procedures for contesting the validity or enforcement of a foreign support order prior to its confirmation. Section 42-741(a) reads, in part: "The nonregistering party may seek to vacate the registration, to assert any defense to an allegation of noncompliance with the registered order, or to contest the remedies being sought or the amount of any alleged arrearages . . . ." This language indicates that a party can contest the "amount of any alleged arrearages" prior to the confirmation of a foreign support order.

Section 42-742 goes on to enumerate the specific defenses which can be raised when contesting the validity or enforcement of a registered order and the effect of a validly raised defense. Section 42-742 provides:

> (a) A party contesting the validity or enforcement of a registered order or seeking to vacate the registration has the burden of proving one or more of the following defenses:
>
> (1) the issuing tribunal lacked personal jurisdiction over the contesting party;
>
> (2) the order was obtained by fraud;
>
> (3) the order has been vacated, suspended, or modified by a later order;
>
> (4) the issuing tribunal has stayed the order pending appeal;
>
> (5) there is a defense under the law of this state to the remedy sought;
>
> (6) full or partial payment has been made;
>
> (7) the statute of limitation under section 42-739 precludes enforcement of some or all of the alleged arrearages; or
>
> (8) the alleged controlling order is not the controlling order.
>
> (b) If a party presents evidence establishing a full or partial defense under subsection (a) of this section, a tribunal shall stay enforcement of the registered order, continue the proceeding to permit production of additional relevant evidence, and issue other appropriate orders. An uncontested portion of the registered order may be

> enforced by all remedies available under the law of this state.
>
> (c) If the contesting party does not establish a defense under such subsection to the validity or enforcement of the order, the registering tribunal shall issue an order confirming the order.

Section 42-742(a)(5) clearly provides that if "there is a defense under the law of this state to the remedy sought," such defense can be raised prior to confirmation of a foreign support order. The Nebraska Supreme Court has previously held that the doctrine of equitable estoppel is a possible defense in proceedings concerning the enforcement or modification of support orders: "[T]he doctrine of equitable estoppel could operate to excuse the payment of accrued child support under appropriate factual circumstances." *Truman v. Truman*, 256 Neb. 628, 633-34, 591 N.W.2d 81, 85 (1999). Because equitable estoppel "is a defense under the law of this state," § 42-742(a)(5), such a defense could have been raised prior to confirmation of the California support orders.

[4] Bradly did not raise the estoppel defense at the June 2008 hearing. After the June 2008 hearing, the court entered an order confirming the registration of the California support orders. Pursuant to § 42-743, after confirmation of the support orders, Bradly was precluded from further contesting the orders with respect to any matter that could have been asserted prior to confirmation. Because the estoppel defense could have been raised prior to confirmation of the orders, the district court did not err in precluding Bradly from raising such defense at the November 2008 hearing.

In his brief to this court, Bradly asserts that he was not given an opportunity to contest the amount of arrearages owed at the June 2008 hearing. He argues that even though the support orders were confirmed after the June 2008 hearing, the court stayed the issue of the amount of arrearages owed, and that his defense is relevant to that issue. Our review of the record reveals that contrary to Bradly's assertions, the district court did not stay the proceedings. Instead, the court specifically found that Bradly had failed to provide evidence of a valid defense to the registration and enforcement of the orders. In

its written order, the court found, "[Bradly] did not satisfy any of the enumerated elements set forth in . . . § 42-742(a) or (b) and therefore, pursuant to . . . § 42-742(c), an order confirming the registration should be issued." The court indicated, "[T]he [support] orders . . . are hereby confirmed as orders enforceable in the same manner and subject to the same procedures as orders issued by a tribunal of the state of Nebraska."

Moreover, although Bradly argues that he was not given the opportunity to contest the amount of arrearages at the June 2008 hearing, Bradly's counsel did assert a defense of partial payment. Counsel argued that Bradly had paid money directly to Suzanne and that the amounts of such payments had not been included in Suzanne's calculations of the arrearages owed. Counsel stated that Bradly had paid over $5,000. However, counsel did not provide any evidence of such payment. Without evidence to support counsel's assertions, the court confirmed the support orders.

[5] Because Bradly could, and should, have raised the estoppel defense prior to confirmation of the orders, he is now precluded from raising such a defense. As such, the district court did not err in precluding Bradly from raising the estoppel defense at the November 2008 hearing. Bradly's assignment of error has no merit.

V. CONCLUSION

We find that the district court had personal jurisdiction over Bradly because Bradly filed a notice of hearing requesting affirmative relief prior to asserting that the district court lacked personal jurisdiction over him. We also find that pursuant to § 42-743, Bradly was precluded from raising an estoppel argument to contest the previously confirmed support orders. As such, we affirm the confirmation of the foreign support orders.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. RAYMOND A. BORGES, APPELLANT.

791 N.W.2d 336

Filed March 2, 2010. No. A-09-829.

1. **Judgments: Appeal and Error.** Regarding questions of law, an appellate court has an obligation to reach an independent, correct conclusion irrespective of the determination made by the court below.
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. **Constitutional Law: Equal Protection.** The Nebraska Constitution and the U.S. Constitution have identical requirements for equal protection challenges.
5. **Equal Protection: Proof.** The initial inquiry in an equal protection analysis focuses on whether the challenger is similarly situated to another group for the purpose of the challenged governmental action; absent this threshold showing, one lacks a viable equal protection claim.
6. ____: ____. The party alleging a violation of equal protection has the burden to prove that the classification violates the principle of equal protection.
7. **Equal Protection.** The Equal Protection Clause does not forbid classifications; it simply keeps governmental decisionmakers from treating differently persons who are in all relevant respects alike.
8. **Constitutional Law: Equal Protection: Statutes.** In an equal protection challenge to a statute, the degree of judicial scrutiny to which the statute is to be subjected may be dispositive; if a legislative classification involves either a suspect class or a fundamental right, courts will analyze the statute with strict scrutiny, and if it does not, then courts analyze the classification using rational basis review.
9. **Equal Protection.** Under the rational basis test, the Equal Protection Clause is satisfied as long as there is (1) a plausible policy reason for the classification, (2) the legislative facts on which the classification is apparently based may rationally have been considered to be true by the governmental decisionmaker, and (3) the relationship of the classification to its goal is not so attenuated as to render the distinction arbitrary or irrational.
10. ____. The rational relationship standard, as the most relaxed and tolerant form of judicial scrutiny under the Equal Protection Clause, is offended only if a classification rests on grounds which are wholly irrelevant to the achievement of the government's objectives.
11. ____. In an equal protection analysis, when determining whether a rational basis exists for a legislative classification, courts look to see if any state of facts can be conceived to reasonably justify the disparate treatment which results.

12. **Equal Protection: Proof.** A state-sponsored specialized program for drug offenders does not violate the Equal Protection Clause when a defendant cannot prove he or she was similarly situated to the group for which the program was designed and when the program is rationally related to the State's legitimate interests.
13. **Sentences: Appeal and Error.** Where a sentence imposed within the statutory limits is alleged on appeal to be excessive, the appellate court must determine whether the sentencing court abused its discretion in considering and applying the relevant factors as well as any applicable legal principles in determining the sentence to be imposed.
14. **Sentences.** In imposing a sentence, the sentencing court is not limited to any mathematically applied set of factors.
15. ____. The appropriateness of a sentence is necessarily a subjective judgment and includes the sentencing judge's observation of the defendant's demeanor and attitude and all the facts and circumstances surrounding the defendant's life.

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

James R. Mowbray and Kelly S. Breen, of Nebraska Commission on Public Advocacy, for appellant.

Jon Bruning, Attorney General, and Erin E. Tangeman for appellee.

SIEVERS, CARLSON, and MOORE, Judges.

SIEVERS, Judge.

Raymond A. Borges pled guilty to attempted delivery of a controlled substance and was sentenced to 15 to 20 years' imprisonment. Borges appeals his sentence, and for the reasons set forth herein, we affirm the sentencing order of the district court for Cheyenne County. Pursuant to Neb. Ct. R. App. P. § 2-111(E)(5)(a) (rev. 2008), this case was submitted without oral argument.

FACTUAL AND PROCEDURAL BACKGROUND

Borges was arrested on November 19, 2008, when he sold 1 gram of methamphetamine to a person cooperating with police officers involved in the Western Nebraska Intelligence and Narcotics Group. When the officers arrested Borges, he dropped a plastic baggie containing methamphetamine. Police then searched his house, where they found additional

methamphetamine. In total, Borges had 6.79 grams of methamphetamine in his possession at the time of his arrest.

Borges was charged in an information filed April 27, 2009, in the district court for Cheyenne County, with delivery of methamphetamine, in violation of Neb. Rev. Stat. § 28-416(1)(a) (Reissue 2008), and possession of methamphetamine with intent to deliver, in violation of § 28-416(1)(a). On May 12, the district court accepted Borges' guilty plea to attempted delivery of methamphetamine, which was the charge in the amended information, in violation of Neb. Rev. Stat. § 28-201 (Reissue 2008) and § 28-416, a Class III felony.

On June 18, 2009, Borges filed a motion for a Specialized Substance Abuse Supervision (SSAS) evaluation. The district court held a hearing on such motion on July 14 and filed its order the following day. The court overruled Borges' motion for an SSAS evaluation, finding that Borges did not have a constitutional right under the U.S. or Nebraska Equal Protection Clause to such evaluation. The court found that Borges was not similarly situated to offenders given SSAS evaluations, based upon the evidence adduced at the hearing, and that even if he were similarly situated, there was a rational relationship between the State's legitimate interests and the action taken by the State. The district court filed its sentencing order on July 21, and in such, the court sentenced Borges to 15 to 20 years' imprisonment. Borges filed his notice of appeal with this court on August 20.

ASSIGNMENTS OF ERROR

Borges assigns as error that the district court (1) erred when it denied his motion for an SSAS assessment, in violation of his right to equal protection under the federal and state Constitutions, and (2) abused its discretion in sentencing him without consideration of an SSAS assessment.

STANDARD OF REVIEW

[1] Regarding questions of law, an appellate court has an obligation to reach an independent, correct conclusion irrespective of the determination made by the court below. *State v. Reeves*, 258 Neb. 511, 604 N.W.2d 151 (2000).

[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. Thompson*, 15 Neb. App. 764, 735 N.W.2d 818 (2007). 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

Equal Protection.

Borges first argues that he had a constitutional right under the Equal Protection Clauses of the U.S. and Nebraska Constitutions to an SSAS evaluation, which is available to other drug offenders in certain Nebraska counties. The SSAS program was implemented to reduce overcrowding in prisons and promote rehabilitation for drug offenders who would not be considered suitable for traditional or intensive supervision probation. The program is offered to offenders with prior felony drug convictions. To qualify, an offender must complete an assessment, which includes a "whole life needs" assessment and a chemical dependency evaluation. The SSAS program started in 2006 and has been utilized in Douglas, Lancaster, Sarpy, Dakota, Buffalo, and Dawson Counties. At the time of the hearing, the remaining 87 Nebraska counties were not involved with the program.

[4,5] The Nebraska Constitution and the U.S. Constitution have identical requirements for equal protection challenges. *Kenley v. Neth*, 271 Neb. 402, 712 N.W.2d 251 (2006). The initial inquiry in an equal protection analysis focuses on whether the challenger is similarly situated to another group for the purpose of the challenged governmental action. *Id.* Absent this threshold showing, one lacks a viable equal protection claim. *Id.*

[6] The district court concluded that Borges was not similarly situated based upon the finding that the evidence did not establish what type of criminal defendant is evaluated for the

SSAS program in the counties where the program is being utilized, other than the generic classification "felony drug offenders." The court specifically listed a lack of evidence on the eligible defendants' "prior offenses (nature and number of priors), whether they had been on probation in the past and the success of those efforts, whether they had been incarcerated previously, for how long and with what level of recidivism." The party alleging a violation of equal protection has the burden to prove that the classification violates the principle of equal protection. See *Le v. Lautrup*, 271 Neb. 931, 716 N.W.2d 713 (2006). Borges did not identify the precise evaluation criteria for the program, other than that several assessments were required, and failed to show that he would be eligible for the SSAS program even if it were available to him in Cheyenne County. Thus, we agree that the evidence adduced at the hearing failed to show that Borges was similarly situated to felony drug offenders who had been deemed eligible for the SSAS program.

[7,8] However, even if Borges were similarly situated to other felony drug offenders who were eligible for the SSAS program, he failed to show that he was entitled to an SSAS evaluation under the Equal Protection Clause.

> The Equal Protection Clause does not forbid classifications; it simply keeps governmental decisionmakers from treating differently persons who are in all relevant respects alike. . . . In an equal protection challenge to a statute, the degree of judicial scrutiny to which the statute is to be subjected may be dispositive. . . . If a legislative classification involves either a suspect class or a fundamental right, courts will analyze the statute with strict scrutiny. . . . If it does not, then courts analyze the classification using rational basis review.

State v. Senters, 270 Neb. 19, 27, 699 N.W.2d 810, 818 (2005) (citations omitted).

[9-11] Borges argues in his brief that he has a fundamental liberty interest and that therefore, strict scrutiny should be utilized by the court. However, what that liberty interest would be in this case is unclear and, during the hearing on the motion for the SSAS evaluation, Borges' counsel conceded that the rational basis test applies.

> Under the rational basis test, the Equal Protection Clause is satisfied as long as there is (1) a plausible policy reason for the classification, (2) the legislative facts on which the classification is apparently based may rationally have been considered to be true by the governmental decisionmaker, and (3) the relationship of the classification to its goal is not so attenuated as to render the distinction arbitrary or irrational. . . . The rational relationship standard, as the most relaxed and tolerant form of judicial scrutiny under the Equal Protection Clause, is offended only if a classification rests on grounds which are wholly irrelevant to the achievement of the government's objectives. . . . When determining whether a rational basis exists for a legislative classification, courts look to see if any state of facts can be conceived to reasonably justify the disparate treatment which results.

Le v. Lautrup, 271 Neb. at 936-37, 716 N.W.2d at 719-20 (citations omitted).

[12] The geographic limitations on the SSAS program meet the rational basis test. Deb Minardi, a deputy probation administrator who supervises the SSAS program, testified that the six counties selected were chosen for the test program because they have the highest proportions of felony drug offenders in the state. Minardi testified that the program was not implemented in all 93 Nebraska counties at the onset of the program because of the costs of ensuring each county had the infrastructure and personnel to conduct the program. Minardi testified that the program shows preliminary promise for rehabilitation and reformation of participants but has not been in place long enough to have any definitive evidence of success. Because of high costs, it seems that the program would not likely be expanded to the remaining counties until there is such evidence. The State has a legitimate interest in reducing the number of inmates incarcerated in state facilities, as well as in a lower rate of recidivism among felony drug offenders. Focusing a test program in the counties with the highest number of felony drug offenders is relevant to these objectives and rationally related to these interests. Thus, we hold that a state-sponsored specialized program for drug offenders does not violate the Equal Protection Clause

when a defendant cannot prove he or she was similarly situated to the group for which the program was designed and when the program is rationally related to the State's legitimate interests. Therefore, this assignment of error lacks merit.

Borges' Sentence.

[13] Borges argues that the district court abused its discretion by sentencing him to 15 to 20 years' imprisonment without considering an SSAS evaluation. Generally, where a sentence imposed within the statutory limits is alleged on appeal to be excessive, the appellate court must determine whether the sentencing court abused its discretion in considering and applying the relevant factors as well as any applicable legal principles in determining the sentence to be imposed. *State v. Alford*, 278 Neb. 818, 774 N.W.2d 394 (2009). Neb. Rev. Stat. § 28-105 (Reissue 2008) specifies that the penalty for a Class III felony is 1 to 20 years' imprisonment, a $25,000 fine, or both. Borges' sentence falls within the prescribed statutory range.

[14,15] In imposing a sentence, the sentencing court is not limited to any mathematically applied set of factors. *State v. Reid*, 274 Neb. 780, 743 N.W.2d 370 (2008). The appropriateness of a sentence is necessarily a subjective judgment and includes the sentencing judge's observation of the defendant's demeanor and attitude and all the facts and circumstances surrounding the defendant's life. *Id*. The district court clearly considered the SSAS program as one of its sentencing options. However, the court pointed out in its July 15, 2009, order on the motion for an SSAS evaluation that the program would not be practicable for Borges, because the program is not available in Cheyenne County. The SSAS program requires that offenders report to a center located in each participating county. The closest reporting center to Cheyenne County is located in Lexington, Nebraska, which is about 200 miles away. Furthermore, a senior probation officer testified that probation officers in counties that are not involved with the SSAS program have not been trained to conduct the whole life needs assessment, which is one of the necessary components.

Borges has a long history of substance abuse. He admits to using alcohol and various drugs and being an addict for

22 years, and he has used methamphetamines on and off for the past 15 years. Borges has an extensive criminal history, including at least 30 convictions, 12 of which were felony arrests. Borges has had 11 alcohol-related arrests and 7 drug-related arrests. He has been sentenced to jail time 16 times, to prison on 4 separate occasions, and to probation 6 times. Notably, Borges has had his probation revoked on three occasions. Borges tested very high on the alcohol, drug, violence, and antisocial scales in his presentence investigation report. Based upon the impracticality of administering the SSAS evaluation in Cheyenne County, a county that does not currently offer the program, and Borges' criminal history, we find that the district court did not abuse its discretion in sentencing Borges to 15 to 20 years' imprisonment. Therefore, Borges' second assignment of error also lacks merit.

AFFIRMED.

STATE OF NEBRASKA, APPELLANT, V.
DAVID L. ANDERSON, APPELLEE.
779 N.W.2d 623

Filed March 2, 2010. No. A-09-870.

1. **Sentences: Appeal and Error.** When the State appeals and claims that a sentence imposed on a defendant is excessively lenient, the standard of review is whether the sentencing court abused its discretion in the sentence imposed.
2. **Sentences.** Whether a defendant is entitled to credit for time served is a question of law.
3. **Statutes.** Statutory language is to be given its plain and ordinary meaning.
4. ____. It is not within the province of the courts to read a meaning into a statute that is not there or to read anything direct and plain out of a statute.
5. **Sentences: Words and Phrases.** The phrase "in custody" under Neb. Rev. Stat. § 83-1,106 (Reissue 2008) 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.

Appeal from the District Court for York County: ALAN G. GLESS, Judge. Reversed and remanded with directions.

Timothy S. Sieh, York County Attorney, for appellant.

No appearance for appellee.

SIEVERS, CARLSON, and MOORE, Judges.

MOORE, Judge.

INTRODUCTION

The appellee, David L. Anderson, was convicted of driving under the influence, third offense, with a blood alcohol concentration of greater than .15 of a gram per 100 milliliters of his blood. Anderson was placed on probation and sentenced to serve 60 days in jail, with credit given for time previously served in jail and in a residential substance abuse treatment program. The State has appealed the sentence imposed upon Anderson, asserting that due to an error in determining the credit for time served, the sentence is excessively lenient. Because we find that Anderson was not entitled to credit against his jail sentence for time spent in a residential treatment facility, we reverse, and remand the cause with directions to vacate the credit given for the time spent in the treatment facility.

BACKGROUND

On May 18, 2009, Anderson entered a plea of no contest to the charge of "Driving Under the Influence, Third offense, .15," a Class IIIA felony. In exchange for the plea, the State dismissed the additional charges of failure to stop and furnish information, possession of marijuana less than 1 ounce, and possession of drug paraphernalia. The district court accepted the plea and found this to be a third offense. The record shows that Anderson had been accepted into a residential substance abuse treatment program on March 18. At the sentencing hearing held on August 4, the district court ordered that Anderson be sentenced to community-based intervention (probation) for a period of 5 years and, among other conditions, ordered that Anderson serve 60 days in the county jail, with credit for 3 days already served in jail and 57 days already served in residential treatment.

The State filed this appeal pursuant to Neb. Rev. Stat. § 29-2320 (Supp. 2009) after obtaining consent from the Attorney General as required by Neb. Rev. Stat. § 29-2321(1)(b) (Supp. 2009).

ASSIGNMENT OF ERROR

The State argues that the district court erred in granting Anderson credit against his jail sentence for time spent in a residential substance abuse treatment program.

STANDARD OF REVIEW

[1] When the State appeals and claims that a sentence imposed on a defendant is excessively lenient, the standard of review is whether the sentencing court abused its discretion in the sentence imposed. *State v. Alford*, 278 Neb. 818, 774 N.W.2d 394 (2009).

[2] Whether a defendant is entitled to credit for time served is a question of law. *Id.*

ANALYSIS

The State argues that the district court erroneously granted Anderson credit against his jail sentence for time spent in a residential substance abuse treatment facility. Because of this error, the State asserts that Anderson's jail sentence falls below the minimum statutory limit for his offense and, as such, is excessively lenient.

Neb. Rev. Stat. § 60-6,197.03(6) (Supp. 2007) requires that a person convicted of driving under the influence of alcohol, who has been twice previously convicted and who had a blood alcohol concentration of .15 of a gram per 100 milliliters of his blood or more, shall be sentenced to serve 60 days in a city or county jail as a condition of probation.

[3,4] Neb. Rev. Stat. § 47-503(1) (Reissue 2004) provides that credit against a jail term shall be given to any person sentenced to a city or county jail for time spent *in jail* as a result of the criminal charge for which the jail term is imposed or as a result of conduct upon which such charge is based. Statutory language is to be given its plain and ordinary meaning. *State v. Alford, supra*. It is not within the province of the courts to read a meaning into a statute that is not there or to read anything direct and plain out of a statute. *Id.* Clearly, time spent in a residential treatment facility is not time spent "in jail" under the plain language of § 47-503(1).

[5] The State refers us to Neb. Rev. Stat. § 83-1,106 (Reissue 2008), which is similar to § 47-503 but addresses persons sentenced to prison as opposed to jail. Section 83-1,106 provides for credit for time spent "in custody" as a result of the criminal charge for which a prison sentence is imposed. While § 83-1,106 is not applicable in this case and contains an arguably broader credit for time spent "in custody" as opposed to "in jail," the phrase found in § 47-503, we find the cases defining "in custody" to be further support for our decision in the instant case. The Nebraska Supreme Court held in *State v. Jordan*, 240 Neb. 919, 923, 485 N.W.2d 198, 201 (1992), that the phrase "in custody" under § 83-1,106 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." See, also, *Tyler v. Nebraska Dept. of Corr. Servs.*, 13 Neb. App. 795, 701 N.W.2d 847 (2005). In *Jordan, supra*, the Supreme Court concluded that time spent under electronic monitoring conducted at the defendant's residence did not qualify as time "in custody" for the purpose of sentencing credit as required under § 83-1,106(1). We note that in *Jordan*, the Supreme Court recognized conflicting cases from other jurisdictions that allowed credit for time spent in residential alcohol treatment facilities where restrictions on liberty were equivalent to incarceration. We also note that under different circumstances, the Nebraska Supreme Court has held that a defendant is not entitled to have credit for time served in a voluntary alcohol treatment program prior to conviction. See *State v. Hutton*, 218 Neb. 420, 355 N.W.2d 518 (1984).

We hold that under § 47-503(1), a defendant is not entitled to credit against a jail sentence for time spent in a residential substance abuse treatment facility. Because the district court erred in granting Anderson credit for time spent in treatment, the jail sentence effectively fell below the statutorily imposed requirement of 60 days for the offense for which Anderson was convicted. As such, the district court's erroneous credit resulted in an excessively lenient sentence. See *State v. Alford*, 278 Neb. 818, 774 N.W.2d 394 (2009) (sentence that falls below statutorily prescribed sentencing limits

is example of leniency that can be appealed by State pursuant to § 29-2320).

Accordingly, pursuant to Neb. Rev. Stat. § 29-2322 (Reissue 2008), we remand the cause with directions to vacate the credit for time spent in the residential substance abuse treatment facility.

CONCLUSION

The district court erred in giving Anderson credit against his jail sentence for time spent in a residential substance abuse treatment facility. Its judgment is reversed, and the cause is remanded with directions to vacate this credit.

REVERSED AND REMANDED WITH DIRECTIONS.

LISA ANNE MEADOWS, APPELLANT, V. MONTE LEE MEADOWS, APPELLEE.

789 N.W.2d 519

Filed March 30, 2010. No. A-09-531.

1. **Judgments: Statutes: Appeal and Error.** Questions of law and statutory interpretation require an appellate court to reach a conclusion independent of the decision made by the court below.
2. **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.
3. **Final Orders: Appeal and Error.** Under Neb. Rev. Stat. § 25-1902 (Reissue 2008), an order is final for purposes of an appeal if it affects a substantial right and (1) determines the action and prevents a judgment, (2) is made during a special proceeding, or (3) is made on summary application in an action after judgment is rendered.
4. **Jurisdiction: Final Orders: Appeal and Error.** Overruling a motion to decline jurisdiction under Neb. Rev. Stat. § 43-1207 (Reissue 1998) as an inconvenient forum does not affect a substantial right and is not a final, appealable order.
5. ____: ____: ____. Overruling a motion to decline jurisdiction under Neb. Rev. Stat. § 43-1244 (Reissue 2008) as an inconvenient forum does not affect a substantial right and is not a final, appealable order.

Appeal from the District Court for Buffalo County: WILLIAM T. WRIGHT, Judge. Appeal dismissed.

Kent A. Schroeder, of Ross, Schroeder & George, L.L.C., for appellant.

John P. Rademacher, of Tye & Rademacher, P.C., L.L.O., for appellee.

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

INBODY, Chief Judge.

INTRODUCTION

Lisa Anne Meadows appeals the Buffalo County District Court's order denying her motion to dismiss her ex-husband's complaint for modification of their dissolution decree after the court determined that Nebraska was not an inconvenient forum. Pursuant to this court's authority under Neb. Ct. R. App. P. § 2-111(B)(1) (rev. 2008), this case was ordered submitted without oral argument.

STATEMENT OF FACTS

Monte Lee Meadows and Lisa were married in July 1995, and one child was born of the marriage. The decree of dissolution was entered by the Buffalo County District Court in April 2004. The parties were awarded joint legal and physical custody of their child. Shortly thereafter, Lisa and the child moved to Rock Port, Atchison County, Missouri, wherein Lisa registered a certified copy of the decree with the clerk of the Atchison County Circuit Court. The record indicates that this move was done with the verbal consent of Monte, but without any notification to or any order of the Buffalo County District Court. In 2005, Monte secured new employment in Omaha, Nebraska, which allowed him to significantly cut his transportation costs to visit and pick up the child, which Monte had previously been doing from his home in Kearney, Nebraska.

Since that time, the child has attended school in Rock Port, and at the time of the hearing, the child was enrolled as a sixth grader. During the several years since the decree had been entered, Monte continued to exercise frequent visitation with the child, which visitation included the majority of the summers, at least one weekend a month, and many holidays.

The parties' visitation arrangement appears to have taken place without issue until a holiday visit in December 2008, when the child advised Monte she and Lisa were having some problems. Monte did not return the child to Lisa after the holiday ended and, instead, enrolled her in an Omaha school. After determining where the child had been enrolled, Lisa drove to Omaha, picked up the child from school, and returned to Rock Port without informing Monte.

On January 23, 2009, Monte filed a complaint for modification of the dissolution decree in the Buffalo County District Court, alleging that it was in the child's best interests that he be awarded her sole legal and physical custody. One day earlier, Lisa had filed a similar complaint for modification of the dissolution decree in the Atchison County Circuit Court, asking that she be awarded the child's sole physical custody, that the parties be allowed to maintain joint legal custody, and that the court order a specific parenting schedule for Monte.

On April 21, 2009, a hearing for temporary custody was held in the Buffalo County District Court, at which hearing the court also took up a motion filed by Lisa to dismiss pursuant to Neb. Rev. Stat. § 43-1244 (Reissue 2008) of the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA). See Neb. Rev. Stat. §§ 43-1226 to 43-1266 (Reissue 2008). Lisa alleged that Nebraska was an inconvenient forum and that the court should decline to exercise jurisdiction in order for the matter to be heard in Missouri. Evidence, in the form of numerous affidavits, was submitted to the court, and the matter was taken under advisement. The district court found that, in accordance with § 43-1244, Nebraska was not an inconvenient forum and ordered that custody temporarily remain the same as set forth in the dissolution decree until the final hearing. It is from this order that Lisa has timely appealed the district court's denial of her motion to dismiss on the ground of inconvenient forum.

ASSIGNMENT OF ERROR

Lisa's sole assignment of error is that the district court erred by denying her motion to dismiss pursuant to § 43-1244, finding that Nebraska was not an inconvenient forum.

STANDARD OF REVIEW

[1] Questions of law and statutory interpretation require an appellate court to reach a conclusion independent of the decision made by the court below. *Zahl v. Zahl*, 273 Neb. 1043, 736 N.W.2d 365 (2007).

ANALYSIS

As noted above, this appeal involves a still-pending application for modification, regarding child custody, of a decree of dissolution. Lisa has brought an appeal to this court regarding the district court's order overruling her motion to dismiss on the ground of inconvenient forum, arguing that it was error for the court to rule as such. Monte argues that the appeal should be dismissed because it is not an appeal from a final, appealable order as required by Neb. Rev. Stat. § 25-1902 (Reissue 2008). Therefore, we must first determine whether this appeal is properly before us as a final, appealable order.

[2,3] 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. *Williams v. Baird*, 273 Neb. 977, 735 N.W.2d 383 (2007). Specifically, § 25-1902 provides that a party may appeal from a court's order only if the decision is a final, appealable order. Under § 25-1902, an order is final for purposes of an appeal if it affects a substantial right and (1) determines the action and prevents a judgment, (2) is made during a special proceeding, or (3) is made on summary application in an action after judgment is rendered. See *Blue Cross and Blue Shield v. Dailey*, 268 Neb. 733, 687 N.W.2d 689 (2004).

[4] The Supreme Court has previously held that overruling a motion to decline jurisdiction on the ground of inconvenient forum does not affect a substantial right and is not a final, appealable order. See *Hernandez v. Blankenship*, 257 Neb. 235, 596 N.W.2d 292 (1999). In that case, a petition for a change of custody was brought by the father in Dawson County, Nebraska, and the mother filed a motion to decline jurisdiction on the ground of inconvenient forum pursuant to Neb. Rev. Stat. § 43-1207 (Reissue 1998) of the Nebraska Child

Custody Jurisdiction Act (NCCJA), arguing that Missouri was a more convenient forum to determine the merits of the case. The Supreme Court found that the district court's order overruling the motion did not diminish the mother's available claims and defenses regarding custody of the child. *Hernandez v. Blankenship, supra.* The Supreme Court found that the determination to decline or retain jurisdiction did not "substantially impinge on any constitutional right" and, further, that such a motion was not reviewable until after a final judgment. *Id.* at 240, 596 N.W.2d at 296, citing *Van Cauwenberghe v. Biard*, 486 U.S. 517, 108 S. Ct. 1945, 100 L. Ed. 2d 517 (1988).

Since that time, the Nebraska Legislature has adopted the UCCJEA to repeal and replace the NCCJA, operative January 1, 2004. See, 2003 Neb. Laws, L.B. 148; *White v. White*, 271 Neb. 43, 709 N.W.2d 325 (2006). Section 43-1207 (court, inconvenient forum, determination, communication with another court) was repealed and replaced by § 43-1244 (inconvenient forum). In *Hernandez v. Blankenship, supra*, the holding of the Supreme Court was based upon an NCCJA determination under § 43-1207, and thus, Lisa argues, *Hernandez* should now be overturned because the ruling therein is "inequitable, as it does affect a substantial right." Brief for appellant at 7.

[5] A close and careful review of the NCCJA's § 43-1207, and the more recently adopted UCCJEA's § 43-1244, reveals that the language contained within the two statutes is nearly identical. The language of the UCCJEA's statute is generally more condensed, but expands upon the factors that the trial court shall consider in making its determination. Therefore, we find nothing in the current UCCJEA version which would indicate that § 43-1244 now affects a substantial right, and we accordingly hold that overruling a motion to decline jurisdiction under § 43-1244 on the ground of inconvenient forum does not affect a substantial right and is not a final, appealable order, as was similarly held under § 43-1207.

Therefore, the district court's denial of Lisa's motion to dismiss on the ground of inconvenient forum under § 43-1244 does not diminish any of Lisa's claims or defenses, as the

proceedings are only at the temporary stage and a final determination regarding custody has not yet been made. As such, the order of the district court denying Lisa's motion to dismiss on the ground of inconvenient forum under § 43-1244 does not affect a substantial right and is not a final, appealable order.

APPEAL DISMISSED.

STATE OF NEBRASKA, APPELLEE, V.
ANDREW J. MARTIN, APPELLANT.
782 N.W.2d 37

Filed April 13, 2010. No. A-09-648.

1. **Trial: Convictions.** A conviction in a bench trial of a criminal case is sustained if the properly admitted evidence, viewed and construed most favorably to the State, is sufficient to support that conviction.
2. **Evidence: Appeal and Error.** In determining whether evidence is sufficient to support a conviction, an appellate court does not resolve conflicts in evidence, pass on credibility of witnesses, evaluate explanations, or reweigh evidence presented, which are within a fact finder's province for disposition.
3. **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 the 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.
4. **Double Jeopardy: Convictions: Evidence.** Where there has been insufficient evidence presented to convict a defendant in a first trial, the Double Jeopardy Clause forbids a second trial for the purpose of affording the prosecution another opportunity to supply evidence which it failed to muster in the first proceeding.

Appeal from the District Court for Lancaster County: JEFFRE CHEUVRONT, Judge. Reversed and remanded with directions to dismiss.

Mark E. Rappl for appellant.

Jon Bruning, Attorney General, and George R. Love for appellee.

IRWIN, CARLSON, and MOORE, Judges.

CARLSON, Judge.

INTRODUCTION

Andrew J. Martin appeals his convictions in the district court for Lancaster County of driving under the influence of alcohol (DUI), third offense, and refusal to submit to a chemical test. For the reasons set forth below, we reverse, and remand with directions to dismiss the convictions.

BACKGROUND

On August 31, 2008, at approximately 6:11 a.m., Officer Michael Schmidt of the Lincoln Police Department was dispatched to the area of 46th and Cleveland Streets in Lincoln, Nebraska, in reference to "suspicious parties." On his arrival, Schmidt observed three men standing near a vehicle parked on the west side of 46th Street facing southbound. No one was in the vehicle. Schmidt testified at trial that there was nothing suspicious in the manner in which the vehicle was parked. Schmidt observed damage to the front and passenger side of the vehicle, including a blown tire and a missing side-view mirror.

Schmidt asked the three males standing near the vehicle which one of them was the operator of the vehicle. Martin told Schmidt that the vehicle belonged to him and that he had been driving the vehicle when he reached down to change the music in his stereo. The vehicle hit the curb, causing the tire to blow, and then struck several mailboxes. Martin indicated that the accident happened at a different location from where the vehicle was parked.

During Schmidt's contact with Martin, he observed that Martin had a strong odor of alcohol about his person, that his eyes were bloodshot, that his speech was slurred, and that he was swaying and staggering when he walked. Schmidt testified that these observations of Martin indicated to him a presence of alcohol in Martin's system. Schmidt had Martin submit to a standardized field sobriety test, and the results indicated that Martin had been consuming alcohol. Martin refused to submit to any other field sobriety tests, including a preliminary breath test. At this juncture, Schmidt arrested Martin for DUI. Martin was transported to a detoxification center for a chemical test,

where he was read the postarrest chemical test advisement form and refused to submit to a chemical test.

On December 5, 2008, an information was filed charging Martin with DUI, third offense, and refusal to submit to a chemical test. A bench trial was held on April 30, 2009. The only witness at trial was Schmidt. At the close of the State's evidence, Martin made a motion to dismiss on the ground that the State failed to establish a prima facie case of DUI. The district court overruled the motion, and Martin rested. The court found Martin guilty of the offenses charged beyond a reasonable doubt.

The court sentenced Martin to serve a 3-year term of intensive supervision probation, including a $1,000 fine, a 60-day jail sentence, and an 8-year license revocation.

ASSIGNMENT OF ERROR

Martin assigns that the trial court erred in finding that the State presented sufficient evidence to sustain a conviction for DUI.

STANDARD OF REVIEW

[1,2] A conviction in a bench trial of a criminal case is sustained if the properly admitted evidence, viewed and construed most favorably to the State, is sufficient to support that conviction. *State v. Thompson*, 278 Neb. 320, 770 N.W.2d 598 (2009). In making this determination, an appellate court does not resolve conflicts in evidence, pass on credibility of witnesses, evaluate explanations, or reweigh evidence presented, which are within a fact finder's province for disposition. *Id.*

ANALYSIS

[3] Martin alleges that the State failed to present sufficient evidence to sustain a conviction for DUI. 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. Thompson, supra.* The elements of DUI which the State must prove beyond a reasonable doubt are

(1) that Martin was operating or in actual physical control of a motor vehicle and (2) that he did so while under the influence of alcoholic liquor. See Neb. Rev. Stat. § 60-6,196 (Reissue 2004).

Martin argues that the State failed to prove either element of DUI. In regard to the first element, Martin contends that although he admitted to driving the vehicle, his admission in and of itself is insufficient to prove he was operating or in actual physical control of a motor vehicle, and that there was no evidence to corroborate his admission. Martin also argues that even if we conclude that the first element is met, there is insufficient evidence to establish the second element of DUI, that Martin operated the vehicle while under the influence of alcohol.

Assuming without deciding that the evidence was sufficient to prove that Martin operated the vehicle, we conclude that the evidence is insufficient to show that Martin was under the influence of alcohol when he did so. The evidence shows that Martin was intoxicated at the time Schmidt made contact with him around 6 a.m. and that Martin told Schmidt he had operated the vehicle and had an accident. However, there is no evidence of when Martin last operated the vehicle or when the accident occurred. Therefore, there is no evidence of Martin's impairment level, if any, at the time he was operating the vehicle.

Schmidt was dispatched to Martin's location based on a report of "suspicious parties" in the area. There was no mention of anyone driving a vehicle or of an accident. When Schmidt arrived at the scene, he observed three men standing near or around a vehicle, but no one was in the vehicle. Schmidt admitted that he did not know how long the vehicle had been parked at that location, that he did not know when the accident happened, and that he never saw Martin drive the vehicle. Further, there were no witnesses who saw Martin driving the vehicle or saw the accident.

The evidence provides no indication as to when Martin last operated his vehicle, and therefore, although Martin was intoxicated when contacted by Schmidt, there is no evidence that he was under the influence of alcohol at the time that he operated

the vehicle. As a result, the evidence is insufficient to sustain Martin's conviction for DUI.

[4] Where there has been insufficient evidence presented to convict a defendant in a first trial, the Double Jeopardy Clause "forbids a second trial for the purpose of affording the prosecution another opportunity to supply evidence which it failed to muster in the first proceeding." *Burks v. United States*, 437 U.S. 1, 11, 98 S. Ct. 2141, 57 L. Ed. 2d 1 (1978). Because we have concluded that the evidence is insufficient to support a conviction, we conclude that the Double Jeopardy Clause prohibits the State from retrying Martin.

CONCLUSION

We conclude that the State failed to present sufficient evidence to sustain Martin's conviction for DUI, third offense, and for refusal to submit to a chemical test. The Double Jeopardy Clause prohibits the State from retrying him. Therefore, the convictions and the sentence of intensive supervision probation are reversed, and the cause is remanded with directions to dismiss.

REVERSED AND REMANDED WITH DIRECTIONS TO DISMISS.

SUSAN J. SHERMAN, APPELLEE, V.
SCOTT ALAN SHERMAN, APPELLANT.
781 N.W.2d 615

Filed April 20, 2010. No. A-09-647.

1. **Judgments: Injunction: Appeal and Error.** A protection order is analogous to an injunction. Accordingly, the grant or denial of a protection order is reviewed de novo on the record.
2. **Judges: Trial.** A judge must be impartial, his or her official conduct must be free from even the appearance of impropriety, and a judge's undue interference in a trial may tend to prevent the proper presentation of the cause of action.
3. **Judges.** A judge must be careful not to appear to act in the dual capacity of judge and advocate.
4. **Judgments: Pleadings.** The contested factual hearing in protection order proceedings is a show cause hearing, in which the fact issues before the court are whether the facts stated in the sworn application are true.

5. **Due Process: Pleadings: Proof: Records.** Even though the procedural due process afforded in a harassment protection hearing is limited, some evidence must still be presented and the allegations of the petition require proof by evidence incorporated in the bill of exceptions.
6. **Judicial Notice.** A court may not take judicial notice of disputed facts.
7. **Evidence.** Documents must be admitted into evidence at contested factual hearings in protection order proceedings to be considered by the court.

Appeal from the District Court for Douglas County: LYN V. WHITE, County Judge. Reversed and remanded with directions.

Scott Alan Sherman, pro se.

Anthony W. Liakos, of Govier & Milone, L.L.P., on brief, for appellant.

Joni Visek, of Visek Law, for appellee.

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

INBODY, Chief Judge.

INTRODUCTION

Scott Alan Sherman appeals the entry of a harassment protection order entered in favor of Susan J. Sherman. Because we find that the evidence was insufficient to support entry of the harassment protection order, we must reverse the court's entry of the order and remand the cause with directions to vacate the harassment protection order.

STATEMENT OF FACTS

On May 12, 2009, Susan filed a form petition and affidavit to obtain a domestic abuse protection order against her ex-husband, Scott, under Neb. Rev. Stat. § 42-924 (Reissue 2008). Susan sought an order prohibiting Scott from threatening, assaulting, molesting, or attacking her, or otherwise disturbing her peace; prohibiting him from telephoning, contacting, or otherwise communicating with her except for communication regarding their children; and ordering Scott to stay away from her home unless it is to pick up or drop off their children. The court issued an ex parte domestic abuse protection order against Scott that same day. After he was served with the protection order, Scott requested a hearing and filed a

motion to dismiss and vacate the protection order. He also filed a motion to deem Susan's petition and affidavit frivolous and sought attorney fees.

At the June 18, 2009, hearing, Susan appeared pro se and Scott appeared with counsel. During the hearing, Scott's counsel moved to dismiss the ex parte domestic abuse protection order. In response, the court, sua sponte, requested that the bailiff retrieve a harassment protection order, stating that Susan "want[ed] to amend it to that." The court took judicial notice of Susan's affidavit to obtain a domestic abuse protection order, which affidavit noted that on Mother's Day, May 10, 2009, Scott called Susan 8 to 10 times during a family dinner, and that Scott calls repeatedly whenever Susan is "having family over." The affidavit further set forth that on Fridays, Scott would send Susan text messages calling her a "SLUT," "WHORE," "BITCH," and "bad parent."

Susan submitted as exhibits letters from two of her coworkers corroborating her affidavit regarding Scott's constant calls and text messages. Susan informed the judge, "I have two letters from co-workers," but those exhibits were never offered into evidence and are not included in the record on appeal. Despite this, the exhibits were read aloud by the judge, so their content is included in the bill of exceptions. Further, Scott's counsel objected to the exhibits, but the court did not rule on the objection, and the court noted that it was considering the exhibits in making its ruling.

After taking judicial notice of the allegations contained in Susan's petition and affidavit to obtain the domestic abuse protection order and considering the aforementioned exhibits, the court entered a harassment protection order pursuant to Neb. Rev. Stat. § 28-311.09 (Reissue 2008) in favor of Susan, against Scott, for a period of 1 year. The harassment protection proceeding is considered a district court proceeding, even if heard by a county court judge, and an order or judgment of the county court in a domestic relations matter (including harassment protection orders) has the force and effect of a district court judgment. Neb. Rev. Stat. § 25-2740 (Reissue 2008). Thus, Scott has appealed to this court.

ASSIGNMENTS OF ERROR

Scott contends that the court violated his rights of due process in entering the harassment protection order against him, that the court erred in acting as an advocate for Susan, and that the evidence presented by Susan was insufficient to support the entry of the harassment protection order against him. Further, Scott contends that the court erred in failing to award attorney fees on the basis that Susan's petition was frivolous.

STANDARD OF REVIEW

[1] A protection order is analogous to an injunction. *Mahmood v. Mahmud*, 279 Neb. 390, 778 N.W.2d 426 (2010). Accordingly, the grant or denial of a protection order is reviewed de novo on the record. *Id.*

ANALYSIS

Violation of Due Process/Court Acting as Advocate.

Scott argues that he was denied due process because Susan filed for a domestic abuse protection order, not a harassment protection order, and therefore, he did not receive adequate notice of either the allegations related to the harassment protection order or the entry of that order. He further contends that the court erred in acting as Susan's advocate by requesting the bailiff to retrieve a harassment protection order, stating that Susan "want[ed] to amend it to that."

The Nebraska Supreme Court recently considered a similar, but not identical, situation in *Mahmood v. Mahmud, supra*. In that case, the petitioner requested a domestic abuse protection order using a form petition and affidavit in which she described a history of numerous telephone calls and letters, but did not allege violence. That same day, the judge entered an ex parte harassment protection order. After a hearing, the court ordered that the protection order remain in place.

The respondent in *Mahmood* appealed, alleging, among other things, that (1) the court lacked jurisdiction to issue a harassment protection order because the petitioner had filed a petition and affidavit for a domestic abuse protection order, (2) issuance of a harassment protection order upon a petition and affidavit for a domestic abuse protection order was invalid

because it did not comport with applicable statutes, and (3) issuance of a harassment protection order upon a petition and affidavit for a domestic abuse protection order, and a hearing without notice to the pro se respondent as to the type of order being defended against, prejudiced the respondent and violated his due process rights.

The Nebraska Supreme Court held that a court has the authority to enter a harassment protection order even though the petitioner filed a petition and affidavit for a domestic abuse protection order. The Supreme Court found that the provisions of § 28-311.09(1) stating that a judge may issue a harassment protection order "[u]pon the filing of such a petition and affidavit" were not jurisdictional and did not change the rules of notice pleading generally applicable to civil actions, and that the statute did not provide that a court was without the authority to act absent the proper standard form. The Supreme Court noted that although the petitioner in *Mahmood* used a standard form for abuse instead of one for harassment, the county court judge properly looked to the relief requested rather than simply relying on the title of the petition, and that the thrust of the petition was to seek a harassment protection order. Since the petitioner described a history of numerous telephone calls and letters, but did not allege violence, the petition, although titled a petition to seek a domestic abuse protection order, was more properly considered a petition to seek a harassment protection order. Further, the Supreme Court held that the petition provided fair notice of the claim asserted and was sufficient to confer authority on the county court to issue the order.

Although the petitioners in *Mahmood v. Mahmud*, 279 Neb. 390, 778 N.W.2d 426 (2010), and the instant case both filed petitions and affidavits for domestic abuse protection orders, the court in this case did not immediately, upon its filing, consider Susan's petition and affidavit for a domestic abuse protection order as a request for a harassment protection order and then issue an ex parte harassment protection order as did the court in *Mahmood*; rather, the court in this case issued a domestic abuse protection order. It was not until the contested hearing that the court apparently realized that Susan's allegations did not allege domestic abuse as required by a domestic

abuse protection order and that in reality, proceeding with a domestic protection order theory would necessarily have resulted in a dismissal. See § 42-924 (domestic abuse protection order). Scott was in a different position than the respondent in *Mahmood* because, when Scott requested the hearing, he believed that he was defending against the entry of a domestic abuse protection order. It was not until the hearing had begun that Scott received notice that he would need to defend against the entry of a harassment protection order. However, once Scott became aware that the court was proceeding under the harassment protection order theory, Scott failed to seek a continuance to cure any prejudice caused by the change in theory of protection order. Thus, we find that this issue has not been properly preserved for appellate review.

[2,3] Despite this finding, we do note that the judge's actions at the hearing in making the determination of which theory to pursue, rather than allowing Susan to make that choice herself, did cross the line into advocacy.

> "A judge must be impartial, his or her official conduct must be free from even the appearance of impropriety, and a judge's undue interference in a trial may tend to prevent the proper presentation of the cause of action. [Citation omitted.] A judge must be careful not to appear to act in the dual capacity of judge and advocate. . . ."

Lucas v. Anderson Ford, 13 Neb. App. 133, 141, 689 N.W.2d 354, 361 (2004), quoting *Jim's, Inc. v. Willman*, 247 Neb. 430, 527 N.W.2d 626 (1995), *disapproved on other grounds, Gibilisco v. Gibilisco*, 263 Neb. 27, 637 N.W.2d 898 (2002).

In order to prevent crossing the line into advocacy for a pro se litigant, when presented with a situation in which an ex parte domestic abuse protection order has been entered, but at the hearing, it becomes apparent that the matter may more properly be considered as a harassment protection order, the judge should explain the requirements for both domestic abuse and harassment protection orders and allow the petitioner to choose which theory to pursue. If the petitioner chooses to pursue the alternative theory to the petition and affidavit filed, and the respondent objects, the court should inquire if the respondent is requesting a continuance, which should be granted, if so

requested, while leaving the ex parte protection order temporarily in place. Following this procedure ensures that a judge does not cross the line from judge to advocate in assisting the pro se litigant while at the same time protecting the rights of the opposing party.

Insufficiency of Evidence.

We now consider Scott's claims that the evidence was insufficient to support entry of the harassment protection order. In finding sufficient evidence to enter the harassment protection order, the court took judicial notice of the allegations contained in Susan's petition and affidavit to obtain the domestic abuse protection order and of the letters she offered as exhibits.

[4,5] The Nebraska Supreme Court has recently considered the sufficiency of evidence adduced at a contested factual hearing in protection order proceedings. *Mahmood v. Mahmud*, 279 Neb. 390, 778 N.W.2d 426 (2010). In *Mahmood*, the protection order proceedings were so informal that the record contained no sworn testimony or exhibits. The ex-wife argued that a prima facie case could be established by her form petition and affidavit. The Nebraska Supreme Court agreed but stated that the petition and affidavit could not be considered as evidence until offered and accepted at the trial as such. The Supreme Court noted that a contested factual hearing in protection order proceedings is a show cause hearing, in which the fact issues before the court are whether the facts stated in the sworn application are true. *Id.* Even though the procedural due process afforded in a harassment protection hearing is limited, some evidence must still be presented and the allegations of the petition require proof by evidence incorporated in the bill of exceptions. See *id.* Since no evidence was admitted at the hearing on which the court could base its findings, the evidence was insufficient to support the protection order.

[6] Because Susan's petition and affidavit were not received as evidence at trial, they could not be considered as evidence. Further, the court's attempt to take judicial notice of the allegations contained in Susan's petition and affidavit must fail because a court may not take judicial notice of disputed facts. See *Ray Tucker & Sons v. GTE Directories Sales Corp.*, 253

Neb. 458, 571 N.W.2d 64 (1997). Thus, the allegations contained in Susan's petition and affidavit were not evidence upon which the court could base its findings and were not properly considered by the court in making its determination.

[7] With the exclusion of Susan's petition and affidavit, this leaves Susan's two exhibits as the sole possible remaining evidence to support entry of the harassment protection order. However, neither of these exhibits was received into evidence by the court either. Documents must be admitted into evidence at contested factual hearings in protection order proceedings to be considered by the court. See *Mahmood v. Mahmud, supra*. Thus, the exhibits were also not evidence upon which the court could base its findings. Based upon our de novo review, in light of the fact that there was no evidence before the court upon which it could base its findings, we find that the evidence is insufficient to support the harassment protection order.

Attorney Fees.

Scott contends that the court erred in failing to grant him attorney fees on the ground that Susan's petition was frivolous. Scott sought attorney fees based on Neb. Rev. Stat. § 25-824(4) (Reissue 2008), which provides that a court

> shall assess attorney's fees and costs if, upon the motion of any party or the court itself, the court finds that an attorney or party brought or defended an action or any part of an action that was frivolous or that the action or any part of the action was interposed solely for delay or harassment.

Although we have determined that the evidence presented at the contested factual hearing was insufficient to support the court's entry of the harassment protection order, Susan's action was not frivolous and Scott was not entitled to attorney fees.

CONCLUSION

Because the evidence was insufficient to support entry of the harassment protection order, we reverse, and remand with directions to vacate the harassment protection order.

REVERSED AND REMANDED WITH DIRECTIONS.

IN RE INTEREST OF CARRDALE H. II, A CHILD UNDER 18 YEARS OF AGE. STATE OF NEBRASKA, APPELLEE, V. CARRDALE H., APPELLANT.

781 N.W.2d 622

Filed April 27, 2010. No. A-09-953.

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. **Juvenile Courts: Proof.** Generally, in an adjudication proceeding, the State need not prove that the juvenile has actually suffered harm but must establish that without intervention, there is a definite risk of future harm.
3. **Juvenile Courts: Jurisdiction: Proof.** At the adjudication stage, in order for a juvenile court to assume jurisdiction of minor children under Neb. Rev. Stat. § 43-247(3)(a) (Reissue 2008), the State must prove the allegations of the petition by a preponderance of the evidence.
4. ____: ____: ____. If the pleadings and evidence at the adjudication hearing do not justify a juvenile court's acquiring jurisdiction of a child, then the juvenile court has no jurisdiction, i.e., no power to order compliance with a rehabilitation plan and no power over the parent or child at the disposition hearing unless jurisdiction is alleged and proved by new facts at a new adjudication-disposition hearing.

Appeal from the Separate Juvenile Court of Douglas County: DONNA F. TAYLOR, County Judge. Reversed and remanded with directions to dismiss.

Thomas C. Riley, Douglas County Public Defender, and Stephen P. Kraft for appellant.

Donald W. Kleine, Douglas County Attorney, and Jordan Boler for appellee.

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

SIEVERS, Judge.

INTRODUCTION

Carrdale H. appeals from an order of the separate juvenile court of Douglas County which took jurisdiction over his son, Carrdale H. II (the juvenile). On appeal, Carrdale challenges

the sufficiency of the evidence to support adjudication under Neb. Rev. Stat. § 43-247(3)(a) (Reissue 2008).

STATEMENT OF FACTS

In May 2009, the State filed a motion for temporary custody, which was granted by the juvenile court. The State filed its amended petition in July 2009, in which it alleged that the juvenile lacked proper parental care and supervision by reason of the habits of his mother and Carrdale. Because the mother has not appealed in this matter, it is unnecessary to discuss the allegations against her. The petition alleged that the juvenile was at risk of harm because of Carrdale's use of alcohol and/or controlled substances, because Carrdale engages in domestic violence with the juvenile's mother in the presence of the juvenile, and because Carrdale had failed to provide the juvenile with safe, stable, and appropriate housing.

The hearing in this case was based on a few stipulated facts: The juvenile was born in October 2008, Carrdale is his biological father, and a substance which proved to be .3 of a gram of crack cocaine was found in Carrdale's possession in March 2009. The remaining allegations in the petition against Carrdale, such as domestic violence, were dismissed. After brief arguments by counsel, the juvenile court found that the juvenile, less than 1 year old at the time of the hearing, was harmed by Carrdale's possession of illegal drugs. The court noted that such possession subjects Carrdale to arrest and the inability to care for the juvenile. The juvenile was adjudicated under § 43-247(3)(a). Carrdale filed a motion to reconsider, which the separate juvenile court denied. Carrdale has timely appealed to this court.

ASSIGNMENT OF ERROR

Carrdale asserts that there was insufficient evidence to adjudicate the juvenile within the meaning of § 43-247(3)(a).

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 Angelica L. & Daniel L.*, 277 Neb. 984, 767 N.W.2d 74 (2009).

ANALYSIS

Carrdale contends that the fact of his possession of a small amount of crack cocaine is insufficient to warrant the juvenile court's adjudication of the juvenile under § 43-247(3)(a). Carrdale directs us to *In re Interest of Brianna B. & Shelby B.*, 9 Neb. App. 529, 614 N.W.2d 790 (2000), a case in which a father appealed from an adjudication of his two children under § 43-247(3)(a) on the basis of his alcohol use. As summarized, the evidence in that case established a pattern of drinking. This court found that although the evidence showed that the parents had consumed alcohol on occasions when the children were in the house, there was no evidence presented to show any impact such drinking had on the children. The juvenile court's order of adjudication was reversed.

Carrdale argues that his case is analogous to *In re Interest of Brianna B. & Shelby B.* because there was no evidence to establish that his actions had any impact on the juvenile. We agree that it is. However, it is important to note one distinction. In *In re Interest of Brianna B. & Shelby B.*, the conduct of the parents was not illegal, whereas Carrdale had an illegal substance in his possession, which is a Class IV felony. See Neb. Rev. Stat. § 28-416(3) (Reissue 2008). The juvenile court based its decision upon this fact and reasoned that because Carrdale's actions subjected him to arrest, the juvenile was subjected to the risk that Carrdale could not properly care for him.

[2] Generally, the State need not prove that the juvenile has actually suffered harm but must establish that without intervention, there is a definite risk of future harm. See, e.g., *In re Interest of Anaya*, 276 Neb. 825, 758 N.W.2d 10 (2008). In *In re Interest of Anaya*, the Nebraska Supreme Court found that the parents' failure to submit their infant to mandatory blood testing required by Neb. Rev. Stat. § 71-519 (Reissue 2009) did not, standing alone, establish neglect to warrant adjudication under § 43-247(3)(a). By refusing to submit their child to the blood test, the parents engaged in illegal activity. The

mandatory blood testing is enforced through civil proceedings and "any other remedies which may be available by law" pursuant to Neb. Rev. Stat. § 71-524 (Reissue 2009). Similarly, Carrdale's offense, if he was in fact charged and convicted, may result in imprisonment, but of course, he could also be convicted and placed on probation. See Neb. Rev. Stat. § 28-105 (Reissue 2008).

In prior cases, we have determined that a showing that the parent is in prison and thereby unable to care for his child may be sufficient for adjudication under § 43-247(3)(a). See *In re Interest of Maxwell T.*, 15 Neb. App. 47, 721 N.W.2d 676 (2006) (father who was incarcerated prior to and at time of State's petition, had not had contact with his son for 6 months, and had left son in care of someone who was unable to care for him was properly adjudicated because juvenile was lacking proper parental care due to faults or habits of father). Likewise, in the context of cases involving termination of parental rights, the appellate courts have often held that while incarceration alone cannot serve as the basis for the termination of parental rights, when a parent voluntarily engages in illegal activity leading to incarceration, the court may consider the parent's inability to perform his or her parental obligations because of imprisonment. See *In re Interest of Theodore W.*, 4 Neb. App. 428, 545 N.W.2d 119 (1996).

[3] But, here, the State failed to adduce any evidence whether Carrdale was actually charged with an offense, and thus there obviously was no conviction and incarceration. Furthermore, § 28-105 does not require imprisonment for a Class IV felony, but, rather, there is no minimum prison term prescribed by the statute. The State also failed to adduce whether there was any history of drug use either away from or in the presence of the juvenile, whether Carrdale had prior drug- or alcohol-related offenses, whether the juvenile was present when Carrdale had drugs in his possession, whether the juvenile was in any way affected by Carrdale's actions, or any other such information that allows a reasonable inference that Carrdale's "use of alcohol and/or controlled substances places said child at risk for harm" as alleged in the amended petition. Based only upon an exhibit showing that Carrdale had a controlled substance in his

possession in March 2009, and without evidence of charges filed or a sentence imposed or any impact on the juvenile, the risk of harm to the juvenile cannot be considered "definite." At the adjudication stage, in order for a juvenile court to assume jurisdiction of minor children under § 43-247(3)(a), the State must prove the allegations of the petition by a preponderance of the evidence. *In re Interest of Rebekah T. et al.*, 11 Neb. App. 507, 654 N.W.2d 744 (2002). Based upon our de novo review, we find that the juvenile court erred in finding that the limited evidence presented at the adjudication hearing proved the allegation in the petition by a preponderance of the evidence.

[4] If the pleadings and evidence at the adjudication hearing do not justify a juvenile court's acquiring jurisdiction of a child, then the juvenile court has no jurisdiction, i.e., no power to order compliance with a rehabilitation plan and no power over the parent or child at the disposition hearing unless jurisdiction is alleged and proved by new facts at a new adjudication-disposition hearing. See *In re Interest of D.M.B.*, 240 Neb. 349, 481 N.W.2d 905 (1992). Therefore, we remand the cause with directions to dismiss the petition because the juvenile court does not have jurisdiction.

But, our respected colleague's dissent demands a response. While in the "Internet age" one can readily access virtually unlimited sources and amounts of information, we do not think that our jurisprudence has now evolved to the point that a judge can plug the gaps in a State's burden of proof by quotations obtained by Internet research. If we have reached that point, then the notion that judges in our decisionmaking process are limited to consideration of only the evidence in the record becomes essentially meaningless. We strongly believe that we are limited to the evidence in the record. Here, the State chose to limit its evidence to the solitary fact that on one occasion, Carrdale possessed a small amount of crack cocaine. The dissent concludes from such solitary fact that "the strongest inference flowing from Carrdale's possession of this drug is that he had used it in the past and intended to do so again." How this is not purely speculation escapes us. From this truly uninformative record, one could likewise speculate that this

was the first time he had ever possessed the drug, or that he was "holding" for someone else. The dissent, when reduced to its essence, simply would hold that "parental possession of drugs is enough to adjudicate" and that no evidence is needed that the child is being neglected, that the child is lacking in proper parental care, or that the father is a habitual user or dealer of drugs such that we can conclude, from the evidence, that the risk of harm to the child justifies the intervention of the State in the parent-child relationship. Obviously, we are well aware that the court need not await harm or tragedy to the child before such intervention can occur, but we cannot accept the proposition that the mere stipulation that a father possessed a small amount of crack cocaine on one occasion, without more, satisfies the State's burden of proof for adjudication.

CONCLUSION

The State failed to show, by a preponderance of the evidence, that Carrdale's use of alcohol and/or controlled substances placed the juvenile at risk of harm. Thus, because we find there was insufficient evidence presented to warrant an adjudication of the juvenile as concerns Carrdale, we reverse the adjudication order and remand the cause with directions to dismiss.

REVERSED AND REMANDED WITH DIRECTIONS TO DISMISS.

CASSEL, Judge, dissenting.

A parent who possesses crack cocaine places his or her child at substantial risk of harm. The majority opinion, however well intended, refuses to accept this simple reality. Although, as Justice Holmes famously observed, the life of the law has been experience, the majority opinion disregards human experience with crack cocaine and other such drugs. While many legal questions are complex and nuanced, I find no such complexity here. Therefore, I respectfully dissent.

I disagree with the majority opinion for four reasons. First, the majority fails to heed the rule that a court need not wait until disaster has befallen a minor child before the court may acquire jurisdiction. Second, the majority inappropriately

equates possession of crack cocaine to a parent's religiously motivated resistance to government-mandated blood testing of an infant child. Third, the majority overlooks the many cases involving drug use that have come before the Nebraska appellate courts and that illustrate the devastation of children's lives caused by a parent's involvement with illegal drugs. Finally, numerous federal and state government reports demonstrate the enormous costs suffered by society, as well as the individual children involved, from parental use of illegal drugs. I now discuss each reason in greater detail.

There is no requirement that a juvenile court wait until disaster has befallen a minor child before the court may acquire jurisdiction. If it is reasonable to assume that injury will occur absent action by the court, then the court may assume jurisdiction and act accordingly. *In re Interest of Joshua M. et al.*, 251 Neb. 614, 558 N.W.2d 548 (1997). Carrdale H. stipulated that .3 of a gram of crack cocaine was found in his possession in March 2009. By far, the strongest inference flowing from Carrdale's possession of this drug is that he had used it in the past and intended to do so again. This inference satisfies the burden of proof for adjudication of the child, which at this stage requires only a preponderance of the evidence. At the adjudication stage, in order for a juvenile court to assume jurisdiction of minor children under Neb. Rev. Stat. § 43-247(3)(a) (Reissue 2008), the State must prove the allegations of the petition by a preponderance of the evidence. *In re Interest of Heather R. et al.*, 269 Neb. 653, 694 N.W.2d 659 (2005). The purpose of the adjudication phase of a juvenile proceeding is to protect the interests of the child. The parents' rights are determined at the dispositional phase, not at the adjudication phase. *Id.* The probability of harm to the child follows naturally from the nature of the parent's problem. It is more than reasonable to assume that absent action by the juvenile court, the possession of crack cocaine by the parent will lead to injury to the child. The majority opinion fails to recognize this train of logic.

The majority opinion equates possession of crack cocaine to a parent's religiously motivated resistance to government-mandated blood testing of an infant child. This comparison

is inapposite. In *In re Interest of Anaya*, 276 Neb. 825, 758 N.W.2d 10 (2008), upon which the majority relies, the Nebraska Supreme Court confronted an attempt by the State to use the juvenile code to address the parents' failure to submit their infant to mandatory blood testing required by Neb. Rev. Stat. § 71-519 (Reissue 2009). Although Neb. Rev. Stat. § 71-524 (Reissue 2009) afforded a direct remedy to the State for the parents' failure to submit the child for testing, the State chose to proceed under the juvenile code despite the clear absence of any other evidence of abuse or neglect. The majority opinion in the case before us effectively treats the parents' sincerely held religious beliefs in *In re Interest of Anaya* the same as Carrdale's possession of crack cocaine. To me, the difference is profound and self-evident. Both case law and social literature are replete with examples of harm befalling children as a direct result of a parent's use of illegal drugs. I have been unable to find any case law or general literature documenting harm actually resulting from a parent's refusal to implement a government-mandated test of an infant's blood.

The critical question—whether it is reasonable to assume that injury will occur absent action by the court—requires one to consider human experience bearing on the situation. In doing so, I first look to Nebraska case law, which repeatedly describes the effect of such drugs as crack cocaine upon children and families. This court and the Nebraska Supreme Court have seen numerous juvenile cases involving the abuse and neglect of children due to a parent's involvement with illegal drugs, thus demonstrating that parental substance abuse is a significant issue in the juvenile court system. See, e.g., *In re Interest of Michael B. et al.*, 258 Neb. 545, 604 N.W.2d 405 (2000) (affirming termination of mother's parental rights in part due to her habitual use of illegal drugs); *In re Interest of Kantril P. & Chenelle P.*, 257 Neb. 450, 598 N.W.2d 729 (1999) (affirming termination of mother's parental rights in part because mother used cocaine and refused to comply with court's order to participate in drug dependency treatment program); *In re Interest of Joshua M. et al.*, 256 Neb. 596, 591 N.W.2d 557 (1999) (concluding mother's parental rights were properly terminated where mother was unfit due to her habitual

use of narcotic drugs); *In re Interest of H.P.A.*, 237 Neb. 410, 466 N.W.2d 90 (1991) (affirming termination of mother's parental rights where mother used marijuana on nearly daily basis and used other drugs when available); *In re Interest of Eden K. & Allison L.*, 14 Neb. App. 867, 717 N.W.2d 507 (2006) (testimony and evidence provided that mother's use of methamphetamine impaired ability to provide proper parenting and that mother was not in position to parent due to incarceration for check forgery and drug charges, but this court reversed juvenile court's order terminating mother's parental rights); *In re Interest of Stacey D. & Shannon D.*, 12 Neb. App. 707, 684 N.W.2d 594 (2004) (affirming termination of mother's parental rights where mother failed to demonstrate capability of caring for her children without presence of drugs in her life despite being given approximately 3 years to do so); *In re Interest of Brook P. et al.*, 10 Neb. App. 577, 634 N.W.2d 290 (2001) (affirming termination of parental rights where parents used drugs repeatedly over many years and were unable to abstain from them despite extensive help); *In re Interest of Theodore W.*, 4 Neb. App. 428, 545 N.W.2d 119 (1996) (affirming termination of father's parental rights where, approximately 2½ months after child's birth, father was arrested for possession of crack cocaine with intent to deliver and would remain incarcerated until child was almost 8 years old). These cases clearly demonstrate the reasonableness of the assumption that absent court action, injury to the child will follow from Carrdale's possession of crack cocaine.

I find another source of accumulated human experience in government reports describing such drugs and their effects upon parents and children. These reports make evident the societal costs due to a parent's use of illegal drugs and the harm thereby resulting to children. As aptly explained by the National Center on Addiction and Substance Abuse at Columbia University,

> [t]he human costs are incalculable: broken families; children who are malnourished; babies who are neglected, beaten and sometimes killed by alcohol- and crack-addicted parents; eight-year-olds sent out to steal or buy drugs for addicted parents; sick children wallowing in

> unsanitary conditions; child victims of sodomy, rape and incest; children in such agony and despair that they themselves resort to drugs and alcohol for relief. For some of these children it may be possible to cauterize the bleeding, but the scars of drug- and alcohol-spawned parental abuse and neglect are likely to be permanent.

No Safe Haven: Children of Substance-Abusing Parents at ii (Jan. 1999), http://www.eric.ed.gov/ERICDocs/data/ericdocs2sql/content_storage_01/0000019b/80/16/cd/a9.pdf (last visited Apr. 16, 2010).

> Substance abusers often abandon or neglect their children because their primary focus is obtaining and using drugs or alcohol. They also place their children's safety and well-being at risk when they buy drugs or engage in other criminal activity to support their drug habit. Recovery from drug and alcohol addiction is generally a difficult and lifelong process that may involve periods of relapse.

U.S. General Accounting Office, Foster Care: Agencies Face Challenges Securing Stable Homes for Children of Substance Abusers at 2 (Sept. 1998), http://www.gao.gov/archive/1998/he98182.pdf (last visited Apr. 16, 2010).

> Parents who use hard drugs may be unable to meet even the basic needs of their children. Their use of hard drugs can lead to erratic behavior that places the safety and well-being of their children at risk. For example, the immediate effects of both crack-cocaine and crystallized methamphetamines include hyperstimulation and an amplified sense of euphoria. Crack-cocaine users may also experience feelings of depression, restlessness, irritability, and anxiety, and prolonged use can lead to paranoid behavior.

Id. at 14.

> Most children with substance-abusing parents enter foster care because their parents fail to meet their basic physical and emotional needs. . . . Because of the nature of addiction, obtaining and using drugs or alcohol are the most important focus in the lives of substance abusers. As a consequence, the safety and well-being of their children

> is often secondary to their addiction. Research suggests that substance-abusing parents of children in foster care do not always form healthy emotional attachments with their children and may have limited parenting skills. These parents may abandon their children at birth or sometime later in their lives, be periodically absent from the home, or leave their children in unsafe environments.

Id. at 14-15.

Children of substance-abusing parents often come to the attention of the child welfare system at birth due to prenatal substance exposure or later in life when they are found to have been abused or neglected. U.S. General Accounting Office, Parental Substance Abuse: Implications for Children, the Child Welfare System, and Foster Care Outcomes (Oct. 28, 1997), http://www.gao.gov/archive/1998/he98040t.pdf (last visited Apr. 16, 2010). One report stated that children whose parents abuse alcohol or drugs are almost three times more likely to be verbally, physically, or sexually abused and four times more likely to be neglected. U.S. Department of Health and Human Services, Substance Abuse and Mental Health Services Administration's Center for Substance Abuse Treatment, You Can Help: A Guide for Caring Adults Working with Young People Experiencing Addiction in the Family, http://csat.samhsa.gov/publications/youcanhelp.aspx (last visited Apr. 16, 2010). A publication of the U.S. Department of Health and Human Services reported that parents with substance abuse problems are more likely than other parents to maltreat their children and that between one-third and two-thirds of substantiated child abuse and neglect reports involved substance abuse. Blending Perspectives and Building Common Ground: A Report to Congress on Substance Abuse and Child Protection (Apr. 1999), http://aspe.hhs.gov/HSP/subabuse99/chap4.htm (last visited Apr. 16, 2010). Further, children from substance-abusing households were more likely than others to be served in foster care rather than in the home, spent longer periods of time in foster care, and were less likely to have left foster care within 1 year. *Id.* In a January 1999 report, the National Center on Addiction and Substance Abuse at Columbia University estimated that drug abuse caused or contributed to 7 of 10

cases of child maltreatment and accounted for approximately $10 billion in federal, state, and local government spending on child welfare programs. http://www.ncjrs.gov/ondcppubs/publications/policy/ndcs00/chap2_9.html (last visited Apr. 16, 2010). Another study estimates that $5.3 billion of annual state spending goes toward child welfare costs associated with substance abuse. U.S Department of Health and Human Services, Parental Substance Use and the Child Welfare System (Jan. 2009), http://www.childwelfare.gov/pubs/factsheets/parentalsubabuse.pdf (last visited Apr. 16, 2010).

This is but a sample of the information available in government reports found via the Internet and is by no means exhaustive. See, also, U.S. General Accounting Office, Foster Care: Parental Drug Abuse Has Alarming Impact on Young Children (Apr. 1994), http://archive.gao.gov/t2pbat3/151435.pdf (last visited Apr. 16, 2010); U.S. General Accounting Office, Child Protective Services: Complex Challenges Require New Strategies (July 1997), http://www.gao.gov/archive/1997/he97115.pdf (last visited Apr. 16, 2010); U.S. Department of Health and Human Services, Substance Abuse Among Women and Parents (July 1994), http://aspe.hhs.gov/hsp/cyp/xsfamdrg.htm (last visited Apr. 16, 2010); Jill Goldman et al., U.S. Department of Health and Human Services, A Coordinated Response to Child Abuse and Neglect: The Foundation for Practice (2003), http://www.childwelfare.gov/pubs/usermanuals/foundation/foundation.pdf (last visited Apr. 16, 2010); Nancy K. Young et al., U.S. Department of Health and Human Services, Screening and Assessment for Family Engagement, Retention, and Recovery (SAFERR) (2007), http://download.ncadi.samhsa.gov/prevline/pdfs/SMA07-4261.pdf (last visited Apr. 16, 2010); Nancy K. Young et al., National Center on Substance Abuse and Child Welfare, A Review of Alcohol and Other Drug Issues in the States' Child and Family Services Reviews and Program Improvement Plans (Nov. 2005), http://www.ncsacw.samhsa.gov/files/SummaryofCFSRs.pdf (last visited Apr. 16, 2010).

The harm resulting to children from use of illegal drugs has also been well documented in Nebraska. Here, nearly 77 percent of children reviewed in 2005 who were under

3 years old had parental substance abuse as a factor for removal from the parental home. Carolyn K. Stitt, Nebraska Foster Care Review Board, 2005 Annual Report, Hope is On the Horizon, http://www.fcrb.nebraska.gov/pdf/publications/archive/2005%20Annual%20Report%20-%20main%20body.pdf (last visited Apr. 16, 2010). Among the barriers to permanency for children with a plan of reunification, parental substance abuse affected the greatest number of children. Report to Governor Dave Heineman on the Special Research Project on Young Foster Children Conducted by the Foster Care Review Board August 2006–January 2007, http://www.fcrb.nebraska.gov/pdf/publications/special/2006%20special%20study%20on%20children%20birth%20-%20five.pdf (last visited Apr. 16, 2010).

The state and federal government reports reinforce the basic premise supporting the juvenile court's decision: Carrdale's possession of crack cocaine placed his child at substantial risk of harm.

Contrary to the majority opinion's suggestion, I have not relied on *facts* outside the record. I rely solely upon the *stipulated fact* that Carrdale possessed crack cocaine and upon the *reasonable inferences* that flow from the stipulated fact. The finder of fact may draw reasonable inferences from the facts and circumstances proved. *Jindra v. Clayton*, 247 Neb. 597, 529 N.W.2d 523 (1995). From the stipulated fact, I draw the reasonable inferences that Carrdale used crack cocaine in the past and intends to do so in the future. While the majority may believe it is equally likely that this was the first time he possessed the drug or that he was "'holding'" it for someone else, I respectfully disagree. I contend that in the light of human experience, my inferences are reasonable.

The majority's search for "evidence . . . that the child is being neglected, that the child is lacking in proper parental care, or that the father is a habitual user or dealer of drugs" demonstrates its reluctance to implement the applicable rule. If it is reasonable to assume that injury will occur absent action by the court, then the court may assume jurisdiction and act accordingly. *In re Interest of Joshua M. et al.*, 251 Neb. 614, 558 N.W.2d 548 (1997). I find it reasonable to assume that

Carrdale's possession of crack cocaine will result in harm to the child, while the majority does not. I contend that the weight of human experience, as described in the extensive cases and government reports cited above, firmly establishes that my assumption is the reasonable one. It therefore follows that the juvenile court was empowered to assume jurisdiction and act accordingly. I would affirm the juvenile court's decision doing so.

SUSAN KAYE THOMPSON, APPELLANT, V.
GARY DEAN THOMPSON, APPELLEE.
782 N.W.2d 607

Filed May 11, 2010. No. A-09-612.

1. **Divorce: Child Custody: Child Support: Property Division: Alimony: Attorney Fees: Appeal and Error.** In an action for the dissolution of marriage, an appellate court reviews de novo on the record the trial court's determinations of custody, child support, property division, alimony, and attorney fees; these determinations, however, are initially entrusted to the trial court's discretion and will normally be affirmed absent an abuse of that discretion.
2. **Trial: Evidence: Appeal and Error.** The reopening of a case to receive additional evidence is a matter within the discretion of the district court and will not be disturbed on appeal in the absence of an abuse of that discretion.
3. **Child Support.** An obligor parent is entitled to a credit against his or her current child support obligation for payments made by the Department of Veterans Affairs to the child as a result of the obligor parent's disability, in the absence of circumstances making the allowance of such a credit inequitable.
4. **Trial: Expert Witnesses.** Expert opinions are not binding on the trial court.
5. **Divorce: Property Division.** As a general rule, all property accumulated and acquired by either spouse during the marriage is part of the marital estate.
6. **Property Division.** The ultimate test in determining the appropriateness of the division of property is fairness and reasonableness as determined by the facts of each case.
7. **Divorce: Property Division.** In cases where the growth of the marital estate cannot be attributed to one party more than to another, the trial court may divide the estate equally.
8. ____: ____. The division of marital property should take into account when the growth of the marital estate can be traced to one spouse, and the other spouse, through indolence or neglect, chose to make only minimal beneficial contributions to the marriage and was not engaged in activity beneficial to the marriage.
9. **Alimony: Appeal and Error.** In reviewing an alimony award, an appellate court does not determine whether it would have awarded the same amount of alimony

as did the trial court, but whether the trial court's award is untenable such as to deprive a party of a substantial right or just result.

10. **Alimony.** Factors which should be considered by a court in determining alimony include: (1) the circumstances of the parties; (2) the duration of the marriage; (3) the history of contributions to the marriage, including contributions to the care and education of the children, and interruption of personal careers or educational opportunities; and (4) the ability of the supported party to engage in gainful employment without interfering with the interests of any minor children in the custody of each party.
11. **Attorney Fees.** The award of attorney fees depends on multiple factors that include the nature of the case, the services performed and results obtained, the earning capacity of the parties, the length of time required for preparation and presentation of the case, customary charges of the bar, and the general equities of the case.

Appeal from the District Court for Douglas County: GREGORY M. SCHATZ, Judge. Affirmed in part, affirmed in part as modified, and in part reversed and vacated.

Stephanie Weber Milone for appellant.

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

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

SIEVERS, Judge.

FACTUAL BACKGROUND

Susan Kaye Thompson and Gary Dean Thompson were married January 2, 1987, and two children were born of the marriage, one of whom, Sarah Jane Thompson, remained a minor at the time of trial, at age 17. The parties separated on August 1, 2006, and Sarah continued to live with Susan in the family home. Gary lived in a number of apartments thereafter with the parties' older daughter, who attended college and worked. The older daughter reached the age of majority in May 2007. Susan did not pay support to Gary for the older daughter, nor did Gary pay support to Susan for Sarah either after the separation or during the pendency of this dissolution action. Gary's contact with Sarah following the parties' separation was extremely limited, and the parties stipulated at trial that Gary's parenting time with Sarah would be at Sarah's discretion.

At the time of trial, Susan was 55 years of age and without health problems. Susan's education consisted of an associate degree in business management, and she had been employed for 25 years with Commercial Federal Bank, which later became Bank of the West. Her job was operations manager of the consumer lending division. Susan's earnings were approximately $55,000 gross per year. After the trial was completed, but before the entry of the decree, Susan was notified by her employer that she was being laid off effective June 1, 2009. She filed a motion to reopen the evidence and introduce evidence of such pending layoff, but that motion was denied by the trial court, which reasoned that such fact could be addressed via a modification proceeding.

At the time of trial, Gary was 54 years of age and living alone. Gary's education consisted of several associate degrees and a bachelor's degree, and he had largely completed the work for a master's degree, but had not actually received the degree. During the parties' marriage, Gary worked at a variety of jobs, including being self-employed doing home improvements and repair. He worked doing consulting for ConAgra, he worked for Oriental Trading Company, and he worked as a property manager. Additionally, Gary had been in the military for approximately 28 years, with his service ending in March 1999.

Susan testified that during the course of the marriage, Gary incurred substantial debt, often without her knowledge, and that the parties were required on a number of occasions to take second mortgages on their home, but that at the time of trial, all of the second mortgages had been paid off. Susan asserts that Gary had been a "spendthrift" during the marriage.

The parties agreed that 70 percent of Gary's military retirement was accumulated prior to their marriage, and they agreed to divide the marital portion, 30 percent, equally; thus, Susan's portion of the military retirement was 15 percent. In 2005, Gary decided to work on a Web-based business from his home due to his health problems. Gary's testimony at trial was that he was disabled from engaging in gainful employment and that after July 2007, he had not done any work that generated income. In February 2006, Gary had applied for Social Security disability

benefits because he considered himself totally disabled at that time due to severe anxiety, major depression, short-term memory loss, carpal tunnel "trigger lock," heart palpitations, and knee problems. Gary introduced into evidence certified records from the Department of Veterans Affairs (VA), which had determined that he was permanently and totally disabled. Because of such award of VA disability, Gary elected to withdraw his Social Security disability application and take VA benefits. Gary's VA benefits as of trial were $985 per month, medical care, and some benefits to be paid on behalf of his children. Sarah's benefits were to start retroactively from December 1, 2007, but the VA had not made a determination of the benefits Sarah would receive as a consequence of Gary's disabled status.

Such additional facts as are necessary to resolve the assignments of error will be set forth in our analysis section.

PROCEDURAL BACKGROUND

The trial was held on October 8, 2008, and January 5, 2009, and the trial court issued a letter with its findings dated January 16, 2009. On March 11, Gary filed a motion with the court, asking it to clarify certain rulings in its January 16 letter. A hearing was held April 10 on Gary's motion to clarify the rulings, and the court determined that Gary's child support obligation was $118 per month, which was to begin the first full month following the entry of the decree. The trial court also ordered Gary to sign authorizations giving Susan access to information about the VA benefits for the children. Also, on April 8, Susan asked the court to reopen the evidence because of her discovery of a Centris Federal Credit Union account that she alleged she was unaware of until after the trial.

On May 1, 2009, the trial court filed its order on Gary's motion for clarification and the other pending motions. On May 20, Susan filed a second motion to reopen the evidence, alleging that she had been notified the previous day that she was being laid off from her employment, effective June 1. The trial court denied Susan's motion, indicating that the proper procedure for modifying a decree was to file an application to

modify, although a decree had not yet been entered. The decree of dissolution, which was issued on May 22, largely followed the January 16 decision letter.

DISTRICT COURT DECREE OF DISSOLUTION

The district court's decree of dissolution of marriage was entered on May 22, 2009. That decree dissolved the marriage and awarded legal and physical custody of the parties' remaining minor child, Sarah, to Susan, subject to Gary's parenting time as arranged with Sarah. The decree further provided:

- Gary was found "legally disabled" and his child support was set at $118 per month, but such obligation was ordered to be credited, dollar for dollar, by any VA benefits payable to Sarah. Any VA benefits payable to Sarah for the time prior to the start date of Gary's child support obligations were payable directly to Sarah and not to be credited against Gary's child support obligation.
- Susan was to maintain health and dental coverage on Sarah as long as such coverage was available through her employment. Susan was further ordered to maintain health and dental insurance on Gary for 6 months following the entry of the decree, if such was available through her employment.
- "As a result of [Gary's] disability," Susan was solely responsible for noncovered medical and dental expenses for Sarah.
- The trial court found that the marital estate should be divided pursuant to exhibit 62, finding the division proposed therein to be fair and reasonable and further finding that the values contained therein were supported by the evidence offered at trial.
- Susan was awarded the marital real estate (equity found to be $89,923), household goods, miscellaneous personal property valued at $5,000, and 15 percent of Gary's military pension (monthly annuity).
- Gary was awarded the coin collection (valued at $6,500), personal property in storage (valued at $5,000), and the balance (85 percent) of his military pension.
- Gary was awarded a lien in the sum of $40,000 against the real estate awarded to Susan, to be paid within 90 days from the date of entry of the decree.

- Susan's 401K account (valued at $234,366 at the time of trial) was to be divided equally, with a valuation date being set as of the date of the entry of decree. Any gains or losses from the date of the decree to the date of the distribution were to be divided equally between the parties, and an appropriate qualified domestic relations order (QDRO) "shall be prepared to effectuate the equal division of [Susan's] 401(k) retirement account."
- Gary was ordered to pay credit card debts in his name that had a combined balance of $25,657 as of the parties' separation in August 2006.
- Gary was ordered to pay the Centris Federal Credit Union overdraft protection accounts ending in the numbers 937-8, 937-9, and 218-8. The record indicates that the total owed on all three accounts was $662.81.
- The court attached to the decree an exhibit showing the debts Gary was ordered to pay, which totaled $78,034.83.
- Susan was ordered to pay alimony to Gary in the amount of $300 per month beginning on the first day of the month following the entry of the decree and similarly each month thereafter until Gary is no longer disabled, reaches age 60, or remarries, or upon the death of either party, whichever occurs first.
- Susan was ordered to pay $3,000 toward Gary's attorney fees.

ASSIGNMENTS OF ERROR

Susan assigns, consolidated and restated, the following errors by the trial court: (1) failing to use Gary's earning capacity as the basis for child support and crediting Gary's VA disability benefits against his child support obligation; (2) abusing its discretion in its division of property in the following respects: (a) the value attributed to the family residence, (b) ordering Susan to pay Gary a $40,000 lien within 90 days, (c) failing to dispose of the asset known as Icon Mountain, Inc., (d) awarding Gary the coin collection when it had already been disposed of, (e) awarding items "in storage" to Gary that had been disposed of, and (f) awarding Gary 50 percent of Susan's 401K even though he was a "spendthrift"

throughout the parties' marriage and failed to contribute to the accumulation of the marital estate; (3) failing to employ language in the decree sufficient to accomplish the award to Susan of 15 percent of Gary's military retirement; (4) ordering Susan to pay Gary alimony; (5) ordering Susan to continue to pay for Gary's health insurance during the interlocutory period even though he has health care benefits available through the VA; (6) ordering Susan to pay $3,000 toward Gary's attorney fees; (7) ordering a parenting plan which the parties had not agreed upon; and (8) not allowing Susan to reopen the evidence regarding her posttrial but predecree layoff from employment.

STANDARD OF REVIEW

[1] In an action for the dissolution of marriage, an appellate court reviews de novo on the record the trial court's determinations of custody, child support, property division, alimony, and attorney fees; these determinations, however, are initially entrusted to the trial court's discretion and will normally be affirmed absent an abuse of that discretion. *Sitz v. Sitz*, 275 Neb. 832, 749 N.W.2d 470 (2008).

ANALYSIS

Motion to Reopen Evidence.

[2] Because Susan's last assignment of error, that the trial court should have allowed the reopening of the evidence, would necessarily require a remand to the trial court if we sustained such assignment, we discuss it first. After the trial evidence was completed and the trial court had outlined its intended decision via a letter ruling, but before a decree of dissolution was actually entered, Susan filed a motion on May 20, 2009, to reopen the evidence. The basis for such, as shown by the evidence introduced concerning the motion, was that on May 19, she had received a letter from her employer, Bank of the West, indicating that she would be laid off effective June 1 due to economic conditions. The trial court denied the motion, reasoning that such matter would be more properly taken up in a motion to modify the decree. The rule is that the reopening of a case to receive additional evidence is a matter within

the discretion of the district court and will not be disturbed on appeal in the absence of an abuse of that discretion. *Myhra v. Myhra*, 16 Neb. App. 920, 756 N.W.2d 528 (2008); *Jessen v. DeFord*, 3 Neb. App. 940, 536 N.W.2d 68 (1995).

The termination letter references a future event, albeit said to occur in the very near future. Thus, whether the termination would come to pass would be somewhat speculative. Moreover, although Susan was earning a net of $3,626 per month, the letter does state that she "will be eligible for severance" pursuant to the company's "Severance Plan." No evidence was introduced about the value of such severance, but given that Susan was a 25-year employee, the inference is reasonable that she would not be immediately without resources and that such severance could affect a modification of the decree based on the potential loss of her job. Finally, as a longtime employee who was the operations manager in the consumer lending division, Susan would clearly have substantial experience and skills, and evidence about job replacement and the marketability of her skills and experience after a termination would enable the trial court to more accurately assess how the termination would affect the financial obligations that the decree imposed on her. For these reasons, we cannot say the trial court abused its discretion in denying the motion to reopen the evidence. However, we find that in the event a motion to modify because of Susan's loss of her job at Bank of the West is filed (or has been filed), such change shall not be deemed a change that was in contemplation of, or anticipated by, the parties.

Gary's Earning Capacity and VA Benefits.

Susan's attack on the trial court's imposition of a $118-per-month child support obligation for Sarah is multifaceted. She argues that the court should have used Gary's "earning capacity," that the record lacks evidence to support the court's finding that Gary is "'legally disabled'" from gainful employment, and that the trial court lacks jurisdiction to give Gary credit against his child support obligation, because federal law prohibits state courts "from exercising subject matter jurisdiction over [VA] disability benefits." Brief for appellant at 18. Susan cites *Ryan v. Ryan*, 257 Neb. 682, 600 N.W.2d 739 (1999),

for the jurisdictional argument. *Ryan* is not really on point, because it involved a denial by the trial court of the wife's attempt to receive a portion of the husband's VA disability pension as part of the division of marital property. The Nebraska Supreme Court held that Nebraska courts lack jurisdiction to divide the VA disability income, because such is not divisible marital property under the federal Uniformed Services Former Spouses' Protection Act. The *Ryan* court, referencing the decision in *Mansell v. Mansell*, 490 U.S. 581, 109 S. Ct. 2023, 104 L. Ed. 2d 675 (1989), held:

> The Court concluded that the [Uniformed Services Former Spouses' Protection Act] had a preemptive effect of its own and held that "the Former Spouses' Protection Act does not grant state courts the power to treat as property divisible upon divorce military retirement pay that has been waived to receive [VA] disability benefits." 490 U.S. at 594-95.

257 Neb. at 690-91, 600 N.W.2d at 745. Thus, *Ryan* does not directly address what the trial court did in this case, which was to order that "[Gary's] monthly child support obligation shall be credited, dollar for dollar, by any [VA] Benefits payable to [Sarah]" and that the credit would continue as long as Gary's child support obligation remains in effect. However, under the trial court's decree, any VA benefits payable for Sarah prior to the time that Gary's child support obligation began (June 1, 2009) would be payable directly to Sarah and not credited to Gary's obligation. Therefore, the *Ryan* decision, while excluding VA disability benefits from the divisible marital estate, is not on point on the question of whether a child support obligor can be awarded credit against the child support obligation from the obligor's VA disability pension. Thus, Susan's reliance on *Ryan* is misplaced. That said, we have not found any Nebraska authority which directly addresses this precise issue.

[3] However, in *Duke v. Richard*, 215 W. Va. 470, 600 S.E.2d 182 (2004), the court concluded that the father was entitled to credit against his current child support obligation for payments made by the VA to the child as a result of the father's disability and that the family court erred in holding

otherwise. The West Virginia court reasoned that such benefits should properly be regarded as a substitute for current support payments from the obligor's own earnings. In other words, the obligor is entitled to a credit against his or her current support obligation for those payments in a manner similar to that specified in the statute governing the application of Social Security benefits to such obligations. *Id.* Other courts have permitted a credit on the ground that the federal benefits received on behalf of the children are merely a substitute for the wages the obligor would have received but for the fact of disability or retirement, and from which support payments would have otherwise been received. See, *Davis v. Davis*, 141 Vt. 398, 449 A.2d 947 (1982); *Binns v. Maddox*, 57 Ala. App. 230, 327 So. 2d 726 (1976). We note that our Supreme Court used a virtually identical rationale in *Hanthorn v. Hanthorn*, 236 Neb. 225, 460 N.W.2d 650 (1990), when the court held that Social Security payments made to a parent's child on account of the parent's disability should be considered as credits toward the parent's court-ordered support obligation, in the absence of circumstances making the allowance of such a credit inequitable. See, also, *Tash v. Tash*, 353 N.J. Super. 94, 801 A.2d 436 (2002) (if non-means-tested benefits are paid to or for dependent child for whom support is being determined, benefits must be deducted from basic support obligation). Therefore, we conclude that the trial court did have jurisdiction to award a credit against child support for VA benefits paid to the minor child.

We now turn to Susan's claim that the trial court erred in its calculation of child support, because, summarized, Gary is simply not disabled, he produced insufficient evidence of such disability, and his earning capacity should be used to set child support. Against those claims, we note that the parties' joint tax returns show that in 2003, Gary earned $17,426 from his maintenance and repair business; that in 2004, that business had a net loss of $7,361; that in 2005, the net loss was $962; and that in 2006, the net loss was $9,281. In 2007, the parties filed separately and Gary reported a loss of $16,941 (from three different businesses—Web marketing services, maintenance and repair, and resale of coins and currency). Thus, it can hardly be said that in recent years, Gary has actually had

much earning capacity. Additionally, on May 22, 2008, the VA acted on his claim for disability filed November 15, 2007, by granting him a "nonservice-connected pension." The VA decision letter states: "The evidence shows that you have disabilities, to include major depression, right [and] left upper extremity carpal tunnel syndrome and hypertension, which prevent you from working. . . . [W]e consider you to be permanently and totally disabled." The monthly benefit awarded was $931—which had apparently increased as of the time of trial to $985. Susan's argument suffers from the failure to tell us what Gary's monthly earning capacity might be in the face of the evidence we have just detailed, including his lack of earning in recent years. Accordingly, we reject the assignment of error that the trial court should have used some figure for Gary's earnings other than his VA disability, and we reject the claim that the trial court erred by giving Gary credit for the VA benefits that Sarah receives after June 1, 2009, when his child support obligation begins.

Valuation and Division of Family Residence.

Susan assigns error to the trial court's valuation of the family residence. The trial court used the figure of $122,000 from a licensed appraiser hired by Gary, resulting in equity of $89,923. She also complains of the trial court's order that she pay Gary a $40,000 lien on the residence, as property division, within 90 days of the date of the decree.

Susan finds fault with Gary's appraisal, because the appraiser has been used 50 to 75 times in the past by Gary's attorney, the appraiser acknowledged limited recent sales in that particular subdivision, the basement was only partially remodeled, and there was a leakage problem in the master bedroom, causing its use to be limited. However, these matters simply go to the weight a fact finder would give to the appraisal.

[4] In contrast, Susan, calling on her experience in the lending division of Bank of the West, valued the real estate at $95,000, or $27,000 less. Susan then argues that expert opinions are not binding on the trial court, citing *Anania v. Anania*, 6 Neb. App. 572, 576 N.W.2d 830 (1998), a general proposition which we certainly agree with and frequently cite. Susan

then concludes that "the trial court abused its discretion in not utilizing Susan's value for the real estate," brief for appellant at 22, a conclusion that seems facially at odds with the authority she cites. In any event, we have reviewed the appraisal done by the licensed appraiser, who does appraisals of predominantly residential real estate. The appraisal is comprehensively done in a standard format with comparables. Susan, as an owner of the property, is certainly entitled to express her opinion as to the value of the residence, and she has valuable work experience giving her a knowledge level beyond that of the average homeowner. Thus, the trial court likely could have used her valuation without error, but the trial court obviously was not required to accept her opinion. The trial court made a reasonable choice between competing valuations, and there is no basis to find error in the acceptance of the licensed appraiser's opinion of the value of the marital residence.

With respect to the court's order that Susan pay Gary the $40,000 lien imposed on the property within 90 days of the decree, we note that the ratio of equity to value is 73 percent. Accordingly, given the substantial equity in the home, it is not inequitable that Gary promptly receive his share of the home, and we assume that the trial court operated on the basis that Susan would be able to refinance the house to secure the funds to pay the lien. Susan argues that Gary's appraisal would not support a loan from her employer and that she "likely would not qualify to refinance the home loan," brief for appellant at 23, given that she had been laid off from her job. As to the effect of the alleged layoff, we have already upheld the trial court's rejection of Susan's motion to reopen the evidence to prove up on the layoff. Thus, we cannot consider that she might now be laid off from her job and the impact such occurrence would have on her ability to secure funds to pay off the $40,000 lien. However, we conclude, as we did earlier, that such alleged layoff shall not be considered as an event that was in contemplation of, or anticipated by, the parties, in the event of a future contempt proceeding or other enforcement proceeding with respect to Susan's payment of the lien. We find no error in the trial court's valuation of the marital residence, or the terms of the payoff of the lien.

Treatment of Icon Mountain, Inc.

Susan alleges that the trial court erred in failing to dispose of an "asset," a company entitled "Icon Mountain, Inc.," which Gary described as "active." However, his testimony about such was that while he had renewed the Internet domain name, applied for the corporate name, and paid the fees in 2006, "nothing else has been done with the corporation" and that it exists "[i]n name only." Susan does not argue that it has any value, but only error by the trial court in "failing to dispose of th[is] asset." The evidence makes it debatable as to whether this is even an "asset," but it is true the decree is silent as to such. Using our de novo review power, we simply award all right, title, and interest in Icon Mountain to Gary, but we assign it no value, given the complete lack of evidence that it has any value.

Coin Collection and Items in Storage.

Susan argues that the trial court erred in awarding Gary the coin collection at an equity value of $6,500, because it does not exist. The evidence shows that Gary gave possession of it to his son, who had loaned Gary money, and that the son sold it for $6,500 and kept the money. After citing some authority concerning dissipation of marital assets, Susan argues: "Thus, while the trial court should have included a value for the coin collection and included the same as a marital asset in its division of property, it erred in awarding the actual asset to Gary." Brief for appellant at 24. While we could understand if Gary were complaining about being given an asset that did not exist and having such count as part of his share of the marital property, we simply do not understand Susan's argument or, for that matter, why she cares that the trial court put an asset on Gary's side of the property division ledger that does not exist any longer. If anyone got the "short end of the stick" with respect to the coin collection, it is Gary, not Susan, assuming that it is now "gone" as Gary testified; but if it still exists, the fact that Gary was awarded it is not inequitable—unless it is worth more than the $6,500 value Gary assigned to it—but Susan offered no proof of such fact. Thus, we find this assignment of error to be meritless.

The same argument is advanced with respect to $5,000 worth of personal items Gary had in storage that were lost to the storage facility because he did not pay his rent. The storage items were awarded to Gary by the trial court at a value of $5,000. Again, we do not comprehend how Susan was harmed by the trial court's action, and we likewise find this assignment of error to be meritless.

We note that if these two allegedly nonexistent assets were simply backed out of Gary's property division award, as Susan apparently wants us to do, Gary's award would drop from $143,026 to $131,526, while Susan's award would stay the same at $172,106, meaning Gary's percentage of the marital estate would drop from 45.4 percent to 43.3 percent, but as said, Gary is not complaining, and Susan's complaint is without merit.

Division of Susan's 401K Plan.

Susan had accumulated a 401K plan that was valued at $234,366 as of September 15, 2008, and it was this value that was in Gary's proposed property division, exhibit 62, which the trial court adopted. The trial court ordered that the 401K be divided equally between the parties "with a valuation date being set as the date of the entry of the Decree" and, further, that any "gains/losses from the date of the Decree to the date of distribution" be divided equally between the parties. The decree ordered that a QDRO be prepared to effectuate the division.

[5,6] Susan asserts that Gary made "little contribution" to the marital estate, repeatedly quit jobs, and repeatedly ran up substantial debt, thus dissipating resources, and that her contributions to the accumulation of the marital estate were vastly more substantial than Gary's. Brief for appellant at 25. Thus, she claims that an equal division of her 401K was error, citing *Mathew v. Palmer*, 8 Neb. App. 128, 589 N.W.2d 343 (1999). Susan makes no claim that her 401K was not accumulated during the marriage, and thus she tacitly admits that it was properly included in the marital estate—but argues that an equal division of it is unfair and inequitable. As a general rule, all property accumulated and acquired by either spouse during

the marriage is part of the marital estate. *Heald v. Heald*, 259 Neb. 604, 611 N.W.2d 598 (2000). The ultimate test in determining the appropriateness of the division of property is fairness and reasonableness as determined by the facts of each case. *Id.*

[7,8] In *Mathew*, the evidence was that while the wife worked steadily plus carried much of the load in caring for the children, the husband was "indolent." 8 Neb. App. at 144, 589 N.W.2d at 354. In that opinion, we said:

> The Nebraska Supreme Court recently considered the propriety of a division of marital assets and noted that "[b]oth parties were gainfully employed throughout the 20-year marriage and contributed their earnings to the marriage." *Reichert v. Reichert*, 246 Neb. 31, 40, 516 N.W.2d 600, 607 (1994). The Supreme Court has also stated, "[I]n cases where the growth of the marital estate cannot be attributed to one party more than to another, the trial court may divide the estate equally." *Shockley v. Shockley*, 251 Neb. 896, 903, 560 N.W.2d 777, 782 (1997) (*citing Jirkovsky v. Jirkovsky*, 247 Neb. 141, 525 N.W.2d 615 (1995), and *Kullbom v. Kullbom*, 209 Neb. 145, 306 N.W.2d 844 (1981)). We think these statements recognize the reciprocal proposition, that is, the division of marital property should take into account when the growth of the marital estate can be traced to one spouse, and the other spouse, through indolence or neglect, chose to make only minimal beneficial contributions to the marriage and was not engaged in activity beneficial to the marriage.

Id. at 148, 589 N.W.2d at 356.

In the instant case, the parties were married over 19 years before they separated in August 2006, and it is only Susan who has a retirement account. Gary's Social Security earnings record shows that during those 19 years, Gary had "taxed social security earnings" of $436,275, or average taxed yearly earnings of $22,962 for those 19 years. The husband's contributions to the marriage in *Mathew v. Palmer, supra*, generated adjectives in our opinion such as "indolent," "abysmal," and "minimal." The evidence about Gary's work history, including service in the National Guard during approximately 12 years of

the marriage, cannot be seen as comparable to the husband's history in *Mathew*. Nonetheless, Gary's work history is not comparable to Susan's record, because she was the steady and substantial contributor to the economic status of the union. Gary changed jobs frequently and engaged in a series of less-than-successful business ventures, particularly after the parties separated on August 1, 2006.

The parties have only two assets of consequence: approximately $90,000 of equity in the marital residence and Susan's 401K, the value of which has gone up and down during the parties' lengthy separation and during the pendency of this action. The value adopted by the trial court via exhibit 62 for the 401K was $234,366, and we use that value for analytic purposes, recognizing that at this point in time, it could be quite different given stock market fluctuations.

The existence of the substantial 401K is due solely to Susan's steadfast work at the same job during the entirety of the marriage. Moreover, the parties indisputably separated and lived separate lives beginning August 1, 2006 (personally and financially), and while Gary's employment and earnings thereafter were sporadic and of little consequence, Susan continued to be fully employed. And the evidence shows that Susan's contributions to her 401K, including the company match, were at the approximate rate of $1,500 per quarter. Thus, between the date the parties' marriage had ended for all practical purposes and the date of the decree, Susan would have had an additional 11 or 12 quarters of contributions to her account at the rate of approximately $1,500 per quarter. During this same time, Gary was largely unemployed and living on credit cards. Thus, an equal division of this account gives Gary the benefit of her additional contributions after the separation and ignores the substantial disparity between the economic contributions of the parties to the accumulation of the marital estate. Therefore, we find that an award of 50 percent of the 401K to Gary is not reasonable, or equitable, and was an abuse of discretion. We therefore modify the property division to provide that Gary shall be awarded 33 percent of the total value of Susan's 401K account. See *Ragains v. Ragains*, 204 Neb. 50, 281 N.W.2d 516 (1979) (property division should generally vary from one-third

to one-half value of property involved, depending upon facts and circumstances of particular case).

The trial court used the date of the decree (May 22, 2009) as the date of valuation and provided: "Any gains/losses from the date of the Decree to the date of distribution of the retirement account shall be divided equally between the parties." There is, of course, no evidence as to the value of the 401K as of the date of the decree, which is somewhat problematic, but no error was assigned to this valuation date. The most current evidence about the 401K is that, as of January 2, 2009, the account had a value of $183,017.16 invested in eight different mutual funds. The provision in the decree dividing "gains/losses," as quoted above, implies that Gary was to receive, via the QDRO, 50 percent of the shares held in each mutual fund within the 401K as of the date of the decree. We believe that implied notion for division is appropriate, but we think it wise to make it explicit, as outlined below.

The trial court shall promptly enter the necessary QDRO, within 30 days of the date of the issuance of our mandate, if possible, and may call upon counsel's assistance in accomplishing the entry of the QDRO. See, *Klimek v. Klimek*, 18 Neb. App. 82, 775 N.W.2d 444 (2009); *Fry v. Fry*, 18 Neb. App. 75, 775 N.W.2d 438 (2009). Because of the unknown value of the account on May 22, 2009, as well as how the value of the account was allocated among various investment options available in Susan's plan, the district court may exercise its equitable powers to receive evidence regarding the composition of the account and value of such assets of the 401K both at the date of entry of decree and at the date of any hearing for purposes of issuance of the QDRO. The purpose of doing such would be to allow the trial court to enter an appropriate QDRO specifically dividing the assets of the account such that Susan receives two-thirds of the value of the 401K as of the date of decree, as adjusted for two-thirds of any gains or losses realized thereafter in the account and Gary receives the remaining one-third of the value, again adjusted for gains or losses after May 22, 2009. Of course, any withdrawals Susan may have taken from the account during such time would be allocated toward her two-thirds share of the account.

Award of Alimony.

Susan argues that the trial court erred in requiring her to pay Gary $300 per month in alimony beginning June 1, 2009, and continuing until Gary reaches age 60, he is no longer disabled, he remarries, or either party dies, whichever occurs first. At the time of trial, Gary said he was 54 years of age. Thus, the award is roughly $21,600 over 6 years. The trial court made factual findings in support of the alimony award, reciting the duration of the marriage, the history of contributions to the marriage, Gary's disability, his living expenses, Susan's monthly earnings, and her expenses. Susan argues that the alimony award was error because "the record does not reflect he is disabled from employment, reflects he has earning capacity, . . . reflects he has been [a] spendthrift . . . and reflects Susan was laid off from her job." Brief for appellant at 26-27. The last reason cannot be considered at this juncture, because such fact is not in evidence. And while the evidence shows that Gary was not as economically productive as Susan during the marriage, and that his self-employment businesses in later years were not successful, there is little, if any, evidence to show that he wasted money on bad habits or personal indulgences. In this regard, we note that although Susan testified about the three second mortgages that were taken out because of Gary's shortcomings, the evidence is that as of trial, all of such have been paid, and Susan admitted that Gary always gave her money to apply to the second mortgages. Accordingly, we do not believe that such evidence is really convincing proof that Gary wasted the parties' assets. In short, Susan's "spendthrift" characterization of Gary finds little support in the evidence.

[9,10] In response to Susan's claim that the alimony award was error, Gary points to Susan's long and stable career in which she was earning in excess of $50,000 per year, in contrast to his permanent and total disability status, which generates less than $12,000 a year in income for him, plus his lack of earnings since 2007. He directs us to *Kalkowski v. Kalkowski*, 258 Neb. 1035, 1044, 607 N.W.2d 517, 525 (2000), where the court said:

> In reviewing an alimony award, an appellate court does not determine whether it would have awarded the same

> amount of alimony as did the trial court, but whether the trial court's award is untenable such as to deprive a party of a substantial right or just result. . . . In determining whether alimony should be awarded, in what amount, and over what period of time, the ultimate criterion is one of reasonableness. . . . The purpose of alimony is to provide for the continued maintenance or support of one party by the other when the relative economic circumstances make it appropriate. Alimony should not be used to equalize the incomes of the parties or to punish one of the parties. . . . Factors which should be considered by a court in determining alimony include: (1) the circumstances of the parties; (2) the duration of the marriage; (3) the history of contributions to the marriage, including contributions to the care and education of the children, and interruption of personal careers or educational opportunities; and (4) the ability of the supported party to engage in gainful employment without interfering with the interests of any minor children in the custody of each party.

(Citations omitted.)

Gary introduced an exhibit showing monthly living expenses of $2,277, of which $1,454 was debt service on his credit cards. Otherwise, his monthly expenses are moderate—for example, $200 for food. In contrast, at the time of trial, Susan was netting $3,627, her mortgage payment was only about $700 per month, and she has no other debt. Susan describes herself as healthy, and the remaining minor child was born in 1991 and therefore does not interfere with Susan's employment or ability to work. Thus, given the evidence and our standard of review, we cannot say that the trial court abused its discretion in the award of alimony.

Is Trial Court's Decree Sufficient to Award Susan 15 Percent of Gary's Military Retirement?

Susan argues that the district court erred in failing to employ language in the decree sufficient to accomplish the award to Susan of 15 percent of Gary's military retirement. In order for the award to be enforceable under the Uniformed Services Former Spouses' Protection Act, the award must be expressed

either as a fixed dollar amount or as a percentage of disposable retired pay. 10 U.S.C. § 1408(a)(2)(C) (2006).

In its decree, the district court ordered as follows:

> 5. **DIVISION OF THE MARITAL ESTATE:** The Court finds that [Gary's] proposed division of the marital estate as set forth in Exhibit #62 is fair and equitable and the values contained therein are supported by the evidence offered at trial.
>
> . . . .
>
> Pursuant to Exhibit #62, [*Gary*] *is awarded* all right, title, and interest in and to the coin collection (equity value $6500.00); personal property items in storage (equity value $5000.00); *remaining portion of his military Pension after 15% transfer to* [*Susan*] *(monthly annuity).*

(Emphasis supplied.)

Although the intent of the decree is clear—that Susan is to receive 15 percent of Gary's military pension—this portion of the award could have been set forth more precisely. To avoid any confusion, we modify the above italicized portion of the decree as follows: Susan is awarded 15 percent of Gary's military pension, and Gary is awarded the remaining 85 percent of his military pension. Our research indicates that an award in a divorce decree specifying the percentage of military retirement pay each spouse is to receive is sufficient and that a QDRO is not required.

Did Trial Court Err in Requiring Susan to Continue to Pay for Gary's Health Insurance During Interlocutory Period?

Susan argues that the district court erred in ordering her to pay for Gary's health insurance during the interlocutory period. Susan testified that providing health insurance for Gary costs her an additional $100 per month. Gary testified that because of his disability, he is 100 percent covered by the VA for his health care and prescriptions, but "as long as I'm insured [through other means,] they're gonna take whatever insurance I can collect to keep the cost down for the system." Based on the testimony of the parties, the district court abused its discretion in ordering Susan to continue to pay for Gary's health

insurance during the interlocutory period—at an additional cost to her of $100 per month—when Gary is able to receive free health insurance from the VA. Thus, we reverse and vacate this portion of the decree. Additionally, in order that our modification has meaning, we also order that Gary reimburse Susan for any cost she paid for health insurance for him since the decree, if she did in fact make such payments.

Did Trial Court Err in Requiring Susan to Pay $3,000 Toward Gary's Attorney Fees?

[11] Susan argues that the district court erred in ordering her to pay $3,000 toward Gary's attorney fees.

> The award of attorney fees depends on multiple factors that include the nature of the case, the services performed and results obtained, the earning capacity of the parties, the length of time required for preparation and presentation of the case, customary charges of the bar, and the general equities of the case.

Gress v. Gress, 271 Neb. 122, 132, 710 N.W.2d 318, 328 (2006). Gary submitted a detailed accounting of his attorney fees, which we have reviewed. After a thorough review of the record, and considering the significant difference in the parties' earning capacities, we find that the district court did not abuse its discretion in ordering Susan to pay $3,000 toward Gary's attorney fees.

Did Trial Court's Order for Parenting Plan Constitute Abuse of Discretion?

Sarah was born in March 1991. Thus, she is now 19 years of age and any issues regarding the parenting plan are now moot and will not be addressed by this court. See *State v. McCormick*, 246 Neb. 890, 523 N.W.2d 697 (1994) (it is not within province of Supreme Court to determine moot questions).

CONCLUSION

For the reasons stated above, we modify the district court's decree as set forth above and which we summarize as follows: All right, title, and interest in Icon Mountain is awarded to Gary. Gary shall be awarded 33 percent of Susan's 401K account as of May 22, 2009, plus 33 percent of gains or losses

since such date pursuant to the more specific directions regarding the necessary QDRO found above in our opinion. We reverse and vacate the portion of the decree ordering Susan to pay for Gary's health insurance during the interlocutory period and order Gary to reimburse Susan for any health insurance she may have paid on his behalf since the decree was entered. We affirm the remainder of the decree.

AFFIRMED IN PART, AFFIRMED IN PART AS MODIFIED, AND IN PART REVERSED AND VACATED.

BRIAN L. HALL, APPELLANT, V.
KRISTEN K. HALL, APPELLEE.
782 N.W.2d 339

Filed May 11, 2010. No. A-09-839.

1. **Jurisdiction: Appeal and Error.** A jurisdictional question which does not involve a factual dispute is determined by an appellate court as a matter of law.
2. **Judgments: Appeal and Error.** An appellate court reviews questions of law independently of the lower court's conclusion.
3. **Jurisdiction: Appeal and Error.** Before reaching the legal issues presented for review, it is the duty of an appellate court to settle jurisdictional issues presented by a case.
4. ____: ____. Notwithstanding whether the parties raise the issue of jurisdiction, an appellate court has a duty to raise and determine the issue of jurisdiction sua sponte.
5. **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.
6. **Final Orders: Appeal and Error.** An order is final for purposes of appeal if it affects a substantial right and (1) determines the action and prevents a judgment, (2) is made during a special proceeding, or (3) is made on summary application in an action after judgment is rendered.

Appeal from the District Court for Nemaha County: DANIEL E. BRYAN, JR., Judge. Appeal dismissed.

Louie M. Ligouri, of Ligouri Law Office, for appellant.

David J. Partsch, of Hoch, Partsch & Noerrlinger, for appellee.

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

CASSEL, Judge.

INTRODUCTION

In 2009, Kristen K. Hall sought the enforcement of a provision in a 2005 dissolution decree which required her and her former husband, Brian L. Hall, each to submit a qualified domestic relations order (QDRO) dividing both parties' retirement plan benefits. Brian appeals from a district court order which required him to provide the court with a proposed QDRO within 30 days. Because the order does not affect a substantial right, it is not a final order and we lack jurisdiction to hear this appeal.

BACKGROUND

The parties' marriage was dissolved pursuant to a decree dated November 4, 2005. The decree contained a provision which provided as follows regarding the division of the parties' retirement accounts:

> RETIREMENT AND IRA ACCOUNTS. The Court orders that the parties['] net retirement accounts held by the Nebraska School Retirement System and the Nebraska Public Power District shall be divided equally between the parties. A [QDRO] shall be prepared by the [p]arties. The parties may hire any professional needed for preparation of a QDRO to carry out this provision. The parties shall equally split the cost of any professional needed. The date of the split of the accounts after their separation but before this hearing has been agreed to by the parties.

At the dissolution proceeding, the parties agreed to a date for purposes of valuation, which was June 22, 2005. Retirement account statements offered into evidence at the dissolution proceeding indicated the respective values of Brian's and Kristen's retirement accounts as of June 30.

Brian appealed the district court's decision to this court in case No. A-05-1443, and we affirmed the district court's decision in a memorandum opinion filed on July 13, 2007.

The instant proceeding pertains to a May 4, 2009, "Motion to Compel" Kristen filed in which she requested that the court enter an order compelling Brian to split the parties' retirement accounts as required by the dissolution decree.

At the hearing on the motion, counsel for both parties agreed that Kristen had cashed in her retirement account that was subject to the dissolution decree without any QDRO's having been entered. The record also contains documents which indicate that Brian had requested that Kristen agree to take half of his retirement account as of June 30, 2005, less the amount Brian was to receive from her retirement account, and adjusted for the earnings and losses that accrued to the account since that time. According to Brian's counsel, Brian's account sustained losses after June 22.

On July 31, 2009, the court entered an order which stated that Brian "has 30 days from the date of the filing of this written order to file with the court the proper QDRO implementing [the provisions of the dissolution decree] as set out in the agreement of the parties and confirmed in this opinion." According to the order, the later QDRO was supposed to provide that Kristen would receive half of Brian's account balance as of June 30, 2005, minus the value of half of Kristen's retirement account on the same date, or a total of $222,944.08. It was also to provide for Kristen to receive this amount from Brian's current account balance.

Brian filed a motion for a new trial, which the district court denied, and Brian timely appeals from this order. Pursuant to authority granted to this court under Neb. Ct. R. App. P. § 2-111(B)(1) (rev. 2008), this case was ordered submitted without oral argument.

ASSIGNMENTS OF ERROR

Although we do not reach Brian's assigned errors, we note that in general, Brian asserts that the court erred in (1) awarding Kristen the value of half of his retirement account as of June 30, 2005, when his account subsequently sustained losses; (2) allowing Kristen to retain her entire retirement account which the dissolution decree required her to split; and

(3) requiring Brian to provide the court with a QDRO that remedied Kristen's violation of the original decree.

STANDARD OF REVIEW

[1,2] A jurisdictional question which does not involve a factual dispute is determined by an appellate court as a matter of law. *Midwest PMS v. Olsen*, 279 Neb. 492, 778 N.W.2d 727 (2010). An appellate court reviews questions of law independently of the lower court's conclusion. *Id.*

ANALYSIS

[3,4] Before reaching the legal issues presented for review, it is the duty of an appellate court to settle jurisdictional issues presented by a case. *Connelly v. City of Omaha*, 278 Neb. 311, 769 N.W.2d 394 (2009). Notwithstanding whether the parties raise the issue of jurisdiction, an appellate court has a duty to raise and determine the issue of jurisdiction sua sponte. *Id.*

[5,6] Because we conclude that an order which directs a party to draft a proposed QDRO is not a final, appealable order, we conclude that we lack jurisdiction to hear the instant case. 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. *Id.* An order is final for purposes of appeal if it affects a substantial right and (1) determines the action and prevents a judgment, (2) is made during a special proceeding, or (3) is made on summary application in an action after judgment is rendered. *Williams v. Baird*, 273 Neb. 977, 735 N.W.2d 383 (2007).

Because judgment has already been rendered in the dissolution decree, the order would fall within the third category of possible final orders, i.e., an order made on summary application in an action after judgment is rendered. Thus, the critical question is whether the district court's order affected a substantial right.

We have previously determined that we have jurisdiction over appeals from a district court's entry of a QDRO even when the QDRO has been entered a number of years after the

dissolution decree. *Fry v. Fry*, 18 Neb. App. 75, 775 N.W.2d 438 (2009). We reached this conclusion because "[a] district court has the inherent power to determine the status of its judgments" and a QDRO is "simply an enforcement device of the decree of dissolution." *Id.* at 79, 775 N.W.2d at 442. Therefore, the entry of a QDRO affects a substantial right.

However, the district court order in the instant case does not similarly affect a substantial right. We distinguish the instant case from *Fry v. Fry, supra*, because the order before us does not enforce the terms of the dissolution decree as does a QDRO. The order simply requires the submission of a QDRO which, if approved by the court, would enforce the decree. In essence, the order does not place either of the parties in a position substantially different from the position that either one was in prior to the entry of the order because the pension funds still are not divided.

In fact, the order impacts only a technical right and not a substantial right because the court is not bound by its own determinations contained in the order. Because the court's determinations do not effect a distribution of the parties' assets, during the interim between the entry of the instant order and the later QDRO contemplated by the instant order, there would be nothing to prevent the district court from changing its mind regarding the content of the later order and none of the parties' rights concerning division of the pension funds would have been affected during the interim. Because no substantial right is affected by the instant order, it is purely interlocutory and not appealable.

CONCLUSION

Because there is no final order, we lack jurisdiction to consider this appeal.

APPEAL DISMISSED.

IN RE INTEREST OF EMMA J., A CHILD UNDER 18 YEARS OF AGE. STATE OF NEBRASKA, APPELLEE, V. GENEO J., APPELLANT.

782 N.W.2d 330

Filed May 11, 2010. No. A-09-1031.

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. **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: Jurisdiction: Proof.** In order for a juvenile court to assume jurisdiction of minor children under Neb. Rev. Stat. § 43-247(3)(a) (Reissue 2008), the State must prove the allegations of the petition by a preponderance of the evidence.
4. **Juvenile Courts: Evidence: Proof.** Neb. Rev. Stat. § 43-247(3)(a) (Reissue 2008) requires that the State prove the allegations set forth in the petition by a preponderance of the evidence in cases involving both non-Indian and Indian children.

Appeal from the Separate Juvenile Court of Lancaster County: REGGIE L. RYDER, Judge. Affirmed in part, and in part reversed and remanded with directions.

Laura A. Lowe, P.C., for appellant.

Gary Lacey, Lancaster County Attorney, and Barbara J. Armstead for appellee.

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

INBODY, Chief Judge.

INTRODUCTION

Geneo J. appeals from an order of the separate juvenile court of Lancaster County, adjudicating his minor child, Emma J., as a juvenile within the meaning of Neb. Rev. Stat. § 43-247(3)(a) (Reissue 2008) and placing her outside of the home.

STATEMENT OF FACTS

Procedural History.

On May 20, 2009, the State filed a petition alleging that Emma was a child within the meaning of § 43-247(3)(a) by reason that Emma lacked proper parental care by reason of the

faults or habits of her father, Geneo, and her mother, Venessa J. Specifically, the petition alleges that in 2007, Emma's older sisters, Eva J. and Shakeela J., were adjudicated as a result of being subjected to inappropriate physical discipline by Geneo, and that Venessa had made threatening and rejecting statements and failed to protect Eva and Shakeela. The petition alleges that services designed to correct those matters were put into place, but did not correct the issue; that Geneo and Venessa relinquished their parental rights to Shakeela; and that Eva had turned 19 years of age and was no longer subject to the juvenile court's jurisdiction. The petition alleges that on May 18, 2009, Emma reported inappropriate discipline by Geneo, and that Geneo had threatened to force Emma to have an abortion. The petition also alleges that "active efforts have been made to provide remedial services and rehabilitative programs to prevent the breakup of the Indian family and that these efforts have proven unsuccessful." As noted, the petition asserts that the case involves an "Indian family," but does not contain any specific references to the Indian Child Welfare Act (ICWA). A supplemental transcript was filed by the State which indicates that on June 10, the Omaha Tribe of Nebraska filed a motion to intervene because Emma was "an 'Indian child' as defined by the [ICWA], 25 U.S.C. § 1903(4) and the Nebraska [ICWA]."

Additionally, the State filed an ex parte motion for temporary custody, which was granted by the juvenile court, and Emma was placed with a foster family, specifically the family with whom her older sisters, Eva and Shakeela, were placed and where Shakeela still resided. Also included by the State in the supplemental transcript is an order continuing temporary custody with the Nebraska Department of Health and Human Services (DHHS), which order indicates that the juvenile court determined that Emma's therapist was an expert witness who testified that continued custody of Emma with Geneo would result in serious emotional or physical damage and that active efforts "including a pretreatment assessment, visitation for [Venessa], counseling services, and a comprehensive family assessment have been made or are being offered to the family to provide remedial services and rehabilitation programs

designed to prevent the breakup of the family and those efforts have proved unsuccessful."

On August 5, 2009, the State also filed a motion to allow Emma to testify in chambers alleging that Geneo's or Venessa's presence during her testimony could be harmful to her. After a hearing on the motion, the juvenile court sustained the State's motion and allowed Emma to testify in court, with Geneo and Venessa outside of the courtroom in conference rooms. During which time, Geneo's counsel was given leave every 15 minutes to leave the courtroom and confer with Geneo. Also, Geneo was allowed to view the recording of the testimony and further examine Emma at the continued hearing date.

On August 20 and September 29, 2009, the matter came on for hearing for adjudication on the petition. Geneo and Venessa entered denials on the allegations, and testimony and evidence were submitted to the juvenile court.

Adjudication Hearing Testimony.

At the adjudication hearing, Emma testified that she was 15 years old and was a junior at a high school in Lincoln, Nebraska. Emma testified that she was involved in high school softball and basketball and that during the spring of 2009, she participated on the high school track team. During a track meet on May 14, Emma participated in the 800-meter relay race, but her family did not see her run because they arrived after her race had already concluded. Emma indicated that after her race, she hung out with friends and her boyfriend. Emma agreed that her parents did not approve of her boyfriend because they believed him to be a bad influence and that she was not supposed to be around him. Emma testified that as a result of hanging out with her boyfriend at the track meet, she was grounded and ordered by Geneo to quit the track team.

Emma testified that on May 15, 2009, a Friday, Geneo picked up both her and one of her brothers, Tommy J., and inquired of Tommy as to whether Emma had been with her boyfriend that day. Tommy indicated that he had seen Emma and her boyfriend speaking at school. Emma testified that she got out of the car and went upstairs to her room because she knew she was going to be in trouble for speaking to her

boyfriend. Emma explained that Geneo followed her to her room, yelled at her, and hit her with a closed fist above her left ear on the back of her head and that she fell down. Emma testified that Geneo ordered her to go downstairs and stand on her tiptoes in the kitchen corner. Emma testified that once she was in the corner, Geneo continued to yell at her, compared her to her older sisters, and told her he wished he had no daughters. Emma testified that during this time, her mother, Venessa, was home, along with Tommy and her older half brother, Angelo S., and their small children, but they had gone upstairs to avoid the yelling. Emma explained that Geneo hit her approximately five times with a closed fist and grabbed her around the neck and threw her across the kitchen. Emma explained that it hurt when Geneo hit her and that she caught herself as she hit the counter and the stove. Emma testified that at that time, her mother came in and told Geneo to stop.

Emma testified that Geneo left the house to go to her boyfriend's house and that she remained in the corner because she was upset and did not want to speak with anyone. Shortly thereafter, Geneo returned and the police also arrived at the home. Emma testified that Geneo told her to go wash her face and that he then ordered her to come and speak with the police. Emma explained that two police officers were outside of the home and that she did not tell either officer about the incident which had just taken place with Geneo because both Geneo and Venessa were standing right there and she was scared to tell the police anything.

Emma testified that she was grounded and that no other incident occurred between her and Geneo during the weekend. Emma indicated that on Monday, she did not want to return home and that instead, she contacted her sister Shakeela. Emma testified that she told her sisters and their foster mother about the incident which had occurred on Friday and that she contacted the police to file an abuse report. Emma testified that when the police arrived at the foster family's home, she told a police officer everything about Friday's incidents, including that she was scared to return home. Emma also indicated that Geneo had thought she was pregnant, even though she was not and had not told anyone that she was.

Emma also testified that in February 2009, Geneo had hit her in the head with a closed fist. Emma explained that when she was younger, Geneo used a belt to discipline her, but that as she got older, he used his fists and hands. Emma also explained that on numerous occasions, Geneo would call her a "ho," "whore," and "slut."

Chris Fields, an officer with the Lincoln Police Department, testified that on May 15, 2009, he responded to a call for a child welfare check of Emma at Geneo and Venessa's residence. Fields testified that he spoke with Geneo and Emma and that he did not observe any marks on Emma's face or neck. Fields testified that Emma refused to step away from the house and that he was not able to speak with Emma outside of the presence of Geneo. Fields testified that Emma was crying and upset and indicated to him she was grounded, but that she did not tell Fields she had been hurt by Geneo. Fields explained that as a result of his contact with Geneo and Emma, he did not feel further action was necessary, and that he believed Emma was safe.

Tommy, one of Emma's older brothers, testified that on May 15, 2009, he told Geneo that Emma had been with her boyfriend and Geneo called Emma to come downstairs when Geneo came in the house. Tommy testified that Geneo was not yelling at Emma, but he simply had a deep voice. Tommy testified that he saw Emma in the corner in the kitchen and that he heard a loud bang from the kitchen area around that time, but did not see anything else because he and the other members of the family were upstairs. Tommy testified that the family was together throughout the weekend and that Emma did not talk about any injuries.

Angelo, Emma's older half brother, testified that he was at Geneo's home on May 15, 2009, and heard Geneo yelling at Emma. Angelo also heard a loud bang from the kitchen during the yelling, but he did not see anything because he was upstairs. Angelo testified that when he returned downstairs, Geneo was gone and Emma was standing in the corner. Angelo explained that Emma did not appear to be in any physical distress at that time. Angelo testified that he graduated from college that weekend and that Emma was busy during that time with her

mother and other friends and family planning and organizing his graduation party.

The director of church relations for the People's City Mission, who was Geneo's pastor, testified that on Saturday, May 16, 2009, Geneo brought Emma to the pastor's home to speak with her about her relationship with Geneo and the choices she was making. Geneo's pastor testified that he did not observe any bruises or marks on Emma and that Emma did not indicate that Geneo had harmed her in any way. Geneo's pastor explained that Geneo was at his "wit's end" and that it was probably a good idea that Emma be somewhere else where she would receive supervision that she would listen to.

Tyler Cooper, an officer with the Lincoln Police Department, testified that on May 18, 2009, he received a call that Emma was missing and had run away. On the way to Geneo and Venessa's home, he received another call reporting that Geneo had abused Emma. Cooper testified that he took a runaway report from Geneo and Venessa, during which Geneo told Cooper that he had heard Emma was pregnant and that if he found her, he was going "to make her have an abortion as it was his right because he's [Emma's] father." Cooper testified that Emma had reported to him that Geneo had hit her on the right side of the head, made her stand in the corner, grabbed her by the neck, threw her into the kitchen, and threw things at her. Cooper testified that he did not see any bruising or marks on Emma and that she did not report that Geneo had hit her five times. However, Cooper explained that after speaking with Child Protective Services, he determined that it was appropriate to take Emma into protective custody because Emma's circumstances were very similar to past instances involving Geneo and Emma's older sisters and that there was also an additional abuse report made by Emma the week before, even though that report was unfounded.

Dawn Moore, also an officer with the Lincoln Police Department, testified that she was called to the foster family's residence on May 18, 2009, to take photographs of Emma. Moore testified that she took photographs of Emma's arms, back, and hips and did not observe any markings or bruising. Moore testified that in the course of her duties, she has worked

with victims of assault, and that injuries or marks are not dispositive of whether an assault actually occurred.

Kim Bro, an initial assessment worker for DHHS, testified that she became involved with Emma's case in February 2009, when Emma was still living in Geneo's home. Bro explained that on May 19, she went to Emma's high school to speak with Emma. Bro testified that, on that same day, she also contacted Geneo and Venessa and that Venessa indicated several times that day that she did not want to see Emma and had wasted too much time on her older daughters and was not going to waste any more time with Emma. Bro testified that Geneo also indicated that he did not want to see Emma and further that he did not understand what the problem was because "he had done nothing to her worse than had been done to him in prison." Bro indicated that during each of her conversations with Geneo, he was very angry, and that she ended several conversations with him because he would become verbally abusive. Bro testified that she conducted two separate in-person interviews with Geneo and Venessa, in addition to the various telephone conversations. Bro testified that she knew other people were in the home during the May 15 incident, but she did not speak with them as Geneo had told her she was not allowed to speak with them. Bro testified that, in her opinion, she did not recommend that Emma be placed with Geneo or Venessa because she was concerned for Emma's safety based upon the allegations of abuse.

After taking the matter under advisement, the juvenile court found that all of the allegations in the petition were true by clear and convincing evidence, adjudicated Emma as a child within the meaning of § 43-247(3)(a), and determined that Emma lacked proper care by reason of the fault or habits of Geneo and Venessa. The juvenile court found that active efforts have been made to provide remedial services and rehabilitative programs to prevent the breakup of the Indian family and that those efforts have been unsuccessful. The court also ordered that all temporary orders issued in the case remain in full force and effect pending a predisposition report to be completed by DHHS. From this order, Geneo has timely appealed. Venessa did not file a notice of appeal.

ASSIGNMENTS OF ERROR

Geneo assigns that the juvenile court erred by adjudicating Emma as within the meaning of § 43-247(3)(a), determining that the active efforts were made to prevent the breakup of the Indian family, and continuing out-of-home placement orders without the expert testimony required under ICWA. See Neb. Rev. Stat. §§ 43-1501 to 43-1516 (Reissue 2008).

STANDARD OF REVIEW

[1,2] 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 Taylor W.*, 276 Neb. 679, 757 N.W.2d 1 (2008); *In re Interest of Jagger L.*, 270 Neb. 828, 708 N.W.2d 802 (2006); *In re Interest of Shayla H.*, 17 Neb. App. 436, 764 N.W.2d 119 (2009). 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 Jagger L., supra*.

ANALYSIS

Adjudication.

Geneo contends that the juvenile court erred by adjudicating Emma as a child within the meaning of § 43-247(3)(a). Specifically, Geneo argues that, in accordance with *In re Interest of Phoenix*, 270 Neb. 870, 708 N.W.2d 786 (2006), when adjudicating a petition involving an Indian family, the State has a heightened burden to prove the allegations by clear and convincing evidence. The State argues that, for the adjudication phase of the proceedings, the burden of proof remains a preponderance of the evidence.

Let us start with our review of *In re Interest of Phoenix, supra*. We find that Geneo's reliance upon this case for the proposition of the heightened burden of proof for an ICWA adjudication is misplaced. A closer reading of *In re Interest of Phoenix* indicates that the language from which Geneo chooses to rely upon, in full, deals with the burden of proof for the termination of parental rights for non-Indian children and does not place upon the State the burden of proving the

allegations in an adjudication petition by clear and convincing evidence.

We agree with the State that there is no authority for an enhanced burden of proof in an ICWA adjudication; there is, however, an indication in the cases involving said subject matter that the standard most generally applied at the juvenile court level in ICWA adjudication proceedings is clear and convincing evidence, although, the subject has not been directly addressed as a result of deciding the cases on other grounds. See, *In re Interest of Shayla H., supra* (trial court determined that State proved allegations contained in adjudication petition by clear and convincing evidence; assignment of error not addressed as case was reversed and remanded on other grounds); *In re Interest of Dakota L.*, 14 Neb. App. 559, 712 N.W.2d 583 (2006) (trial court found that ICWA adjudication required enhanced burden of proof by clear and convincing evidence which was assigned as error by appellant but not addressed as case was reversed and remanded on other grounds); *In re Interest of Enrique P. et al.*, 14 Neb. App. 453, 709 N.W.2d 676 (2006) (at adjudication hearing, trial court informed mother that burden of proof was enhanced to clear and convincing evidence as result of children's tribal enrollment status, but adjudicated children based upon preponderance of evidence, although no direct appeal was perfected from adjudication).

[3] Generally, at the adjudication stage, in order for a juvenile court to assume jurisdiction of minor children under § 43-247(3)(a), the State must prove the allegations of the petition by a preponderance of the evidence. Neb. Rev. Stat. § 43-279.01(3) (Reissue 2008); *In re Interest of B.R. et al.*, 270 Neb. 685, 708 N.W.2d 586 (2005); *In re Interest of Rebekah T. et al.*, 11 Neb. App. 507, 654 N.W.2d 744 (2002).

[4] The language of Nebraska's ICWA statutes does not specifically set forth any particular standard of proof for an adjudication proceeding; it does, however, expressly require the State to prove by clear and convincing evidence in the instance where a party is "seeking to effect a foster care placement of, or termination of parental rights, to an Indian child." § 43-1505(4). Whereas, § 43-247 specifically states

that "[n]otwithstanding the provisions of the Nebraska Juvenile Code, the determination of jurisdiction over any Indian child as defined in section 43-1503 shall be subject to the Nebraska [ICWA] . . . ." Therefore, having no language set forth within the ICWA statutes to indicate a heightened or enhanced burden of proof for the adjudication phase of the juvenile proceedings, we find that § 43-247(3)(a) requires that the State prove the allegations set forth in the petition by a preponderance of the evidence in cases involving both non-Indian and Indian children.

Having made this determination, we turn to Geneo's argument that the State failed to meet its burden of proof, notwithstanding his assertion that the burden of proof for adjudicating a juvenile under ICWA is enhanced. Geneo argues that there was a "[l]ack of evidentiary nexus between [the] previous adjudication involving Shakeela and Eva and [the] risk of harm to Emma" and, furthermore, that there was no evidence that Geneo's statement to law enforcement that he would force Emma to have an abortion presented a situation of risk to Emma. Brief for appellant at 18 (emphasis omitted). Geneo contends that these circumstances are a direct result of "Emma's grand plan" to get what she wanted through fabrication and manipulation. Brief for appellant at 20.

In this case, the petition alleges that Emma's two older sisters were adjudicated in 2007 as a result of Geneo's subjecting them to inappropriate physical discipline and Venessa's failure to protect, that Geneo subjected Emma to inappropriate discipline, that Geneo threatened to force Emma to have an abortion, and that the matters leading to the adjudication of Emma's sisters remained uncorrected and placed Emma at risk of harm.

The record indicates that subsequent to the adjudication of Eva and Shakeela, Geneo and Venessa relinquished their parental rights to Shakeela, but Eva had turned 19 years of age and was no longer subject to the juvenile court's jurisdiction. The record indicates that the allegations arising out of Eva and Shakeela's petition are nearly identical to those involving Emma. Emma testified that on May 15, 2009, Geneo discovered that she had been talking to her boyfriend, even though

Geneo had forbidden her to do so. Emma testified that Geneo yelled at her and hit her several times in the back of the head with a closed fist, pushed her down, and ordered her to go to the kitchen and stand in the corner. Emma testified that while she stood in the corner, Geneo continued to yell and hit her in the back of the head. Emma explained that Geneo called her a "ho," "whore," and "slut." Emma explained that Geneo grabbed her around her neck and threw her across the kitchen, at which point Venessa intervened and told Geneo to stop. Emma explained that when she was younger, he would discipline her by hitting her with a belt, but that as she got older, he would hit her with his fists and hands. Emma testified that she did not tell the police what had occurred when they were at the home on May 15, 2009, because she was scared since her mother and father were there. Emma testified that she did not call the police and that she participated in graduation events for her half brother during the weekend without incident. Emma explained that on Monday, May 18, she told Shakeela what happened on the Friday before and that she did not want to go home on Monday because she was still scared.

Emma testified that in the past, Geneo had accused her older sisters of being pregnant and had thought he assumed the same of her even though Emma testified that she was not pregnant and had never told him or anyone else that she was pregnant. Furthermore, Cooper testified that he took a runaway report from Geneo, during which time Geneo told Cooper that he had heard Emma was pregnant and that if he found her, he was going "to make her have an abortion as it was his right because he's [Emma's] father."

Geneo entered a denial of the allegations contained within the petition and presented testimony to refute Emma's assertions, generally attempting to show inconsistencies in Emma's testimony regarding specific timeframes of the incident and Emma's continued contact with her boyfriend. However, we give weight to the fact that the juvenile court observed the witnesses and chose to believe Emma. See *In re Interest of Monique H.*, 12 Neb. App. 612, 681 N.W.2d 423 (2004). Thus, upon our de novo review of the evidence in the record, it is clear that the State proved the elements of the petition for Emma's

adjudication as a child within the meaning of § 43-247(3)(a) by a preponderance of the evidence.

Active Efforts and Expert Testimony.

Geneo argues the juvenile court erred in finding that the State made active efforts to provide remedial services and rehabilitative programs to prevent the breakup of the Indian family and that those efforts were unsuccessful, and in removing Emma from the family home and placing her in foster care without expert testimony as required under ICWA.

Section 43-1505(4) provides:

> Any party seeking to effect a foster care placement of . . . an Indian child under state law shall satisfy the court that active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that these efforts have proved unsuccessful.

See, also, *In re Interest of Louis S.*, 17 Neb. App. 867, 774 N.W.2d 416 (2009).

Additionally, pursuant to ICWA, qualified expert testimony is required on the issue of whether serious emotional harm or physical damage to the Indian child is likely to occur if the child is not removed from the home before foster care placement may be ordered. See § 43-1505(5).

Section 43-1505(5) provides:

> No foster care placement may be ordered in such proceeding in the absence of a determination, supported by clear and convincing evidence, including testimony of qualified expert witnesses, that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child.

See *In re Interest of Phoebe S. & Rebekah S.*, 11 Neb. App. 919, 664 N.W.2d 470 (2003).

Geneo asserts in his brief that the State presented no evidence as to what, if any, active efforts had been made to prevent Emma's placement in foster care and further failed to present any expert testimony. In response, the State claims that the evidence presented at a temporary custody hearing on June 11, 2009, supports the juvenile court's finding that

active efforts had been made and the requisite expert testimony was given.

A supplemental transcript was filed by the State, containing a June 11, 2009, order regarding a motion for temporary custody in which the juvenile court found that active efforts had been made, including "a pretreatment assessment, visitation for [Venessa], counseling services, and a comprehensive family assessment." The order further indicates that the juvenile court determined that Emma's therapist "is a professional person having substantial education and experience in the area of her specialty." The juvenile court's September 30 order for adjudication specifically finds that active efforts had been made.

However, a close review indicates that, in the record before this court, there is no evidence regarding active efforts, nor is there any evidence of expert testimony. In fact, it is clear that the issue of active efforts was not further addressed by the State at the adjudication hearing, even though the juvenile court found that there had been sufficient active efforts. Even if this court were to presume that the issues had been previously addressed by virtue of the June 11, 2009, order, which we do not, there is nothing in the record to substantiate that any efforts had been taken from that time until the adjudication, and no further expert testimony was given at the adjudication hearing.

We find that there is no evidence of any active efforts presented by the State and that there was no expert testimony given as required by ICWA to support continued out-of-home placement of Emma. Therefore, the juvenile court erred in determining that such efforts had been made and that such testimony was presented by the State.

CONCLUSION

In sum, we find that the proper burden of proof for the adjudication of an Indian child is by a preponderance of the evidence. In this case, the State proved by a preponderance of the evidence that Emma was a child within the meaning of § 43-247(3)(a) and we affirm the juvenile court's order of adjudication. However, we find that the record is devoid of any

evidence of active efforts and expert testimony as required by ICWA for out-of-home placement of an Indian child. Therefore, we reverse the portion of the judgment ordering Emma's continued out-of-home placement. We further remand the cause with directions to return Emma to Geneo's home, unless a hearing is held to remove her from the home in compliance with ICWA.

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

STATE OF NEBRASKA, APPELLEE, V. DANIEL S. ALBRECHT, APPELLANT.

790 N.W.2d 1

Filed May 18, 2010. Nos. A-09-542, A-09-543.

1. **Courts: Appeal and Error.** Both a district court and a higher appellate court generally review appeals from a county court for error appearing on the record.
2. **Courts: Evidence: Appeal and Error.** In its appellate review of a matter appealed from a county court to a district court, a higher appellate court can consider only such evidence as was presented to the district court in its intermediate review of the county court judgment.
3. **Judgments: Appeal and Error.** When reviewing a district court judgment for errors appearing on the record, an appellate court nonetheless has an obligation to resolve questions of law independently of the conclusions reached by the trial court.
4. **Constitutional Law: Courts: Jurisdiction: Statutes.** The Nebraska Court of Appeals cannot determine the constitutionality of a statute, yet when necessary to a decision in the case before it, it does have jurisdiction to determine whether a constitutional question has been properly raised.
5. **Appeal and Error.** In the absence of plain error, when an issue is raised for the first time in an appellate court, the issue will be disregarded inasmuch as the trial court cannot commit error regarding an issue never presented and submitted for disposition in the trial court.
6. **Constitutional Law: Statutes.** A challenge to a statute, asserting that no valid application of the statute exists because it is unconstitutional on its face, is a facial challenge; in order to bring a constitutional challenge to the facial validity of a statute, the proper procedure is to file a motion to quash or a demurrer.
7. **Constitutional Law: Statutes: Pleas: Waiver.** Once a defendant has entered a plea, the defendant waives all facial constitutional challenges to a statute unless that defendant asks leave of the court to withdraw the plea and thereafter files a motion to quash.

8. **Statutes: Demurrer.** A motion to quash is a procedural prerequisite to challenge the constitutionality of a statute even though such statute does not bear on the charge but only on the sentence imposed upon conviction of the charge.
9. **Criminal Law: Drunk Driving: Probation and Parole.** For the purposes of determining whether a defendant was participating in criminal proceedings pursuant to Neb. Rev. Stat. § 60-6,197.09 (Cum. Supp. 2008), once a defendant has pled guilty and such plea was accepted to one charge, the defendant was obviously participating in that criminal proceeding at the time he pled guilty to the second charge when both pleas were accepted at the same time, and thus the defendant is not eligible for probation under Neb. Rev. Stat. § 60-6,197.09 (Cum. Supp. 2008).

Appeal from the District Court for Douglas County, W. MARK ASHFORD, Judge, on appeal thereto from the County Court for Douglas County, THOMAS G. MCQUADE, Judge. Judgment of District Court affirmed.

Thomas C. Riley, Douglas County Public Defender, and Cheryl M. Kessell for appellant.

Jon Bruning, Attorney General, and Erin E. Tangeman for appellee.

SIEVERS, MOORE, and CASSEL, Judges.

SIEVERS, Judge.

Daniel S. Albrecht appeals his convictions and sentences for two driving under the influence (DUI) offenses. Because the convictions and sentences result from guilty pleas, we do not hear oral argument on this case. See Neb. Ct. R. App. P. § 2-111(E)(5)(a) (rev. 2008). Albrecht seeks to have us address the effect of a statute, Neb. Rev. Stat. § 60-6,197.09 (Cum. Supp. 2008), that makes a defendant ineligible for probation if he or she is "participating in criminal proceedings" for a DUI offense and commits another such offense. For the reasons set forth herein, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

On August 23, 2007, Albrecht was charged in a "complaint" filed in the county court for Douglas County with DUI pursuant to Omaha Mun. Code, ch. 36, art. III, § 36-115 (2005), and negligent driving for offenses occurring on July 27. On September 27, Albrecht was charged in a "complaint" filed

in the county court for Douglas County with DUI pursuant to § 36-115, driving during revocation pursuant to Neb. Rev. Stat. § 60-4,108 (Reissue 2004), and possession of marijuana pursuant to Neb. Rev. Stat. § 28-416 (Cum. Supp. 2006) for offenses that occurred on August 31 and September 18. The second DUI charge was amended to DUI pursuant to Neb. Rev. Stat. § 60-6,196 (Reissue 2004).

On October 2, 2007, Albrecht pled guilty to both DUI charges, and the remaining three charges were dismissed. The county court ordered a presentence investigation report. The county court held its sentencing hearing on December 13, at which time the court stated that Albrecht was not eligible for probation pursuant to § 60-6,197.09 because he committed the second DUI while the first DUI charge was pending. Albrecht was sentenced to pay a fine of $400, serve a term of 10 days in the corrections center, and have his driving privileges revoked for 6 months for each DUI conviction. The county court ordered that Albrecht serve these sentences concurrently.

Albrecht appealed both of his convictions and sentences to the district court for Douglas County. Albrecht filed a notice of errors on appeal, claiming that the county court imposed excessive sentences and, by a subsequent amendment to his claimed errors, that the statute involved in this case, § 60-6,197.09, was unconstitutionally vague and was an ex post facto law. The district court held a hearing on May 5, 2009. On May 6, the district court affirmed the convictions and sentences of the county court. Albrecht timely appealed both cases to this court, which we have consolidated for review and opinion.

ASSIGNMENTS OF ERROR

Albrecht assigns as error, restated and renumbered, that (1) the district court found that the challenge to § 60-6,197.09 should have been raised by a motion to quash, (2) the district court applied § 60-6,197.09 when neither the statute nor the elements necessary to establish the requirements of the statute were contained in the informations, and (3) the district court affirmed the judgment of the county court which denied Albrecht probation.

STANDARD OF REVIEW

[1,2] Both a district court and a higher appellate court generally review appeals from a county court for error appearing on the record. *State v. Trampe*, 12 Neb. App. 139, 668 N.W.2d 281 (2003). In our appellate review of a matter appealed from a county court to a district court, we can consider only such evidence as was presented to the district court in its intermediate review of the county court judgment. *Id.*

[3] When reviewing a district court judgment for errors appearing on the record, an appellate court nonetheless has an obligation to resolve questions of law independently of the conclusions reached by the trial court. *State v. Jensen*, 269 Neb. 213, 691 N.W.2d 139 (2005).

ANALYSIS

Constitutionality of § 60-6,197.09.

These two appeals attempt to raise the constitutionality of § 60-6,197.09, which provides as follows:

> Notwithstanding the provisions of section 60-498.02 or 60-6,197.03, a person who commits a violation punishable under subdivision (3)(b) or (c) of section 28-306 or a violation of section 60-6,196, 60-6,197, or 60-6,198 while participating in criminal proceedings for a violation of section 60-6,196, 60-6,197, or 60-6,198, or a city or village ordinance enacted in accordance with section 60-6,196 or 60-6,197, or a law of another state if, at the time of the violation under the law of such other state, the offense for which the person was charged would have been a violation of section 60-6,197, shall not be eligible to receive a sentence of probation, a suspended sentence, or an employment driving permit authorized under subsection (2) of section 60-498.02 for either violation committed in this state.

In these appeals, Albrecht challenges the apparent finding of the district court that the challenge to the constitutionality of § 60-6,197.09 should have been raised by a motion to quash in the county court. We say "apparent finding" because, while the district court orally alluded to such conclusion, it was not part of the district court's written order affirming the

convictions and sentences in either of Albrecht's cases. In any event, the State argues that Albrecht's constitutional claim was barred from consideration in the district court, and now in this court, because he did not properly raise the claim of unconstitutionality by a motion to quash in the county court. Albrecht would have us find that a motion to quash was not required because the attack was not on the charging ordinances or statutes, but, rather, on a statute which only impacts the sentencing options of the trial court. The State responds to this argument by pointing out that while the statute was discussed during the county court sentencing, no claim was made that § 60-6,197.09 was unconstitutional, but, rather, Albrecht argued that the statute did not apply to him because he was not on probation.

[4] Having set forth the basic claims of the parties and the procedural history, we must now turn to the issue of this court's jurisdiction over a claim that a statute is unconstitutional. This court cannot determine the constitutionality of a statute, yet when necessary to a decision in the case before us, we do have jurisdiction to determine whether a constitutional question has been properly raised. *Harvey v. Harvey*, 6 Neb. App. 524, 575 N.W.2d 167 (1998); *Bartunek v. Geo. A. Hormel & Co.*, 2 Neb. App. 598, 513 N.W.2d 545 (1994).

[5] At the outset, we note the general proposition that in the absence of plain error, when an issue is raised for the first time in an appellate court, the issue will be disregarded inasmuch as the trial court cannot commit error regarding an issue never presented and submitted for disposition in the trial court. *State v. Simnick*, 279 Neb. 499, 779 N.W.2d 335 (2010). Albrecht did not challenge the constitutional validity of § 60-6,197.09 in the county court. Thus, when he appealed to the district court, acting as an intermediate appellate court, the claim of unconstitutionality would generally be procedurally barred.

[6,7] Moreover, Albrecht did not file a motion to quash in the county court concerning the statute. The bill of exceptions from the district court proceedings shows that Albrecht was explicitly challenging the facial validity of the statute, rather

than as applied to him. In *State v. Kanarick*, 257 Neb. 358, 362, 598 N.W.2d 430, 433 (1999), the court explained:

> A challenge to a statute, asserting that no valid application of the statute exists because it is unconstitutional on its face, is a facial challenge. *State v. Roucka*, 253 Neb. 885, 573 N.W.2d 417 (1998). This court has repeatedly held that in order to bring a constitutional challenge to the facial validity of a statute, the proper procedure is to file a motion to quash or a demurrer. See, e.g., *id.*; *State v. Carpenter*, 250 Neb. 427, 551 N.W.2d 518 (1996); *State v. Conklin*, 249 Neb. 727, 545 N.W.2d 101 (1996); *State v. Valencia*, 205 Neb. 719, 290 N.W.2d 181 (1980). See, also, Neb. Rev. Stat. §§ 29-1808, 29-1810, and 29-1812 (Reissue 1995). We have further stated: "All defects not raised in a motion to quash are taken as waived by a defendant pleading the general issue." *State v. Roucka*, 253 Neb. at 889, 573 N.W.2d at 421. Indeed, once a defendant has entered a plea, the defendant waives all facial constitutional challenges to a statute unless that defendant asks leave of the court to withdraw the plea and thereafter files a motion to quash. *Id.* In the instant case, [the defendant] did not file a motion to quash or a demurrer, he entered a plea of not guilty on December 3, 1997, and he did not subsequent thereto seek leave to withdraw his plea.

Albrecht entered a plea of guilty to both DUI charges then pending before the county court—without filing a motion to quash with respect to the constitutionality of § 60-6,197.09. The voluntary entry of a guilty plea or a plea of no contest waives every defense to a charge, whether the defense is procedural, statutory, or constitutional. *State v. Trackwell*, 250 Neb. 46, 547 N.W.2d 471 (1996).

However, we cannot avoid noting that the foregoing authority tends to be directed to challenges to the statute under which the defendant is charged. In contrast, rather than seeking to challenge the statute or ordinance under which he was charged, Albrecht seeks to challenge a separate statutory provision that only affects what type of sentence he might

receive in that it precludes a probationary sentence in certain circumstances.

[8] Thus, the question becomes whether a motion to quash is a procedural prerequisite to challenge the constitutionality of a statute, even though such statute does not bear on the charge but only on the sentence imposed upon conviction of the charge. We hold that this is a distinction without a difference, and that a motion to quash is a procedural necessity. In *State v. Roucka*, 253 Neb. 885, 573 N.W.2d 417 (1998), the defendant was charged with DUI, second offense, under Neb. Rev. Stat. § 60-6,196 (Reissue 1993), and he filed a motion to quash the information on the basis that § 60-6,196(8) (transferred to Neb. Rev. Stat. § 60-6,197.08 (Cum. Supp. 2006)) was unconstitutionally vague on its face. At the time that *Roucka, supra*, was decided, § 60-6,196(8) provided:

> Any person who has been convicted of driving while intoxicated for the first time or any person convicted of driving while intoxicated who has never been assessed for alcohol abuse shall, during a presentence evaluation, submit to and participate in an alcohol assessment. The alcohol assessment shall be paid for by the person convicted of driving while intoxicated. At the time of sentencing, the judge, having reviewed the assessment results, may then order the convicted person to follow through on the alcohol assessment results at the convicted person's expense in lieu of or in addition to any penalties deemed necessary.

The defendant in *Roucka* argued that the phrase "assessed for alcohol abuse" was not defined in the criminal code, had no generally accepted meaning, was meaningless, and gave the court no direction as to the expenses that may be incurred as a result of the "alcohol assessment." The Supreme Court set forth the procedural requirements for the defendant in *Roucka* to challenge the alcohol assessment required by § 60-6,196(8) as follows:

> A challenge to a statute, asserting that no valid application of the statute exists because it is unconstitutional on its face, is a facial challenge. . . . See, also, *United States v. Solerno*, 481 U.S. 739, 107 S. Ct. 2095, 95 L. Ed. 2d

> 697 (1987) (holding that facial challenge to legislative act is most difficult challenge to mount successfully, because challenger must establish that no set of circumstances exists under which act would be valid). A motion to quash or a demurrer is the proper procedural method for challenging the facial validity of a statute. . . . All defects not raised in a motion to quash are taken as waived by a defendant pleading the general issue. . . . Once a defendant has entered a plea, the defendant waives all facial constitutional challenges to a statute unless that defendant asks leave of the court to withdraw the plea and then files a motion to quash.

253 Neb. at 889-90, 573 N.W.2d at 421.

Clearly, the factual setting of *Roucka* is analogous to that before us in that the defendant in *Roucka* was challenging the consequence of a DUI conviction, yet the prerequisite of a motion to quash was clearly set forth by the Supreme Court. As a result, we conclude that the fact that Albrecht seeks to challenge the constitutionality of a statute that affects his sentence, rather than the underlying charge, does not absolve him of the need to file a motion to quash, which he did not do. Accordingly, he has not properly presented and preserved his challenge to the constitutionality of § 60-6,197.09, and the district court did not err in rejecting his attempted challenge to the statute. This holding is well within this court's limited jurisdiction over challenges to the constitutionality of statutes as outlined in *Bartunek v. Geo. A. Hormel & Co.*, 2 Neb. App. 598, 513 N.W.2d 545 (1994).

Did County Court Improperly Apply § 60-6,197.09?

Albrecht argues, citing *State v. Mlynarik*, 16 Neb. App. 324, 743 N.W.2d 778 (2008), that the county court improperly applied § 60-6,197.09 because the statutory elements making it applicable were not alleged in the charging documents. However, *Mlynarik* is factually distinguishable, because in that case, the trial court's sentencing of the defendant for a second offense misdemeanor was plain error, where the charge against the defendant did not specify that it was a second offense. Therefore, we found that the court could not sentence the

defendant to 3 years of probation, but was limited to a term of 2 years. In other words, because "second offense" is a different crime with different elements than "first offense," we required that the State specifically charge the defendant with such crime. Here, § 60-6,197.09 does not change the crime or the elements thereof, and thus *Mlynarik* is not controlling.

While Albrecht argues that he would have been sentenced to probation but for the county court's application of § 60-6,197.09, that is not entirely clear from the county court record. When the county court sentenced Albrecht after listening to his counsel's argument for probation, the court did state: "In any event, I don't think you qualify for probation because I don't think that statute allows it." We do note that the presentence investigation report stated that Albrecht had completed an inpatient treatment program in August 2005 and recommended probation. Given this record, we conclude that § 60-6,197.09 was used by the county court to deny Albrecht probation. However, given that the constitutional challenge to the statute was waived as discussed above, the question under our standard of review is simply whether there was error on the record in the county court's application of the statute.

The key provision of the statute (with our paraphrasing) is that a person who commits a DUI violation "while participating in criminal proceedings" for a DUI violation "shall not be eligible to receive a sentence of probation." Obviously, it is the language "while participating in criminal proceedings" for another DUI that is key. We know of only one other case discussing § 60-6,197.09—*State v. White*, 276 Neb. 573, 755 N.W.2d 604 (2008). In *White*, the defendant was arrested at 12:42 a.m. on July 27, 2006, tested .21 for blood alcohol content, and was taken home. Obviously, the defendant did not stay home, because later that morning, at 3:44 a.m., he was stopped a second time and this time his blood alcohol content was .196. The defendant was charged with two counts of second-offense DUI with a blood alcohol content of more than .15 and pled no contest to the charges. In each case, he was sentenced to 120 days in jail and his license was revoked for 2 years. The defendant's assignments of error to the Supreme Court were that the district court erred in affirming the order of the trial court

that he was not eligible for probation and erred in its implicit determination that § 60-6,197.09 was not an unconstitutional ex post facto law. The Supreme Court noted the defendant's argument that he was eligible for probation because he was not "participating in criminal proceedings" when he received his second citation, because he had not yet been arraigned on the first citation. The Supreme Court avoided any discussion of the meaning of the term "participating in criminal proceedings" for another DUI by saying:

> However, we do not reach the question of whether [the defendant] was "participating in criminal proceedings," because the trial court also concluded that he was not an appropriate candidate for probation. The only issue we must address, therefore, is whether the court abused its discretion in sentencing [the defendant].

State v. White, 276 Neb. at 575-76, 755 N.W.2d at 607. The *White* court then found that the sentence was not inappropriate and was not an abuse of discretion, and the court affirmed the judgment of the district court, which had affirmed the judgment of the county court.

[9] Here, the presentence investigation report allows the opposite conclusion—that Albrecht could be seen as an appropriate candidate for probation, given the recommendation in the report that he receive probation. Nonetheless, it would be absurd to say that Albrecht was not participating in another criminal proceeding for a DUI given that this case involves two successive arrests, arraignments of those charges, and then successive guilty pleas to the charges in both cases on the same day. Thus, we need not decide the question of exactly when "participation" in a criminal DUI proceeding starts, for example, at arrest, first court appearance, or conviction—because once he pled guilty and such plea was accepted to one charge, he was obviously participating in that criminal proceeding at the time he pled guilty to the second charge. In short, we need not delve into the nuances of what "participating in criminal proceedings" means when two DUI charges are at various stages of the criminal process, because in the case before us, the charges were actually filed, there had been arraignments on such, and then there were successive guilty pleas to each. Accordingly,

under these procedural facts, it is clear that Albrecht was "participating in criminal proceedings" after pleading guilty to one charge when he pled guilty to the second charge. The county court did not err in denying Albrecht probation on the basis of § 60-6,197.09.

Were Imposed Sentences Excessive?

Lastly, Albrecht simply argues that his sentences were excessive. His two sentences were identical: pay a fine of $400, serve 10 days of incarceration, and have his driving privileges revoked for 6 months. The county court ordered that Albrecht serve these sentences concurrently. Although the presentence investigation report concluded that Albrecht was "an appropriate candidate for traditional probation" of 12 months, many judges, including us, might easily disagree. Albrecht has a substantial history, particularly for a 20-year-old, of using virtually all available illegal mood- and mind-altering substances, including heroin. He has had unsuccessful involvement in the juvenile justice system and had previously had probation revoked. Finally, the testing administered during the presentence investigation shows that he was at "maximum" risk for "alcohol" use and abuse. Rather than excessive, the sentences he received, running concurrently, are better described as mild. This assignment of error is without merit.

CONCLUSION

The district court did not err in affirming the convictions and sentences of the county court.

AFFIRMED.

IN RE ESTATE OF PAUL G. EVERHART, DECEASED. E. ARLENE LOVELESS, APPELLANT, V. CHARLOTTE CLARK, PERSONAL REPRESENTATIVE OF THE ESTATE OF PAUL G. EVERHART, APPELLEE.

783 N.W.2d 1

Filed May 18, 2010. No. A-09-770.

1. **Decedents' Estates: Appeal and Error.** Absent an equity question, appeals of matters arising under the Nebraska Probate Code are reviewed for errors appearing on the record.
2. **Marriage.** A void marriage is not valid for any legal purpose; the marriage is void ab initio by statute, and its invalidity may be maintained in any proceeding in any court between any proper parties whether in the lifetime or after the death of the supposed husband and wife, and whether the question arises directly by petition for an annulment or collaterally in other proceedings.
3. **Deeds: Parties: Intent.** The primary rule in construing a deed is to ascertain the intention of the parties from the deed itself, but when such intention is obscure or uncertain, courts may refer to subordinate rules of construction and permissible surrounding circumstances.

Appeal from the County Court for Douglas County: CRAIG Q. MCDERMOTT, Judge. Affirmed in part, and in part reversed.

Ralph E. Peppard, of Peppard Law Office, for appellant.

Lisa M. Line, of Brodkey, Cuddigan, Peebles & Belmont, L.L.P., for appellee.

IRWIN, CARLSON, and MOORE, Judges.

IRWIN, Judge.

I. INTRODUCTION

This is an appeal from the estate proceeding of Paul G. Everhart (Paul), deceased. E. Arlene Loveless (Arlene) filed a request for a homestead allowance and a family allowance. In her request, she alleged that she was Paul's surviving spouse. Paul's daughter, Charlotte Clark (Charlotte), was appointed as personal representative of the estate. Charlotte objected to Arlene's request for the statutory allowances on the ground that the marriage between Paul and Arlene was void and Arlene was not a surviving spouse. Charlotte also sought to quiet title to the home where Paul and Arlene had lived

prior to Paul's death. Charlotte alleged that a deed granting title of the property to Paul and Arlene as husband and wife was void.

The county court determined that Arlene was not a surviving spouse and was not entitled to statutory allowances. The court also found that the decedent was the sole owner of the real property. Arlene appeals from the court's orders.

II. BACKGROUND

The undisputed facts presented by the record show that Paul and Arlene were first cousins. Paul's father and Arlene's mother were siblings. On June 16, 1991, Paul and Arlene participated in a marriage ceremony. At some point after the marriage ceremony, they adopted a child.

On June 19, 1991, Paul and Arlene signed a deed for a piece of real property located on South 13th Street in Omaha, Nebraska. We do not have evidence of any prior deed to the property. However, the June 19 deed refers to Paul and Arlene both as "grantors" and as "grantees." As such, it appears that Paul and Arlene owned the property prior to the execution of the June 19 deed. Specifically, the deed indicates that "Paul G. Everhart and Arlene Everhart, husband and wife," granted the property to "Paul G. Everhart and Arlene Everhart, husband and wife, as joint tenants and not as tenants in common."

On July 26, 2007, Paul died. In his will, Paul acknowledged his marriage to Arlene; however, he did not provide for her except to grant her a life estate in the South 13th Street property. This is the same property that Paul and Arlene had previously granted to themselves as "joint tenants and not as tenants in common." Paul appointed his daughter, Charlotte, as personal representative of the will.

On September 21, 2007, Charlotte filed an application for the informal probate of Paul's will. Subsequently, Arlene filed a request for a homestead allowance pursuant to Neb. Rev. Stat. § 30-2322 (Reissue 2008) and a family allowance pursuant to Neb. Rev. Stat. § 30-2324 (Reissue 2008). Arlene alleged that she was entitled to the statutory allowances both as a surviving spouse and as the mother of Paul's and Arlene's adopted minor child. However, the issue of whether Arlene is entitled

to statutory allowances as the mother of that child is not before us on appeal.

Charlotte objected to Arlene's request for the statutory allowances on the ground that the marriage between Paul and Arlene was void and Arlene was not a surviving spouse. Charlotte also filed a motion to quiet title to the South 13th Street property. Charlotte alleged that the June 19, 1991, deed granting Paul and Arlene a joint tenancy in the property was void because Paul and Arlene were not legally married but in the deed referred to themselves as "husband and wife" and referred to Arlene as "Arlene Everhart."

In an order filed on November 4, 2008, the county court found that the marriage between Paul and Arlene was void and that Arlene was not eligible to receive any of the statutory allowances. The court continued the issue of the title to the South 13th Street property.

In an order filed on July 14, 2009, the county court found that prior to Paul's death, he was the sole owner of the South 13th Street property. The court found that because the marriage between Paul and Arlene was void, "no person existed with the name Arlene Everhart, [and] the name was fictitious at the time the deed was executed." The court concluded that "Arlene Everhart" could not possess an interest in the property.

Arlene appeals from the court's orders here.

III. ASSIGNMENTS OF ERROR

On appeal, Arlene assigns five errors, which we consolidate to two. First, Arlene contends that the court erred in finding that she was not entitled to the homestead allowance or the family allowance because she was not a surviving spouse. Second, she argues that the court erred in finding that the deed to the South 13th Street property did not validly convey a joint tenancy and in finding that Paul was the sole owner of the home prior to his death.

IV. ANALYSIS

1. Standard of Review

When a jurisdictional question does not involve a factual dispute, determination of the issue is a matter of law, which

requires an appellate court to reach a conclusion independent from that of the trial court. *In re Estate of Potthoff*, 273 Neb. 828, 733 N.W.2d 860 (2007).

[1] Absent an equity question, appeals of matters arising under the Nebraska Probate Code, Neb. Rev. Stat. §§ 30-2201 through 30-2902 (Reissue 2008 & Supp. 2009), are reviewed for errors appearing on the record. See *In re Estate of Hedke*, 278 Neb. 727, 775 N.W.2d 13 (2009). 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. *In re Estate of Potthoff, supra*.

In an appeal of an equity action, an appellate court tries factual questions de novo on the record, reaching a conclusion independent of the findings of the trial court. *Christian v. Smith*, 276 Neb. 867, 759 N.W.2d 447 (2008).

2. Jurisdiction

Before we consider Arlene's assigned errors, we address the jurisdictional issue raised in Charlotte's appellate brief. Charlotte alleges that this court does not have jurisdiction to review the November 4, 2008, order which declared the marriage between Paul and Arlene void. Charlotte argues that the November 4 order was a final, appealable order and that because Arlene did not file a timely notice of appeal from that order, we do not have jurisdiction to consider Arlene's assigned errors which pertain to that order.

Neb. Rev. Stat. § 25-1912 (Reissue 2008) provides that a notice of appeal from a final order must be filed within 30 days after the entry of such order. If a notice of appeal is not filed within the 30-day time limit, then the appellate court does not have jurisdiction to hear the appeal. See § 25-1912. Here, the order which declared the marriage between Paul and Arlene void was filed on November 4, 2008. Arlene did not file her notice of appeal with this court until August 5, 2009, 9 months after entry of that order. As such, if the November 4, 2008, order was a final, appealable order, then Arlene's notice of appeal was not timely filed and we do not have jurisdiction to review the court's November 4 order.

Under Neb. Rev. Stat. § 25-1902 (Reissue 2008), the three types of final orders which may be reviewed on appeal are (1) an order which affects a substantial right in an action and which in effect determines the action and prevents a judgment, (2) an order affecting a substantial right made during a special proceeding, and (3) an order affecting a substantial right made on summary application in an action after a judgment is rendered. *Kilgore v. Nebraska Dept. of Health & Human Servs.*, 277 Neb. 456, 763 N.W.2d 77 (2009). The November 4, 2008, order did not determine an action and prevent a judgment, nor was it made on summary application in an action after judgment was rendered. Accordingly, in order to be final and appealable, the order in this case must have affected a substantial right and been made during a special proceeding. A proceeding under the Nebraska Probate code is a special proceeding. See *In re Estate of Potthoff*, 273 Neb. 828, 733 N.W.2d 860 (2007). We are, therefore, left to determine whether the order affected a substantial right.

A substantial right is affected if the order affects the subject matter of the litigation, such as diminishing a claim or defense that was available to an appellant prior to the order from which an appeal is taken. *Id.* A substantial right is not affected when that right can be effectively vindicated in an appeal from the final judgment. *Id.*

In *In re Estate of Rose*, 273 Neb. 490, 730 N.W.2d 391 (2007), the Nebraska Supreme Court considered whether a determination by a county court as to a family allowance and the inclusion of certain property in an augmented estate was a final order where the county court retained jurisdiction to determine the size of the augmented estate, which would serve as a basis for an award of a spouse's elective share. The court determined that the county court's order was made during a special proceeding, but that it did not affect a substantial right. *Id.* The court explained that although the county court's determination as to the family allowance and inclusion of certain property in the augmented estate both decreased and increased the augmented estate, the size of the augmented estate had not yet been determined. *Id.* The court further explained that the rights affected in the county court's order could be considered

in an appeal from the final judgment in which the augmented estate was finally established. *Id*.

The Nebraska Supreme Court considered this issue more recently in *In re Estate of Potthoff, supra*. There, the court considered the finality of a county court's order which found that certain real estate owned by the decedent prior to his death was not a part of the probate estate because the decedent's notice of severance of joint tenancy was not effective. *Id*. The court found that the county court's order completely resolved the separate issue of whether the decedent's interest in the property was part of the probate estate and that there was nothing left to be determined on that issue. *Id.* The court went on to find that the rights involved in the case could not be effectively considered in an appeal from the final judgment in which the probate estate is finally established because by the time the probate estate is finally settled, the property in question may have been disposed of or the value of the property may have been substantially reduced. *Id.*

In this case, the November 4, 2008, order found that Arlene was not a surviving spouse because her marriage to Paul was void. The order went on to indicate that a "[h]earing on the underlying Motion to determine title to real estate shall be continued pending the outcome of the issue of whether the decedent's marriage was void." We read this statement to indicate that the county court intended to retain jurisdiction over the issue of the title to the South 13th Street property after it entered its November 4 order declaring Paul and Arlene's marriage to be void. The court's decision concerning the validity of their marriage would have a direct impact on its decision concerning the title to the South 13th Street property. The June 19, 1991, deed granted the property to Paul and Arlene as "husband and wife." If their marriage was not valid, then the validity of the deed would be in question.

We conclude that the November 4, 2008, order did not affect a substantial right. While the order did determine that the marriage between Paul and Arlene was void and did determine that Arlene was not entitled to any statutory allowances as a surviving spouse, it did not address the total effect of the void marriage on the computation of the probate estate. The invalidity

of Paul and Arlene's marriage directly impacted the county court's determination concerning the validity of the deed to the South 13th Street property. The county court explicitly reserved this issue for a later hearing. The county court's determination concerning the validity of the marriage could be properly addressed after the court entered an order concerning the title to the property.

The order addressing the title to the property and the total effect of the void marriage on the probate estate was filed on July 14, 2009. Arlene timely appealed from the July 2009 order. We find that we have jurisdiction to address Arlene's assigned errors related to both the November 4, 2008, order and the July 14, 2009, order.

3. Validity of Marriage

Arlene contends that the county court erred in finding that her marriage to Paul was void and that she was not Paul's surviving spouse. Arlene argues that a marriage cannot be declared void after one of the parties to the marriage dies, that Charlotte lacked standing to challenge the validity of the marriage because she was not a party to the marriage, and that the doctrine of laches precluded Charlotte from questioning the validity of the marriage approximately 16 years after the date of the marriage ceremony. Arlene's assertions have no merit. We affirm the order of the county court finding that the marriage between Paul and Arlene was void and that Arlene is not entitled to any statutory allowances as a surviving spouse.

Neb. Rev. Stat. § 42-103(3) (Reissue 2008) provides that a marriage is void "when the parties are related to each other as parent and child, grandparent and grandchild, brother and sister of half as well as whole blood, first cousins when of whole blood, uncle and niece, and aunt and nephew." The undisputed evidence in our record reveals that Paul and Arlene were first cousins of whole blood because Paul's father and Arlene's mother were siblings. As such, it is clear that their marriage was void.

[2] A void marriage is not valid for any legal purpose. See *Christensen v. Christensen*, 144 Neb. 763, 14 N.W.2d 613 (1944). See, also, *Watts v. Watts*, 250 Neb. 38, 43, 547 N.W.2d

466, 470 (1996) ("[i]n Nebraska, we have generally refused to give a void marriage any legal effect"). The marriage is void ab initio by statute, and its invalidity may be maintained in any proceeding in any court between any proper parties whether in the lifetime or after the death of the supposed husband and wife, and whether the question arises directly by petition for an annulment or collaterally in other proceedings. *Christensen, supra.*

We find that the county court did not err in finding that the marriage between Paul and Arlene was void. The marriage was prohibited by statute and was void from the time of the marriage ceremony. Because the marriage was void, it was proper to challenge the validity of the marriage after Paul's death and during the probate proceedings. Arlene's assertions to the contrary have no merit.

4. Title to Real Property

Arlene asserts that the county court erred in finding that the June 19, 1991, deed to the South 13th Street property did not validly convey to Paul and Arlene a joint tenancy and in finding that Paul was the sole owner of the property prior to his death.

[3] The primary rule in construing a deed is to ascertain the intention of the parties from the deed itself, but when such intention is obscure or uncertain, courts may refer to subordinate rules of construction and permissible surrounding circumstances. See *Elrod v. Heirs, Devisees, etc.*, 156 Neb. 269, 55 N.W.2d 673 (1952).

In the June 19, 1991, deed, "Paul G. Everhart and Arlene Everhart, husband and wife," granted the South 13th Street property to "Paul G. Everhart and Arlene Everhart, husband and wife, as joint tenants and not as tenants in common." It is clear that the marriage between Paul and Arlene was void and that they were never "husband and wife." It is also clear that because the marriage was not valid, Arlene's legal name was never "Arlene Everhart."

Despite the confusion caused by the use of the terms "husband and wife" and by the reference to "Arlene Everhart" in the June 19, 1991, deed, we find that the intention of the

parties to that deed is clear. Paul and Arlene intended to grant to themselves a joint tenancy with a right of survivorship. Both Paul and Arlene believed at the time of executing the deed that they were husband and wife and that Arlene's legal name was Arlene Everhart. The language in the deed is the result of their mistaken belief. However, this language does not obscure their true intention to grant to themselves a joint tenancy.

Because the intention of Paul and Arlene to convey a joint tenancy is clear from the four corners of the June 19, 1991, deed, we decline to examine other, extrinsic evidence, including Paul's will, in determining ownership of the South 13th Street property. Based on the June 19 deed, we conclude that prior to Paul's death, Paul and Arlene owned the South 13th Street property as joint tenants. As such, when Paul died, Arlene became the sole owner of the property.

We reverse the county court's order which found that the June 19, 1991, deed did not validly convey a joint tenancy to Paul and Arlene and that Paul was the sole owner of the real property at his death.

V. CONCLUSION

We affirm the order of the county court which found that the marriage between Paul and Arlene was void and that Arlene is not entitled to any statutory allowances as a surviving spouse. However, we reverse the county court's order which found that the June 19, 1991, deed did not validly convey a joint tenancy to Paul and Arlene and that Paul was the sole owner of the real property at his death. We conclude that the June 19 deed clearly demonstrated Paul and Arlene's intent to convey a joint tenancy. As such, we find that Arlene is now the sole owner of the South 13th Street property.

AFFIRMED IN PART, AND IN PART REVERSED.

STATE OF NEBRASKA, APPELLEE, V. BRENT LUFF, APPELLANT.

783 N.W.2d 625

Filed May 4, 2010. No. A-09-1061.

This opinion has been ordered permanently published by order of the Court of Appeals dated May 7, 2010.

1. **Jurisdiction: Appeal and Error.** A jurisdictional question that does not involve a factual dispute is determined by an appellate court as a matter of law.
2. **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.
3. **Trial: Convictions: Appeal and Error.** In reviewing a criminal conviction, an appellate court does not resolve conflicts in evidence, pass on credibility of witnesses, evaluate explanations, or reweigh evidence presented; those matters are for the finder of fact.
4. **Jurisdiction: Appeal and Error.** 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.
5. **Motions for New Trial: Evidence.** Pursuant to Neb. Rev. Stat. § 29-2101(5) (Reissue 2008), a new trial may be granted when a defendant produces newly discovered evidence which he could not with reasonable diligence have discovered and produced at trial.
6. **Motions for New Trial: Evidence: Time.** A motion for a new trial based on newly discovered evidence pursuant to Neb. Rev. Stat. § 29-2101(5) (Reissue 2008) must be filed within 3 years of the date of the verdict.
7. **Jurisdiction: Final Orders: Motions for New Trial: Time: Notice: Appeal and Error.** In order to vest an appellate court with jurisdiction, a notice of appeal must be filed within 30 days of the entry of the final order or the overruling of a motion for new trial.
8. **Jurisdiction: Time: Appeal and Error.** Failure to timely appeal from a final order prevents an appellate court's exercise of jurisdiction over the claim disposed of in the order.
9. **Criminal Law: Motions for New Trial: Appeal and Error.** In a criminal case, errors assigned by a defendant based on the overruling of a timely filed motion for new trial may be assigned as error in a properly perfected direct appeal from the judgment.
10. **Motions for New Trial: Evidence: Time: Appeal and Error.** A motion for new trial based on newly discovered evidence need not be filed and ruled upon within 30 days of the sentence; therefore, the ruling on such a motion would necessarily be appealed separately from the conviction and sentence.
11. **Effectiveness of Counsel: Records: Trial: Evidence: Appeal and Error.** A claim of ineffective assistance of counsel need not be dismissed merely because

it is made on direct appeal. The determining factor is whether the record is sufficient to adequately review the question.

12. **Trial: Evidence: Appeal and Error.** If a matter has not been raised or ruled on at the trial level and requires an evidentiary hearing, an appellate court will not address the matter on direct appeal.
13. **Effectiveness of Counsel: Proof.** To sustain a claim of ineffective assistance of counsel, the defendant must show that (1) counsel's performance was deficient, meaning that counsel did not perform at least as well as a criminal lawyer with ordinary training and skill in the area, and (2) such deficient performance prejudiced the defense, that is, a demonstration of reasonable probability that but for counsel's deficient performance, the result of the proceeding would have been different.
14. **Effectiveness of Counsel: Words and Phrases.** A reasonable probability is a probability sufficient to undermine confidence in the outcome.
15. **Convictions.** When a defendant challenges a conviction, the question is whether there is a reasonable probability that absent the errors, the fact finder would have had a reasonable doubt concerning guilt.
16. **Effectiveness of Counsel: Proof.** The two prongs of the test for proving a claim of ineffective assistance of counsel, deficient performance and prejudice, may be addressed in either order.
17. **Effectiveness of Counsel: Presumptions: Appeal and Error.** The entire ineffective assistance of counsel analysis is viewed with a strong presumption that counsel's actions were reasonable and that even if found unreasonable, the error justifies setting aside the judgment only if there was prejudice.
18. **Effectiveness of Counsel: Appeal and Error.** When reviewing a claim of ineffective assistance of counsel, an appellate court will not second-guess reasonable strategic decisions by counsel.
19. **Attorney and Client.** Except for such basic decisions as whether to plead guilty, waive a jury trial, or testify in his or her own behalf, a defendant is bound by the tactical or strategic decisions made by his or her counsel.
20. **Criminal Law: Trial: Evidence.** In any criminal case, any conflicts in the evidence or questions concerning the credibility of witnesses are for the finder of fact to resolve.
21. **Convictions: Trial: Evidence.** Uncorroborated testimony would be sufficient to convict a defendant in any case wherein the fact finder determined that such testimony was sufficient evidence of guilt beyond a reasonable doubt.

Appeal from the District Court for Hall County: TERESA K. LUTHER, Judge. Affirmed.

David A. Domina and Mark D. Raffety, of Domina Law Group, P.C., L.L.O., for appellant.

Jon Bruning, Attorney General, and Stacy M. Foust for appellee.

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

MOORE, Judge.

INTRODUCTION

Brent Luff was convicted of and sentenced for attempted first degree sexual assault on a child. Luff filed a direct appeal, which we dismissed for failure to file a brief. Luff later filed a motion for new trial based on newly discovered evidence, and the trial court denied the motion. Luff filed a motion for postconviction relief alleging that his attorney was ineffective for failing to file a brief on appeal and requested reinstatement of his direct appeal, which the trial court granted. The matter is presently before this court on Luff's new direct appeal, and we affirm.

BACKGROUND

Luff was a friend of the family of the victim, D.H. Luff was charged with first degree sexual assault on a child for an incident which occurred in the late evening of June 12, 2004, and early morning hours of June 13. On that evening, Luff was at the family's home where he had been working on a vehicle. He stayed for dinner, after which D.H.'s mother and Luff consumed several alcoholic drinks. D.H.'s mother offered Luff the spare bed so that he did not have to drive home. After her mother and brother had gone to bed, D.H. took a shower and proceeded to go to her bedroom to go to sleep when Luff asked her to talk with him, which she did. Luff then asked her to lie down with him, and he "ushered" her to the spare bed where he took off her clothes. D.H. felt Luff's hands in her vaginal area and both Luff's finger and penis slightly enter her vagina before she got off the bed.

On December 15, 2005, Luff was convicted of attempted first degree sexual assault on a child. On January 24, 2006, the district court sentenced Luff to 6 months in jail and 48 months' probation and ordered him to comply with Nebraska's Sex Offender Registration Act. On February 23, Luff filed a direct appeal, which, by mandate issued on July 26, 2006, we dismissed for failure to file a brief.

On December 22, 2006, Luff filed a motion for new trial based on newly discovered evidence. In support of the motion, Luff proffered an affidavit of a friend of D.H., which affidavit stated that D.H. told her that the incident never occurred and that D.H. falsely accused Luff because "he needed to be put away." The trial court denied the motion and reasoned that the proffered new evidence was in the nature of impeachment evidence and was therefore insufficient to sustain the motion.

On June 29, 2009, Luff filed a motion for postconviction relief alleging that his attorney was ineffective for failing to file a brief on appeal. Luff requested reinstatement of his direct appeal. Citing *State v. Trotter*, 259 Neb. 212, 609 N.W.2d 33 (2000), the trial court found that Luff received ineffective assistance of counsel during his direct appeal and granted his request for a new direct appeal.

ASSIGNMENTS OF ERROR

Luff asserts, restated, that (1) he received ineffective assistance of counsel when his trial attorney introduced a photograph into evidence and subjected Luff to direct examination regarding the photograph, (2) the evidence was insufficient to sustain his conviction, (3) Luff should have been allowed to inquire into corroborating evidence, and (4) the district court erred when it denied his motion for a new trial.

STANDARD OF REVIEW

[1] A jurisdictional question that does not involve a factual dispute is determined by an appellate court as a matter of law. *State v. York*, 278 Neb. 306, 770 N.W.2d 614 (2009).

[2,3] 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. Branch*, 277 Neb. 738, 764 N.W.2d 867 (2009). We do not resolve conflicts in evidence, pass on credibility of witnesses, evaluate explanations, or reweigh evidence presented; those matters are for the

finder of fact. See *State v. Epp*, 278 Neb. 683, 773 N.W.2d 356 (2009).

ANALYSIS

Jurisdiction and Motion for New Trial.

[4] 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. *State v. Poindexter*, 277 Neb. 936, 766 N.W.2d 391 (2009). The State asserts that we are without jurisdiction to consider whether the district court erred when it denied Luff's motion for a new trial because Luff failed to timely appeal and did not allege in his motion for postconviction relief that he was denied effective assistance of counsel when his attorney failed to timely appeal the denial of his motion for new trial.

[5-8] Pursuant to Neb. Rev. Stat. § 29-2101(5) (Reissue 2008), a new trial may be granted when a defendant produces newly discovered evidence which he could not with reasonable diligence have discovered and produced at trial. A motion for a new trial under this section must be filed within 3 years of the date of the verdict. Neb. Rev. Stat. § 29-2103(4) (Reissue 2008). In order to vest an appellate court with jurisdiction, a notice of appeal must be filed within 30 days of the entry of the final order or the overruling of a motion for new trial. Neb. Rev. Stat. § 25-1912(1) (Reissue 2008); *DeBose v. State*, 267 Neb. 116, 672 N.W.2d 426 (2003). Timeliness of an appeal is a jurisdictional necessity. *State v. Sinsel*, 249 Neb. 369, 543 N.W.2d 457 (1996). Failure to timely appeal from a final order prevents an appellate court's exercise of jurisdiction over the claim disposed of in the order. *State v. Poindexter, supra*.

The facts in this case are not disputed. Luff timely filed his motion for new trial based on newly discovered evidence. The district court denied the motion and reasoned that the new evidence, the affidavit of D.H.'s friend, was in the nature of impeachment evidence and was insufficient to sustain the motion. Luff did not appeal. Luff later filed a motion for postconviction relief, although he did not allege that his attorney was ineffective for failing to appeal from the denial of his motion for new trial. The district court reinstated Luff's direct

appeal, and Luff now assigns as error the district court's denial of his motion for a new trial.

[9,10] In a criminal case, errors assigned by a defendant based on the overruling of a timely filed motion for new trial may be assigned as error in a properly perfected direct appeal from the judgment. *State v. Thomas*, 262 Neb. 985, 637 N.W.2d 632 (2002). However, a motion for new trial based on newly discovered evidence need not be filed and ruled upon within 30 days of the sentence; therefore, the ruling on such a motion would necessarily be appealed separately from the conviction and sentence. *State v. Thomas, supra*. See § 29-2103. As such, because Luff failed to timely file a notice of appeal following the denial of his motion for new trial based on newly discovered evidence and the district court reinstated only Luff's direct appeal, we are without jurisdiction to consider this assignment of error.

Ineffective Assistance of Counsel.

Luff asserts that he received ineffective assistance of counsel when his trial attorney offered into evidence a photograph of his penis and subjected him to direct examination regarding the photograph.

[11,12] A claim of ineffective assistance of counsel need not be dismissed merely because it is made on direct appeal. The determining factor is whether the record is sufficient to adequately review the question. *State v. Davis*, 276 Neb. 755, 757 N.W.2d 367 (2008). If a matter has not been raised or ruled on at the trial level and requires an evidentiary hearing, an appellate court will not address the matter on direct appeal. *Id.*

[13-16] The Nebraska Supreme Court has adopted the two-prong test set forth by the U.S. Supreme Court in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), for proving a claim of ineffective assistance of counsel. *State v. Canbaz*, 270 Neb. 559, 705 N.W.2d 221 (2005). To sustain a claim of ineffective assistance of counsel, the defendant must show that (1) counsel's performance was deficient, meaning that counsel did not perform at least as well as a criminal lawyer with ordinary training and skill in the area, and (2) such deficient performance prejudiced the defense, that is, a

demonstration of reasonable probability that but for counsel's deficient performance, the result of the proceeding would have been different. See *id*. A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Id*. When a defendant challenges a conviction, the question is whether there is a reasonable probability that absent the errors, the fact finder would have had a reasonable doubt concerning guilt. *Id*. The two prongs of this test, deficient performance and prejudice, may be addressed in either order. *State v. Deckard*, 272 Neb. 410, 722 N.W.2d 55 (2006).

[17-19] The entire ineffective analysis is viewed with a strong presumption that counsel's actions were reasonable and that even if found unreasonable, the error justifies setting aside the judgment only if there was prejudice. *State v. Buckman*, 259 Neb. 924, 613 N.W.2d 463 (2000). When reviewing a claim of ineffective assistance of counsel, an appellate court will not second-guess reasonable strategic decisions by counsel. See *State v. Canbaz, supra*. Except for such basic decisions as whether to plead guilty, waive a jury trial, or testify in his or her own behalf, a defendant is bound by the tactical or strategic decisions made by his or her counsel. *State v. Nesbitt*, 264 Neb. 612, 650 N.W.2d 766 (2002).

Luff asserts that his counsel was ineffective because there was no reasonable trial strategy which would support introduction of the photograph into evidence and his testimony with regard thereto. However, even if we were to assume that counsel's performance was deficient, Luff has not established that he was prejudiced. Luff argues that the photograph and testimony "must have" offended the jury and "could only have damaged Luff's credibility." Brief for appellant at 19. As we discuss further below, D.H.'s testimony is sufficient to sustain Luff's conviction, and Luff fails to demonstrate that the result in the case would have been different absent the photograph and Luff's testimony regarding the photograph. As such, we conclude that Luff did not receive ineffective assistance of counsel as alleged.

Corroborating Evidence.

[20,21] Luff next asserts that he should be given a new trial and allowed to question whether any corroborating evidence

existed to support the charge of attempted sexual assault. Luff argues essentially that Neb. Rev. Stat. § 29-2028 (Reissue 2008), which provides that the "testimony of a person who is a victim of a sexual assault as defined in sections 28-319 to 28-320.01 shall not require corroboration," does not include attempt of the crimes within those sections. However, Luff points to, and our research reveals, no legal authority to support his proposition that corroboration is required in cases of attempt regarding the statutes at issue. We note that in any criminal case, any conflicts in the evidence or questions concerning the credibility of witnesses are for the finder of fact to resolve. *State v. Branch*, 277 Neb. 738, 764 N.W.2d 867 (2009). As such, uncorroborated testimony would be sufficient to convict a defendant in any case wherein the fact finder determined that such testimony was sufficient evidence of guilt beyond a reasonable doubt. We conclude that this assignment of error is without merit.

Sufficiency of Evidence.

Luff asserts that the evidence is insufficient to sustain his conviction.

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. Branch, supra*. We do not resolve conflicts in evidence, pass on credibility of witnesses, evaluate explanations, or reweigh evidence presented; those matters are for the finder of fact. See *State v. Epp*, 278 Neb. 683, 773 N.W.2d 356 (2009).

Luff was convicted of attempted first degree sexual assault pursuant to Neb. Rev. Stat. §§ 28-201 (Reissue 2008) and 28-319(1)(c) (Reissue 1995). Luff argues that D.H. testified that she did not remember everything that happened on the night of the assault and that therefore her testimony was not credible. However, we do not pass on credibility. D.H. testified that she felt Luff's hands in her vaginal area, he penetrated her with both his finger and penis, and she was 15 years old at the time of the assault. This testimony, when viewed in the

light most favorable to the prosecution, is sufficient to sustain Luff's conviction.

CONCLUSION

For the foregoing reasons, we affirm Luff's conviction and sentence.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V.
JOSEPH E. TAMAYO, APPELLANT.
783 N.W.2d 240

Filed June 1, 2010. No. A-09-223.

1. **Judgments: Speedy Trial: Appeal and Error.** As a general rule, a trial court's determination as to whether charges should be dismissed on speedy trial grounds is a factual question which will be affirmed on appeal unless clearly erroneous.
2. **Judgments: Appeal and Error.** When issues on appeal present questions of law, an appellate court has an obligation to reach an independent conclusion irrespective of the decision of the court below.
3. **Speedy Trial.** To calculate the time for speedy trial purposes, a court must exclude the day the information was filed, count forward 6 months, back up 1 day, and then add any time excluded under Neb. Rev. Stat. § 29-1207(4) (Reissue 2008) to determine the last day the defendant can be tried.
4. **Speedy Trial: Proof.** The State has the burden of proving that one or more of the excluded periods of time under Neb. Rev. Stat. § 29-1207(4) (Reissue 2008) are applicable if the defendant is not tried within 6 months of the commencement of the criminal action.
5. **Speedy Trial: Pretrial Procedure.** For pretrial motions, the excluded time is from the filing of the motion under Neb. Rev. Stat. § 29-1207(4)(a) (Reissue 2008) until its final disposition.
6. ____: ____. A defense motion to engage a psychiatrist for the specific purposes outlined in the motion is a proceeding under Neb. Rev. Stat. § 29-1207 (Reissue 2008) that tolls the speedy trial clock, and such proceeding ends with the court's order on the motion and the speedy trial clock begins running again.
7. **Trial: Mental Competency.** The question of whether an appellant is competent to stand trial is separate and distinct from the question of whether an appellant may be responsible for the commission of the crime. The test to determine whether an accused is competent to stand trial is not the same test applied to determine whether the accused may be not guilty by reason of insanity, but the test of mental competency to stand trial is whether a defendant has the capacity to understand the nature and object of the proceedings against him, to comprehend his own condition in reference to such proceedings, and to make a rational defense.

8. ____: ____. If a judge becomes aware of facts which raise doubts as to the defendant's competency to stand trial, the question should be settled pursuant to Neb. Rev. Stat. § 29-1823 (Reissue 2008).
9. **Evidence: Waiver.** A simple admission authorizes the receipt of any statement made by an opponent, as evidence in contradiction and impeachment of his present claim, whereas a judicial admission concerns a method of escaping from the necessity of offering any evidence at all; and a simple admission is an item in the mass of evidence to be considered, whereas a judicial admission is a waiver relieving the opposing party from the need of any evidence.

Appeal from the District Court for Douglas County: J. PATRICK MULLEN, Judge. Motion for rehearing sustained. Original memorandum opinion withdrawn. Reversed and remanded with directions.

James J. Regan for appellant.

Jon Bruning, Attorney General, and Nathan A. Liss for appellee.

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

SIEVERS, Judge.

Joseph E. Tamayo filed a motion for rehearing following the release of our memorandum opinion in this case, in which we found that the trial court did not err in denying Tamayo's motion to discharge on statutory speedy trial grounds. See *State v. Tamayo*, No. A-09-223, 2009 WL 3654503 (Neb. App. Nov. 3, 2009) (selected for posting to court Web site). We granted the motion for rehearing, and our previous opinion is hereby withdrawn. We now reconsider whether the district court erred in its application of Neb. Rev. Stat. § 29-1207(4)(a) (Reissue 2008) by excluding from the running of the speedy trial clock the period of April 8 to October 20, 2008, as a "proceeding" concerning Tamayo's competency to stand trial. Upon reconsideration, we conclude that our opinion was incorrect with regard to this issue, and we reverse the order of the district court denying Tamayo's motion to discharge on speedy trial grounds.

BACKGROUND

On January 18, 2008, the State filed an information charging Tamayo with first degree murder and use of a deadly weapon

to commit a felony. Because Tamayo was indigent, the court appointed counsel to represent him. On February 6, Tamayo filed a plea in abatement. On March 28, the district court entered an order dismissing the plea in abatement. On April 7, Tamayo filed a "Motion for Psychiatric Expert." The record in the instant case does not contain a transcription of any hearing that may have been held with regard to that motion. The court's subsequent order entered on April 11 granted Tamayo's motion to engage the services of a psychiatrist for two specific purposes.

On October 15, 2008, the district court conducted a hearing regarding the findings contained in the psychiatrist's evaluation. The psychiatrist's report admitted into evidence was entitled "Competence Evaluation of Joseph Tamayo." In the section of the report entitled "Reason for This Evaluation," the report stated that Tamayo "was seen in order to provide an independent psychiatric evaluation to determine his sanity at the time of the alleged crime and competence to stand trial and to give statements to the police." The report recounted a portion of the evaluation in which the psychiatrist asked Tamayo about his understanding of the legal system, including the trial process. At the conclusion of the report, it stated the psychiatrist's opinion that Tamayo "is marginally competent to stand trial." The report also included a letter from the psychiatrist to Tamayo's counsel dated September 24, 2008, in which the psychiatrist noted that Tamayo's counsel had telephoned him on September 22, "requesting an additional report addressing . . . Tamayo's competence to stand trial." In this letter, the psychiatrist stated that he was charging an additional $180 for his services rendered for this "additional" report. However, we note that there was only one report in the record from the psychiatrist. This report included a section on Tamayo's understanding of the law and the charges against him. On October 20, the district court entered an order in which the court found that Tamayo was competent to stand trial.

On October 27, 2008, Tamayo filed a motion to suppress certain evidence. In an order dated December 23, 2008, the court denied this motion.

On January 30, 2009, Tamayo filed a motion to discharge under § 29-1207, in which motion he alleged that he had "not been brought to trial within the time required by law" and that "more than six months have passed since the filing of the Information . . . without [Tamayo's] having been brought to trial." At the hearing on Tamayo's motion to discharge, the transcription of the October 15, 2008, proceeding, the psychiatrist's report, the trial docket, and a copy of the complete court file were received into evidence.

On February 20, 2009, the court entered an order denying Tamayo's motion for discharge. The court found that in the absence of exclusions, the last day to bring Tamayo to trial would have been on July 18, 2008. The court found that a period of 50 days from February 7 to March 28, 2008, was excludable because the delay resulted from Tamayo's plea in abatement. The court also found that a period of 195 days from April 8 to October 20—when the court entered an order finding that Tamayo was competent to stand trial—was excludable. This excludable period was based on the court's determination that the delay was for the purpose of a competency proceeding.

The court additionally found that there was an excludable period of 57 days as a result of Tamayo's motion to suppress which he filed on October 27, 2008, and which was denied on December 23. The court concluded that there were 302 excludable days, which extended the time to bring Tamayo to trial to May 16, 2009. Tamayo timely appealed, and as said, we have granted rehearing and withdrawn our previous opinion and decision.

ASSIGNMENTS OF ERROR

Tamayo assigns, as restated, that the district court erred in (1) determining the amount of time that should be excluded in computing whether Tamayo had been brought to trial within the time period required by § 29-1207, (2) determining that Tamayo was not entitled to an absolute discharge from the offenses charged, and (3) interpreting how a mental competency proceeding governed by Neb. Rev. Stat. § 29-1823

(Reissue 2008) affects the determination of excludable time in a speedy trial calculation under § 29-1207(4)(a).

STANDARD OF REVIEW

[1] As a general rule, a trial court's determination as to whether charges should be dismissed on speedy trial grounds is a factual question which will be affirmed on appeal unless clearly erroneous. *State v. Wells*, 277 Neb. 476, 763 N.W.2d 380 (2009).

[2] When issues on appeal present questions of law, an appellate court has an obligation to reach an independent conclusion irrespective of the decision of the court below. *State v. Sellers*, 279 Neb. 220, 777 N.W.2d 779 (2010).

ANALYSIS

[3,4] Section 29-1207(1) of Nebraska's speedy trial statutes provides in part that "[e]very person indicted or informed against for any offense shall be brought to trial within six months, and such time shall be computed as provided in this section." To calculate the time for speedy trial purposes, a court must exclude the day the information was filed, count forward 6 months, back up 1 day, and then add any time excluded under § 29-1207(4) to determine the last day the defendant can be tried. *State v. Williams*, 277 Neb. 133, 761 N.W.2d 514 (2009). Under § 29-1207(1), the last day to bring Tamayo to trial was July 18, 2008, plus properly excluded time periods. The State has the burden of proving that one or more of the excluded periods of time under § 29-1207(4) are applicable if the defendant is not tried within 6 months of the commencement of the criminal action. See *State v. Shipler*, 17 Neb. App. 66, 758 N.W.2d 41 (2008).

Tamayo does not argue that the district court's determinations that the time for the plea in abatement and the motion to suppress were improperly excluded from the speedy trial calculations under § 29-1207(4)(a). Nor does Tamayo argue that the time between the April 7, 2008, motion and the April 11 order on his motion for a psychiatric evaluation was not properly excluded. Section 29-1207(4)(a) excludes the time for an examination and hearing on competency as well as the

time period during which a criminal defendant is not competent to stand trial. However, Tamayo argues that the district court improperly excluded the time between the April 11 order and the October 15 competency hearing because Tamayo's competency to stand trial was not in question until the hearing on October 15 and, thus, such time was not a "proceeding" concerning the defendant's competency as contemplated by § 29-1207(4)(a) that would be excluded from the running of the speedy trial clock.

Tamayo argues that the first time his competency to stand trial was called to the court's attention was when the written report from Dr. Bruce Gutnik was offered into evidence at the October 15, 2008, hearing. The State, on the other hand, argues that Tamayo's competency was in question beginning with the April 7 motion. Resolution of the excludable time under discussion begins by setting forth exactly what Tamayo's April 7 "Motion for Psychiatric Expert" requested. The motion stated:

> [Tamayo] moves the Court for the authority to engage the services of a psychiatrist to evaluate [Tamayo] for the following purposes:
>
> 1. To determine [Tamayo's] mental capacity to waive his Miranda rights and/or to voluntarily provide a statement to law enforcement officers; and
>
> 2. To determine [Tamayo's] mental capacity as it relates to the defense of not responsible by reason of insanity under Nebraska law.

Significantly, the motion made no mention of competency to stand trial and did not include that issue as a purpose of the psychiatric examination. And, the trial court's order made no mention of the issue of competency to stand trial. The trial court's very precise and specific order was entered on April 11, 2008. The order granted Tamayo's motion and stated as follows:

> This matter came before the Court on [Tamayo's] request to hire the services of a psychiatrist to evaluate his mental condition as it relates to his ability to provide a voluntary statement and to the possible defense of not responsible by reason of insanity. . . .

> IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that [Tamayo] is authorized to engage the services of a psychiatrist for the above-stated purposes.

Thus, neither the motion nor the court's order makes any mention of "competency to stand trial." Our record does not include any transcription of what was said or done on April 10, 2008, concerning this motion, and neither party filed a request for such in the bill of exceptions. Thus, we do not know whether there was a hearing or, if so, whether it was on the record. We note that the order itself does not recite that a hearing was held or that evidence was received—as is customary when such occurs. Therefore, it is sheer speculation to conclude that competency was at issue in April given the complete absence of any mention of the issue of competency in either the motion or the resulting order. Additionally, this is an appropriate place to note that even the trial court's order of October 20 determining that Tamayo was competent to stand trial contains the following recitation about its earlier order file stamped April 11:

> On the 10th day of April . . . at [Tamayo's] request this court ordered that [Tamayo] be allowed to engage the services of a psychiatrist for the purposes of evaluation of his medical condition relating to his ability to provide a voluntary statement and to the possible defense of not responsible by reason of insanity.

Again, the trial court indicates that the request for the hiring of the psychiatrist included two specific issues—neither of which was competence to stand trial. Therefore, it follows that the State has offered no evidence that competency to stand trial was raised, discussed, or in question at the April 10, 2008, hearing, nor was such within the parameters of the specific order entered by the court at that time. Accordingly, given the contents of the motion, the order ruling on the motion, and the lack of proof from the State that competency to stand trial was at issue at the hearing on April 10, we conclude that a "proceeding" to examine and determine Tamayo's competence to stand trial was not begun on April 10. However, when the trial court denied the motion to discharge, it made the following finding of fact: "It is clear from the time of [Tamayo's] counsel[']s

request for the appointment of a psychiatrist that such an appointment was for the purpose of determining [Tamayo's] competency to stand trial in addition to other related matters regarding statements he may have given to police."

With all due respect to the trial judge, this statement is simply and clearly wrong. The dissent suggests that we must be stricken with the "wrongness" of this finding "with the force of a five-week-old, unrefrigerated dead fish," quoting *Parts and Elec. Motors, Inc. v. Sterling Elec.*, 866 F.2d 228, 233 (7th Cir. 1988), before we can say that such finding is clearly wrong. While we do not adopt the "dead fish" test, we do respectfully suggest that if it really was clear as the trial judge says "from the time of [Tamayo's] counsel['s] motion" that competency was a purpose of the examination, even a reasonable fish peddler would naturally expect that either the motion to engage a psychiatrist or the order granting the motion would at least contain the word "competency," which neither does.

The dissent finds that the "competency proceeding" began either when the order was entered or, at the latest, on July 7, 2008, when the psychiatrist examined Tamayo. However, that conclusion ignores recent precedent defining a "proceeding" for speedy trial purposes. Under § 29-1207(4)(a), time is excluded from the speedy trial clock for "[t]he period of delay resulting from other proceedings concerning the defendant, including, but not limited to, an examination and hearing on competency . . . ." In *State v. Murphy*, 255 Neb. 797, 587 N.W.2d 384 (1998), the court considered whether the excludable time on a defendant's motions to take depositions ended when the motion was ruled upon or when the depositions were completed. The court found that the excludable time ended with the ruling on the motion, reasoning as follows:

> The State argues that even if the motion for depositions was "finally disposed" on February 5, 1997, the time consumed in taking depositions may still be excluded under § 29-1207(4)(a), since by its own language, that subsection is "not limited to" the periods specifically enumerated therein. However, § 29-1207(4)(a) refers only to "proceedings." Black's Law Dictionary 1204 (6th ed. 1990) states that a "proceeding" is "[i]n a more particular sense, any

> application to a court of justice, however made, for aid in the enforcement of rights, for relief, for redress of injuries, for damages, or for any remedial object." If the term "proceedings" was read broadly, rather than in its "particular sense," § 29-1207(4)(a) would include any delay at trial that "concerns" the defendant. If the Legislature had intended that the term "proceeding" encompass such a broad purview, there would have been little reason for the Legislature to have provided for exclusion under § 29-1207(4)(f), the "catchall provision." *State v. Turner*, 252 Neb. [620,] 629, 564 N.W.2d [231,] 237 [(1997)]. Thus, the term "proceeding" must be read narrowly.
>
> Clearly, a motion for depositions is an "application to a court of justice" and, thus, is a "proceeding," as the statute specifically provides. However, once that application has been granted, no further application to a court of justice is required to obtain the depositions.

State v. Murphy, 255 Neb. at 803-04, 587 N.W.2d at 389.

[5,6] For pretrial motions, the excluded time is from the filing of the motion under § 29-1207(4)(a) until its "final disposition." See *State v. Covey*, 267 Neb. 210, 673 N.W.2d 208 (2004). Given the language of the motion for the engagement of a psychiatrist and the language of the April 11, 2008, order granting the motion, the motion was finally disposed of on April 11 by the order of that date. Thus, in the present case, once the trial court granted Tamayo's motion to engage a psychiatrist for the two purposes outlined in the motion—neither of which dealt with competency to stand trial—the "proceeding" to engage a psychiatrist was over, and there was nothing further pending before the court regarding such motion. The "proceeding" that tolled the speedy trial clock was over when the order of April 11 was entered.

[7] The only evidence before us is that Tamayo's counsel was requesting a psychiatric evaluation for two specific purposes: the insanity defense and the voluntariness of the statement he gave to police, completely different issues than Tamayo's competence to stand trial. Our Supreme Court has explained:

> The question of whether the appellant is now competent to stand trial is separate and distinct from the

> question of whether the appellant may be responsible for the commission of the crime. The test to determine whether an accused is competent to stand trial is not the same test applied to determine whether the accused may be not guilty by reason of insanity. The test of mental competency to stand trial is whether the defendant now has the capacity to understand the nature and object of the proceedings against him, to comprehend his own condition in reference to such proceedings, and to make a rational defense. See, *State v. Crenshaw*, 189 Neb. 780, 205 N.W.2d 517 (1973); *Dusky v. United States*, 362 U.S. 402, 80 S. Ct. 788, 4 L. Ed. 2d 824 (1960); *State v. Klatt*, 187 Neb. 274, 188 N.W.2d 821 (1971).

State v. Guatney, 207 Neb. 501, 509, 299 N.W.2d 538, 543-44 (1980).

Tamayo's mental state raised in the motion, and addressed in the order, is solely his mental state at the time of the crime and the resulting police interrogation for purposes of a possible insanity defense and the exclusion of his statement. In short, the motion sought trial evidence to exonerate Tamayo—not to avoid a trial by virtue of incompetency. That said, it is nonetheless clear that Tamayo's competency to stand trial did become an issue at some juncture, and for purposes of our speedy trial analysis, we must determine when a "proceeding" to determine competency, in the language of § 29-1207(4)(a), began, which in turn determines how many days are excluded due to such proceeding.

[8] We begin this phase of our analysis with § 29-1823, which states in part:

> If at any time prior to trial it appears that the accused has become mentally incompetent to stand trial, such disability may be called to the attention of the district court by the county attorney, by the accused, or by any person for the accused. The judge of the district court of the county where the accused is to be tried shall have the authority to determine whether or not the accused is competent to stand trial.

Our record does not illuminate precisely when Tamayo's competency was called to the attention of the district court. At no

time was there a separate motion for a competency evaluation, nor was competency mentioned in any court proceeding or pleading prior to the October 15, 2008, hearing. If a judge becomes aware of facts which raise doubts as to the defendant's competency to stand trial, the question should be settled. *State v. Johnson*, 4 Neb. App. 776, 551 N.W.2d 742 (1996), and § 29-1823(1) impose similar duties. But, there is nothing in the record that shows that the trial judge had any information suggesting incompetency to stand trial when he sustained the motion for the engagement of a psychiatrist to evaluate Tamayo for the purposes specified in the motion and order—or at any time before the hearing of October 15.

The only evidence contained in the record that demonstrates when competency became an issue is the letter dated September 24, 2008, from Dr. Gutnik, who evaluated Tamayo in July 2008, to Tamayo's counsel. Dr. Gutnik's letter to defense counsel is attached to Dr. Gutnik's report dated September 24, 2008. The letter begins, "Thank you for your telephone call of September 22, 2008, requesting an additional report addressing . . . Tamayo's competence to stand trial. I have reviewed my material and prepared the report, which is enclosed." This letter is dated the same date as the competency report that went into evidence at the October 15 hearing, which concluded that Tamayo was competent to stand trial. Such letter shows that on September 22, Tamayo's counsel requested that Dr. Gutnik include a competency evaluation in his report—and the State introduced no evidence to dispute this evidence that competency to stand trial was not at issue until September 22. This letter also allows the inference that while competency to stand trial was not a part of the original evaluation conducted nearly 3 months prior, Dr. Gutnik was able to address that issue based upon his earlier examination of, and interactions with, Tamayo in July. Of course, the mere fact that the psychiatrist was able to render an opinion on competency to stand trial in late September based on his earlier July examination does not mean that a "competency proceeding" that tolls the speedy trial clock was ongoing since the date of the examination. The examination is a medical process, whereas a competency proceeding is a legal process,

and *State v. Murphy*, 255 Neb. 797, 587 N.W.2d 384 (1998), teaches us how one defines a "proceeding" for speedy trial purposes—and it is not when the psychiatrist conducts a mental status examination.

We observe that the comments of the trial court and counsel on October 15, 2008, do not tell us whether the trial court was informed before October 15 that defense counsel wanted the psychiatrist's report to address whether Tamayo was competent to stand trial. We quote the pertinent exchange between the court and counsel:

> THE COURT: And upon application by [Tamayo] this Court entered an order regarding the allowance of a psychiatrist, by [Tamayo], to determine possible defenses in this case. And I think that perhaps that order's been expanded upon.
>
> . . . .
>
> [Prosecuting attorney]: Judge, I believe that in prior discussions it was somewhat regarding insanity but also kind of a general mental state of [Tamayo]. And in that regard the issue of competency was raised and was addressed by this doctor who was chosen as — court appointed by the defense in this case and gave an opinion with regard to competency. So I think that's what we're here for today.
>
> . . . .
>
> [Defense counsel:] I would just add, just agree or indicate that as part of the evaluation done, pursuant to my request and the Court's order, . . . Tamayo was examined for competence to assist me in his defense and to stand trial.

[9] This exchange clearly sets out that the original order for a psychiatric evaluation was intended to address possible defenses, not competency, and the court's opening remark indicates some degree of awareness that at some unspecified point in time, the scope of the psychiatrist's report had been expanded—and a permissible inference is that it had been "expanded" to include the issue of competency to stand trial. The district court cited the last statement quoted above from Tamayo's counsel in its order overruling the motion to

discharge, and the dissent says that defense counsel's statement is a determinative "judicial admission" made at the October 15, 2008, hearing by defense counsel that a competency proceeding was ongoing. Thus, according to the dissent, "the competency proceeding was in existence no later than July 7." We respectfully submit that there are several problems with this conclusion. First, July 7 is the date of a medical procedure, not a legal proceeding that tolls the speedy trial clock. Second, the argument fails to distinguish between a judicial admission and a "simple admission." We discussed this difference in *Nichols Media Consultants v. Ken Morehead Inv. Co.*, 1 Neb. App. 220, 224-25, 491 N.W.2d 368, 372 (1992):

> The difference between judicial admissions and simple admissions was explained in *Kipf v. Bitner*, 150 Neb. 155, 33 N.W.2d 518 (1948). The court, in that case, stated: "'The law of Evidence has suffered, in its most vital parts, from an ailment almost incurable . . . that of confusion of nomenclature. The term "admissions" exhibits this misfortune in one of its notable aspects. There are two principles, not at all connected, which for a century or more have had to be discussed by the aid of a single and common term. One . . . authorizes the receipt of any statement made by an opponent, as evidence in contradiction and impeachment of his present claim. (The form of which, if admissible, is immaterial. It may be oral or written or it may be a sworn statement, as for example a deposition. . . .) Such statements . . . should better . . . be designated Quasi-Admissions. The true Admission, in the fullest sense of the term, is another thing, and involves a totally distinct principle. It concerns a method of escaping from the necessity of offering any evidence at all. The former (quasi admissions) is an item in the mass of evidence; the latter (judicial admissions) is a waiver relieving the opposing party from the need of any evidence.'" (Citation omitted.) (Emphasis omitted.) *Id.* at 164-65, 33 N.W.2d at 523-24, quoting 4 John H. Wigmore, Evidence in Trials at Common Law § 1058 (James H. Chadbourn rev. 1972).

Therefore, at best, defense counsel's statement could only be merely a simple admission to be considered with the other evidence, including the evidence that competency became an issue on September 22, 2008, because there was absolutely nothing else said or done in the hearing on October 15 to show that the State was offering (or relying upon) defense counsel's statement as relieving its burden to show when the "competency proceeding" began and ended. Further, defense counsel's statement is not as unequivocal as the dissent asserts. It can also be read to say that he had the psychiatrist perform the evaluation authorized in the court's order, but later asked that the psychiatrist opine on competency—which is exactly what all of the other available evidence proves.

Granted, the statement by Tamayo's counsel on October 15, 2008, clearly indicates that the completed evaluation report included a competency evaluation. This statement by counsel, however, does not concede or prove that such inclusion of a competency evaluation occurred at the time of the original motion and court order. Rather, given the contents of Dr. Gutnik's letter to Tamayo's counsel, what is clear is that competency to stand trial was not the subject of a "proceeding" until, at the earliest, September 22, when defense counsel asked that Dr. Gutnik address that issue in his report. Using September 22 as the start date of a competency "proceeding" admittedly gives the concept of a "proceeding" a broad reading and one that we concede runs counter to *State v. Murphy*, 255 Neb. 797, 587 N.W.2d 384 (1998), which requires a "narrow" construction of what constitutes a "proceeding," remembering that there is no evidence that the trial court was involved in the issue of competency until the hearing of October 15. In summary, while the issue of competency may have been brought to the court's attention before October 15, there is no evidence of how such may have occurred or when. And that, fundamentally, is a failure by the State to carry its burden to prove excludable time periods. In any event, giving the State the benefit of the most favorable view of the evidence, September 22 is the absolute earliest date that can be used under the evidence for the start of a "competency proceeding" when defense counsel

asked the psychiatrist to include his opinion on competency in his report.

We acknowledge that one older case says that the time period "attributable to psychiatric evaluations and treatment" is properly excludable under § 29-1207(4). See *State v. Bolton*, 210 Neb. 694, 316 N.W.2d 619 (1982). However, *Bolton* is factually distinguishable from the instant case, and in any event, it was decided before *State v. Murphy, supra*, when the Supreme Court narrowed and refined the definition of a "proceeding" that tolls the speedy trial clock. Thus, we conclude that *State v. Murphy, supra*, compels the result we reach.

In *Bolton*, the Supreme Court counted days as excluded from the speedy trial count beginning with the date of the defendant's commitment by the Douglas County Board of Mental Health on March 14, 1980, until the district court's finding of February 4, 1981, that he was then competent to stand trial. The Supreme Court referenced this timeframe and said such was "attributable to psychiatric evaluations and treatment, [and therefore was] properly excludable as an 'other proceeding' under the provisions of § 29-1207(4)(a)." *State v. Bolton*, 210 Neb. at 699, 316 N.W.2d at 622. No other case we have found uses this expansive notion that merely because a defendant is undergoing psychiatric evaluation or treatment, the speedy trial clock is tolled. We respectfully suggest that under the *State v. Murphy, supra*, definition of "proceeding," there would not be tolling of the speedy trial clock merely because a criminal defendant is undergoing psychiatric treatment or evaluations. Rather, under current precedent, *State v. Murphy, supra*, it is a "proceeding" to determine competency to stand trial that tolls the speedy trial clock.

Another older case that is of some interest, although speedy trial issues were not assigned as error, is *State v. Teater*, 217 Neb. 723, 351 N.W.2d 60 (1984). On August 26, 1982, the district court ruled that the defendant was incompetent to stand trial, and he was committed to the Lincoln Regional Center under the district court's power found in § 29-1823 (Reissue 1979) for further evaluation. Six months later, and after extensive evaluation by psychiatrists and psychologists, the district court determined that the defendant was mentally competent to

stand trial. In the context of the defendant's claim that he was not timely arraigned, the Supreme Court simply said:

> Any delays in the instant case were the result of the proceedings to determine [the defendant's] competency to stand trial and the continuance granted at the request of [the defendant's] counsel. Both of these factors tolled the defendant's right to a speedy trial. See Neb. Rev. Stat. § 29-1207(4)(a) and (b) (Reissue 1979).

State v. Teater, 217 Neb. at 726, 351 N.W.2d at 63.

However, in contrast to *State v. Bolton, supra*, and the instant case, in *State v. Teater, supra*, the criminal defendant had been determined to be incompetent by the court to stand trial, thereby excluding the time during which he was incompetent under § 29-1207(4)(a). Clearly, the district court did not order a psychiatric evaluation for the purposes of determining competency in its April 11, 2008, order, and unlike in *Bolton*, there is no evidence that Tamayo's mental health required ongoing treatment after his arrest or that he was committed to a mental health facility. Therefore, we find that the time between April 7 and September 22 was not excludable as a time period "attributable to psychiatric evaluations and treatment" as was the case in *Bolton* and *Teater*.

In conclusion, we find the district court clearly erred in its factual finding that a "competency proceeding" occurred from April 8 until October 20, 2008, and that such time was excludable in the speedy trial calculation under § 29-1207(4)(a). However, the district court properly determined that 3 days, from April 8 to 11, were excludable as the "proceeding" pertaining to the pretrial motion for a psychiatric evaluation. If we calculate the excludable days using September 22 as the inception date for the competency proceeding, there is a total of 28 excludable days. Adding these 28 days to the 51 days for the plea in abatement, the 57 days for the motion to suppress, and the 3 days for the motion for a psychiatric evaluation, there is a total of 139 excludable days. The last day to bring Tamayo to trial under § 29-1207(1) was July 18. Adding 139 excludable days to that date, the last day to bring Tamayo to trial was December 5. Tamayo filed his motion to discharge on January 30, 2009, and he had not yet been brought to trial. Neb. Rev.

Stat. § 29-1208 (Reissue 2008) states that if a defendant is not brought to trial before the running of the time for trial, as extended by excluded periods, he shall be entitled to his absolute discharge from the offense charged and for any other offense required by law to be joined with that offense. As such, Tamayo is entitled to discharge for the offenses charged in the information filed January 18, 2008.

CONCLUSION

Because we find that the district court erroneously concluded that there were 195 excludable days for the competency proceeding when there were, at most, 3 days for the pretrial psychiatric evaluation motion and 28 days for the competency proceeding, we reverse the February 20, 2009, order denying Tamayo's motion to discharge and hereby remand the matter to the district court with directions to absolutely discharge Tamayo from the charges pending in this case.

REVERSED AND REMANDED WITH DIRECTIONS.

CASSEL, Judge, dissenting.

In the instant appeal, this court is called upon to determine whether the district court clearly erred in determining that the time had not expired for the State to bring Joseph E. Tamayo to trial. See Neb. Rev. Stat. § 29-1207 (Reissue 2008). The majority opinion finds clear error. I respectfully disagree.

I have no quarrel with the portion of the majority's analysis which distinguishes a motion for a pretrial psychological evaluation from a competency proceeding for speedy trial purposes. However, I respectfully disagree with the majority's conclusion that the district court clearly erred in determining when the competency proceeding began. This is because in light of the record, I believe the applicable standard of review requires a different conclusion.

The appellate standard of review imposes a high burden on Tamayo. As a general rule, a trial court's determination as to whether charges should be dismissed on speedy trial grounds is a factual question which will be affirmed on appeal unless clearly erroneous. *State v. Wells*, 277 Neb. 476, 763 N.W.2d 380 (2009). "To be clearly erroneous, a decision must strike us as more than just maybe or probably wrong; it must, as

one member of this court recently stated during oral argument, strike us as wrong with the force of a five-week-old, unrefrigerated dead fish." *Parts and Elec. Motors, Inc. v. Sterling Elec.*, 866 F.2d 228, 233 (7th Cir. 1988). In making the determination as to factual questions, 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. *State v. Vela*, 279 Neb. 94, 777 N.W.2d 266 (2010). When testing the trial judge's findings of fact, an appellate court considers the evidence in the light most favorable to the successful party and gives the successful party the benefit of every inference reasonably deducible from the evidence. *Risor v. Nebraska Boiler*, 277 Neb. 679, 765 N.W.2d 170 (2009).

The district court relied upon the admission of Tamayo's counsel, who stated at the time of the October 15, 2008, hearing, "I would just add, just agree or indicate that as part of the evaluation done, pursuant to my request and the Court's order, . . . *Tamayo was examined for competence* to assist me in his defense and *to stand trial*." (Emphasis supplied.) Thus, the examination was conducted for two purposes, one of which was for competence to stand trial.

This statement constitutes a judicial admission, which is binding on Tamayo in this appeal. A judicial admission, as a formal act done in the course of judicial proceedings, is a substitute for evidence and thereby waives and dispenses with the production of evidence by conceding for the purpose of litigation that the proposition of fact alleged by an opponent is true. *State v. Canady*, 263 Neb. 552, 641 N.W.2d 43 (2002). Pursuant to Neb. Rev. Stat. § 7-107 (Reissue 2007):

> An attorney or counselor has power . . . (2) to bind his client by his agreement in respect to any proceeding within the scope of his proper duties and powers; but no evidence of any such agreement is receivable except the statement of the attorney himself, his written agreement signed and filed with the clerk, or an entry thereof upon the records of the court . . . .

Further, statements made by a party or his attorney during the course of a trial may be judicial admissions. *Schroeder v.*

Barnes, 5 Neb. App. 811, 565 N.W.2d 749 (1997). See, also, *Vermaas v. Heckel*, 170 Neb. 321, 102 N.W.2d 647 (1960) (party or party's counsel can make judicial admission in course of trial). In the instant case, Tamayo's counsel actually made a judicial admission because in the course of a proceeding, he agreed that a competency examination had occurred pursuant to a court order.

Only one date of examination appears in our record. Dr. Bruce Gutnik evaluated Tamayo on July 7, 2008. Tamayo's counsel judicially admitted that the examination was conducted, in part, to determine competence to stand trial. In addition, Dr. Gutnik's report states, "Tamayo was seen in order to provide an independent psychiatric evaluation to determine his sanity at the time of the alleged crime and *competence to stand trial* . . . ." (Emphasis supplied.)

At a minimum, considering the evidence most favorably to the State as the successful party and giving the State the benefit of every inference reasonably deducible from the evidence, the competency proceeding was in existence no later than July 7, 2008. I reach this conclusion because Tamayo's counsel admitted that the evaluation was completed pursuant to counsel's request and a court order, and logically both would have had to occur prior to the evaluation. Assuming that all of the majority's other calculations are correct, the additional 77 days from July 7 to September 22 would extend the majority's last day to bring Tamayo to trial, i.e., December 5, 2008, to February 20, 2009. As Tamayo's motion for discharge was filed January 30, 2009, the time to commence trial had not yet expired.

Moreover, under our standard of review, the judicial admission can be read to support the trial court's finding tracing the commencement of competency proceedings to the date when Tamayo filed his motion for the appointment of a psychiatrist. One can read the admission as agreeing that the evaluation was "done, pursuant to . . . the Court's order." The only possible order in the record to which this could refer is the order of April 11, 2008. In order to reject the district court's finding, the majority relies upon its reading of the April 7 motion, the April 11 order, and the contents of Dr. Gutnik's letter to

Tamayo's counsel. But the question before us is not how this court would have determined the factual questions in the first instance; rather, the question is whether the district court's finding was clearly wrong. And in answering this question, this court must view the evidence most favorably to the State and give it the benefit of every reasonable inference in its favor. I respectfully submit that under the requisite standard, the judicial admission can be read to support the district court's conclusion.

If I were considering the evidence as a fact finder, I might well reach the same conclusion as the majority. But after long and careful reflection, I believe that the standard of review requires me to conclude otherwise. I would affirm the decision of the district court denying Tamayo's motion for absolute discharge.

IN RE INTEREST OF ANTONIO O. AND GISELA O., CHILDREN UNDER 18 YEARS OF AGE. STATE OF NEBRASKA, APPELLEE, V. JOSE O., APPELLANT.

784 N.W.2d 457

Filed June 1, 2010. No. A-09-1012.

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. **Evidence: Appeal and Error.** When the evidence is in conflict, an appellate court may consider and give weight to the fact that the trial court observed the witnesses and accepted one version of the facts over the other.
3. **Juvenile Courts: Parental Rights: Appeal and Error.** In reviewing questions of law, an appellate court in termination of parental rights proceedings reaches a conclusion independent of the lower court's ruling.
4. **Juvenile Courts: Jurisdiction.** Neb. Rev. Stat. § 43-3804 (Reissue 2008) does not create a jurisdictional prerequisite to a juvenile court's exercise of jurisdiction, and when the State fails to strictly comply with the requirements of § 43-3804, the juvenile court is not divested of its jurisdiction to make decisions regarding a juvenile over whom the court properly exercised jurisdiction under Neb. Rev. Stat. § 43-247 (Cum. Supp. 2006).
5. ____: ____. To obtain jurisdiction over a juvenile, the juvenile court's only concern is whether the conditions in which the juvenile presently finds himself

or herself fit within the asserted subsection of Neb. Rev. Stat. § 43-247 (Cum. Supp. 2006).

6. **Parent and Child: Due Process: Parental Rights.** The parent-child relationship is afforded due process protection, and consequently, procedural due process is applicable to a proceeding for termination of parental rights.
7. **Due Process.** When a person has a right to be heard, procedural due process includes notice to the person whose right is affected by a proceeding, that is, timely notice reasonably calculated to inform the person concerning the subject and issues involved in the proceeding; a reasonable opportunity to refute or defend against a charge or accusation; a reasonable opportunity to confront and cross-examine adverse witnesses and present evidence on the charge or accusation; representation by counsel, when such representation is required by constitution or statute; and a hearing before an impartial decisionmaker.
8. **Due Process: Parental Rights: Notice.** If a parent does not attend a termination of parental rights hearing after notice that such proceeding has been instituted and the parent has representation at such hearing through his or her counsel, then there is no denial of due process.
9. **Due Process: Notice.** Due process requires that a person be afforded reasonable notice of further proceedings. However, once having appeared, and having the benefit of counsel, that person has some obligation to keep counsel and the court informed of his or her whereabouts.
10. **Due Process: Juvenile Courts: Parental Rights: Notice.** The State's failure to comply with the notice requirements of Neb. Rev. Stat. § 43-3804(2) (Reissue 2008) does not result in a denial of due process when a parent whose parental rights have been terminated had notice of the proceedings and did not show that he or she was prejudiced by the lack of notification to the foreign consulate.
11. **Appeal and Error.** Errors that are assigned but not argued will not be addressed by an appellate court.
12. ____. In the absence of plain error, an appellate court considers only claimed errors which are both assigned and discussed.
13. **Juvenile Courts: Parental Rights.** Neb. Rev. Stat. § 43-292 (Reissue 2008) specifically requires that in a proceeding for termination of parental rights, the court must find such termination to be in the child's best interests. This requirement ensures that there are ample safeguards in place to ensure that termination of parental rights is not based solely on the duration of out-of-home placement.

Appeal from the Separate Juvenile Court of Douglas County: STEVEN B. TIMM, County Judge. Affirmed.

Thomas K. Harmon, of Law Offices of Thomas K. Harmon, for appellant.

Donald W. Kleine, Douglas County Attorney, and Amy Schuchman for appellee.

IRWIN and CARLSON, Judges.

PER CURIAM.

Jose O. appeals the order of the separate juvenile court of Douglas County terminating his parental rights to Antonio O. and Gisela O. The issue presented on appeal is whether the State's failure to comply with the Vienna Convention on Consular Relations (Vienna Convention) resulted in a deprivation of Jose's due process rights. For the reasons set forth herein, we find that the failure to comply did not deprive Jose of his constitutional right to due process, and we affirm the order of the separate juvenile court terminating his parental rights to his two children.

FACTUAL AND PROCEDURAL BACKGROUND

Jose is the natural father of Antonio, born in October 2004, and Gisela, born in July 2006. The two children have a half sister, Yelitza G., born in June 1998, who has the same mother and was included in the proceedings in this case. Jose is a Mexican national, and his two children are U.S. citizens. There is considerable history of domestic violence between Jose and the children's mother. Such abuse was the reason that Yelitza and Antonio were removed from the home in March 2006.

The State filed a motion for temporary custody of Yelitza and Antonio on March 17, 2006, which motion was granted by the court on March 17. The State filed a petition alleging that Yelitza and Antonio came within the meaning of Neb. Rev. Stat. § 43-247(3)(a) (Reissue 2004) by reason of the faults and habits of their mother. Gisela was born in July 2006 with amphetamine in her system. The following day, the State filed a motion for temporary custody, which was granted by the court, and its supplemental petition, alleging that Gisela came within the meaning of § 43-247(3)(a) by reason of the faults and habits of her mother. On July 12, the separate juvenile court adjudicated the three children by reason of the faults and habits of their mother.

While the original petitions related solely to the mother, on July 24, 2006, the State filed its second supplemental petition, alleging that Antonio and Gisela came within the meaning of § 43-247(3)(a) (Cum. Supp. 2006) by reason of the faults or habits of Jose, in that Jose engaged in domestic violence

with the children's mother; that Yelitza, a "sibling to [the] children," had been hit by Jose; and that the children were at risk for harm. Personal service of the notice of adjudication was returned undeliverable, but Jose's attorney had notice of the proceedings and service was made by publication. Jose participated in intensive family preservation services with the children and their mother in 2006.

In its order dated January 11, 2007, the court adjudicated Antonio and Gisela as to Jose, finding that the allegations that Jose had engaged in domestic violence and that the children were at risk of harm were true by a preponderance of the evidence. The court dismissed the remaining allegation of the petition, finding insufficient evidence of such.

On July 1, 2008, the children's mother filed a petition to obtain a domestic abuse protection order against Jose because of an incident on June 30, 2008, when Jose was at her house, threatening her. The mother included information in her petition that Jose had hit her, punched her, and kicked her on several occasions throughout their relationship and that she was concerned for her safety. The district court for Douglas County filed an ex parte domestic abuse protection order on July 1. However, 3 weeks later, the mother filed a motion to vacate and set aside and to dismiss the protection order, stating that Jose was enrolled in domestic violence classes, and such motion was granted by the court.

On August 12, 2008, Yelitza called the 911 emergency dispatch service because of a domestic disturbance between her mother and Jose. An officer of the Omaha Police Department responded to the call. The officer determined that Jose had been at the house and had hit the children's mother and yelled at her. This occurred while the three children were all present. Jose was subsequently apprehended and was charged with domestic assault in the third degree, pursuant to Neb. Rev. Stat. § 28-323(4) (Reissue 2008), and disturbing the peace, pursuant to Neb. Rev. Stat. § 28-1322(1) (Reissue 2008). Jose pled guilty and was sentenced to 40 days in jail. Following his arrest, Jose was subject to deportation. On August 13, the children's mother filed another petition for a domestic abuse protection order. The district court filed an ex parte domestic

abuse protection order that same day, setting a hearing date of September 2. No additional information regarding such protection order was included in the record.

Between the January 2007 adjudication and May 2009, there were numerous review and permanency planning hearings addressing the ongoing services provided to Jose and the children's mother. On numerous occasions, Jose was ordered by the court to complete a domestic violence class and a parenting class, to maintain a legal source of income and stable housing, and to be tested at the child support office to determine paternity. On February 22, 2007, Jose, per the court's order, was given reasonable rights of supervised visitation in a neutral setting. However, beginning in August 2006, the mother was ordered not to allow contact between Jose and the children. Orders on August 9, 2006, January 11, 2007, and March 25, 2009, specifically disallowed any contact between the children and Jose. Orders on December 13, 2007, and April 11, 2008, ordered the mother to contact the Department of Health and Human Services (DHHS) if Jose attempted to contact her or the children, and orders on July 8 and October 14, 2008, ordered the mother to abide by the safety plan, which was identified at the termination hearing as contacting 911 if Jose was present. From May until November 2008, the children were placed in the home of their mother, but were returned to foster care due to the mother's drug abuse. We note that after March 2006, Antonio and Gisela were never placed in Jose's home.

In addition to the domestic disturbance in August 2008, there was at least one other occasion after the children were removed from his home when Jose had contact with the children, but none of such contacts were in the context of court-ordered visitation. There were reports that the children may have seen Jose sometime in July 2008 and in early 2009. Jose did not have any contact with DHHS workers and did not provide a current address or telephone number at any time. While Jose was incarcerated in September 2008, a DHHS caseworker talked to Jose about the court's orders pertaining to him and the need for him to contact DHHS with an address and telephone number in order to request visitation or obtain information about the children. DHHS did not have any further contact with Jose. The

DHHS caseworker testified that she had heard that Jose had been deported, but that he had returned to Omaha at some point in early 2009. No other verification of Jose's whereabouts after September 2008 was included in the record.

On May 11, 2009, the State filed a motion to terminate Jose's parental rights, alleging that Antonio and Gisela came within the meaning of Neb. Rev. Stat. § 43-292(1), (2), (6), (7), and (9) (Reissue 2008). The motion also alleged that reasonable efforts were not required, because Jose had subjected the children to aggravated circumstances. The State was unable to personally serve notice of the proceedings to Jose; thus, service was made by publication, and notice was properly provided to Jose's attorney.

The separate juvenile court held its hearing on the motion for termination on August 3 and September 23 and 24, 2009. Jose's attorney appeared at the hearing on Jose's behalf. The evidence at such hearing clearly showed that DHHS had not provided written notice to the Mexican consulate to inform it as to the termination proceedings. The only contact between DHHS and the consulate occurred sometime after September 2008 when DHHS contacted the consulate for assistance in locating Jose.

On October 1, 2009, the separate juvenile court filed its order terminating Jose's parental rights to Antonio and Gisela. Relying on *In re Interest of Angelica L. & Daniel L.*, 277 Neb. 984, 767 N.W.2d 74 (2009), the court determined that while the State did not comply with the Vienna Convention or with Neb. Rev. Stat. § 43-3804 et seq. (Reissue 2008), the separate juvenile court retained jurisdiction. The court found that Jose had neglected the children, that the children had been in an out-of-home placement for 15 or more of the most recent 22 months, and that Jose had abandoned the children for the requisite 6-month period. The court further found that reasonable efforts had been made to preserve and reunify the family, but that such had failed to correct these conditions, and that it was in the best interests of the children that Jose's parental rights be terminated. Jose timely appealed.

ASSIGNMENTS OF ERROR

Jose assigns as error, restated and renumbered, that (1) DHHS violated the terms and provisions of the Vienna Convention and that such breach constituted a denial of due process, (2) the separate juvenile court erred in denying Jose's motion to dismiss at the conclusion of the State's case in chief, (3) the decision of the separate juvenile court is contrary to the great weight of the evidence and the law, (4) the separate juvenile court failed to consider a reasonable alternative to termination of parental rights, and (5) the separate juvenile court erred in finding that termination of Jose's parental rights was in the best interests of Antonio and Gisela.

STANDARD OF REVIEW

[1,2] 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 Tyler F.*, 276 Neb. 527, 755 N.W.2d 360 (2008). However, when the evidence is in conflict, an appellate court may consider and give weight to the fact that the trial court observed the witnesses and accepted one version of the facts over the other. *Id.*

[3] In reviewing questions of law, an appellate court in termination of parental rights proceedings reaches a conclusion independent of the lower court's ruling. See *In re Interest of Jessica J. & Jennifer C.*, 9 Neb. App. 521, 615 N.W.2d 119 (2000).

ANALYSIS

State's Violation of Vienna Convention.

Jose argues that the State's failure to notify the Mexican consulate of these proceedings pursuant to the Vienna Convention resulted in the violation of Jose's due process rights. The Vienna Convention, art. 37, Apr. 24, 1963, 21 U.S.T. 77, 102, provides, in pertinent part:

> If the relevant information is available to the competent authorities of the receiving State, such authorities shall have the duty:
>
> . . . .

> (b) to inform the competent consular post without delay of any case where the appointment of a guardian or trustee appears to be in the interests of a minor or other person lacking full capacity who is a national of the sending State. The giving of this information shall, however, be without prejudice to the operation of the laws and regulations of the receiving State concerning such appointments.

Section 43-3804, which addresses the responsibilities of the State when a foreign minor or a minor with multiple nationalities is involved in juvenile proceedings, states in pertinent part:

> (2) [DHHS] shall notify the appropriate consulate in writing within ten working days after (a) the initial date [DHHS] takes custody of a foreign national minor or a minor having multiple nationalities or the date [DHHS] learns that a minor in its custody is a foreign national minor or a minor having multiple nationalities, whichever occurs first, (b) the parent of a foreign national minor or a minor having multiple nationalities has requested that the consulate be notified, or (c) [DHHS] determines that a noncustodial parent of a foreign national minor or a minor having multiple nationalities in its custody resides in the country represented by the consulate.

[4,5] The Nebraska Supreme Court held, in *In re Interest of Angelica L. & Daniel L.*, 277 Neb. 984, 767 N.W.2d 74 (2009), that § 43-3804 (Cum. Supp. 2006) did not create a jurisdictional prerequisite to a juvenile court's exercise of jurisdiction and that when the State fails to strictly comply with the requirements of § 43-3804, the juvenile court is not divested of its jurisdiction to make decisions regarding a juvenile over whom the court properly exercised jurisdiction under § 43-247 (Reissue 2004). The court's rationale was premised upon the general notion that to obtain jurisdiction over a juvenile, the juvenile court's only concern is whether the conditions in which the juvenile presently finds himself or herself fit within the asserted subsection of § 43-247. *In re Interest of Angelica L. & Daniel L., supra.*

The Supreme Court, however, declined to decide whether compliance with the Vienna Convention is a jurisdictional prerequisite for proceedings in juvenile court, because the court found that the trial court had not erred in determining that the State complied with the requirements of the Vienna Convention. While the court did not specifically hold that compliance with the Vienna Convention is not a jurisdictional prerequisite for juvenile court, the court did discuss precedent in other jurisdictions on this issue:

> Other jurisdictions have considered the same issue and have concluded that compliance with the Vienna Convention is not a jurisdictional prerequisite. [See *In re Stephanie M.*, 7 Cal. 4th 295, 867 P.2d 706, 27 Cal. Rptr. 2d 595 (1994).] In *In re Stephanie M.*, the California Supreme Court concluded that any delay in notice to the Mexican consulate did not deprive the California court of jurisdiction. In so concluding, the court analyzed and interpreted the language of the Vienna Convention to mean that the jurisdiction of the receiving state is permitted to apply its laws to a foreign national and that the operation of the receiving state's law is not dependent upon providing notice as prescribed by the Vienna Convention.
>
> Other jurisdictions have concluded that state courts do not lose jurisdiction for failing to notify the foreign consulate as required by the Vienna Convention unless the complainant shows that he or she was prejudiced by such failure to notify. [See, *Breard v. Greene*, 523 U.S. 371, 118 S. Ct. 1352, 140 L. Ed. 2d 529 (1998); *E.R. v. Office of Family & Children*, 729 N.E.2d 1052 (Ind. App. 2000).]

In re Interest of Angelica L. & Daniel L., 277 Neb. at 1002-03, 767 N.W.2d at 90.

In re Interest of Angelica L. & Daniel L. is distinguishable from this case in two ways. First, in *In re Interest of Angelica L. & Daniel L.*, the State had faxed a letter of inquiry to the Guatemalan consulate and had contacted the U.S. Embassy in Guatemala, but the Guatemalan consulate indicated that it had not received notification of the termination proceedings. On the

other hand, in this case, there is no evidence that any contact occurred between the State and the Mexican consulate regarding the termination proceedings. The State concedes in its brief that no one contacted the Mexican consulate at any time during the proceedings in juvenile court other than the inquiry as to Jose's whereabouts. Second, the Supreme Court in *In re Interest of Angelica L. & Daniel L.* focused solely on the jurisdictional issue and did not address whether a failure to comply with the Vienna Convention results in a denial of due process rights to the parent, which is what Jose argues here.

However, one of the cases cited by the Nebraska Supreme Court in *In re Interest of Angelica L. & Daniel L.*, 277 Neb. 984, 767 N.W.2d 74 (2009), does address due process rights. That case is *In re Stephanie M.*, 7 Cal. 4th 295, 316, 867 P.2d 706, 717, 27 Cal. Rptr. 2d 595, 606 (1994), where the California Supreme Court found that there was "no due process right to notice belonging not to an individual but to a foreign consulate for the purpose of enlisting its aid." In simple terms, the California court found that the due process rights belong to the individual, not the foreign consulate. The court also found that the due process rights of the parents and child were met because they had "every procedural protection, including notice, an opportunity to be heard, and the appointment of counsel." *Id*. In that case, the Mexican consulate contacted the court on behalf of the maternal grandmother, who was a Mexican citizen residing in Mexico, after the adjudication of the child but prior to the termination of the parents' rights.

[6,7] The Nebraska Supreme Court recognizes that the parent-child relationship is afforded due process protection and that consequently, procedural due process is applicable to a proceeding for termination of parental rights. *In re Interest of L.V.*, 240 Neb. 404, 482 N.W.2d 250 (1992).

> As stated in *Fuentes v. Shevin*, 407 U.S. 67, 80, 92 S. Ct. 1983, 32 L. Ed. 2d 556 (1972): "For more than a century the central meaning of procedural due process has been clear: 'Parties whose rights are to be affected are entitled to be heard. . . .'" When a person has a right to be heard, procedural due process includes notice to the person whose right is affected by a proceeding, that

> is, timely notice reasonably calculated to inform the person concerning the subject and issues involved in the proceeding; a reasonable opportunity to refute or defend against a charge or accusation; a reasonable opportunity to confront and cross-examine adverse witnesses and present evidence on the charge or accusation; representation by counsel, when such representation is required by constitution or statute; and a hearing before an impartial decisionmaker.

In re Interest of L.V., 240 Neb. at 413-14, 482 N.W.2d at 257.

Here, Jose was represented by the same appointed attorney throughout the adjudication and termination proceedings spanning 3 years. Jose had participated in intensive family preservation services ordered by the court in 2006. Jose was not able to be served personally with summons for these juvenile proceedings, because his whereabouts were not known; thus, service was made by publication. Jose's counsel was properly provided with the State's motions and the court orders from the review and permanency planning hearings, as well as the motion for termination of Jose's parental rights. Jose was not present at the termination hearing, but his counsel appeared on his behalf and had the opportunity to cross-examine the witnesses and adduce evidence on Jose's behalf. Evidence at the termination hearing indicated that Jose had been deported in September 2008, but that he had returned to Omaha in early 2009, before the motion for termination of parental rights was filed. Evidence at the termination hearing also indicated that on a few occasions in 2007 and 2008, Jose had contact with the children but did not ever contact DHHS to update his address or telephone number. Even after DHHS workers talked with Jose in September 2008, Jose failed to provide DHHS with any information as to his whereabouts.

[8,9] If a parent does not attend a termination of parental rights hearing after notice that such proceeding has been instituted and the parent has representation at such hearing through his or her counsel, then there is no denial of due process. See, *In re Interest of A.G.G.*, 230 Neb. 707, 433 N.W.2d 185 (1988); *In re Interest of Jessica J. & Jennifer C.*, 9 Neb. App. 521, 615 N.W.2d 119 (2000). In *In re Interest of A.G.G.,*

supra, a mother appealed from the judgment of the county court which terminated her parental rights, and she assigned as error that there was lack of proper notice, lack of jurisdiction, and insufficiency of the evidence. Personal service was unsuccessful, but was accomplished by publication. The mother had not been in contact with DHHS, her child, or her attorney. The mother's appointed counsel moved to withdraw because he was unaware of her whereabouts and could not contact her. She was appointed new counsel, who moved to dismiss for lack of jurisdiction due to the absence of proper notice. The Supreme Court held that "due process still requires that such person be afforded reasonable notice of further proceedings. However, once having appeared, and having the benefit of counsel, that person has some obligation to keep counsel and the court informed of his or her whereabouts." *Id.* at 713, 433 N.W.2d at 190. Likewise, in *In re Interest of Jessica J. & Jennifer C., supra*, a father who was served with summons instituting the proceedings and whose attorney was given notice and appeared at the continued hearing was not denied due process when the court failed to provide notice of the continued hearing date. Here, Jose had notice that proceedings involving his children were taking place in juvenile court even if he was not personally served with notice of the termination hearing. Jose also had the opportunity to be represented by counsel at all times during the proceedings, thereby affording Jose the right to cross-examine witnesses. Therefore, we find that Jose was provided with reasonable procedural safeguards and was not deprived of due process.

Jose argues that the State's failure to comply with the Vienna Convention prejudiced him in three ways: Jose did not know of his right to consult with the Mexican consulate; had he been notified, Jose would or could have availed himself of that right; and there was a likelihood that said contact with the consular official would have provided assistance to him. We cannot agree that Jose was prejudiced by the State's failure to notify the Mexican consulate. Jose had ample opportunities to contact DHHS in regard to his children and failed to do so at any time. Thus, he has clearly demonstrated by his conduct that it was extremely unlikely he would have contacted the Mexican

consulate at any time regarding these proceedings. Furthermore, he was adequately represented by appointed counsel throughout the proceedings, and there is no evidence to suggest that Jose was not able to communicate with his attorney—if he chose to do so. While Jose's attorney argues in this appeal that Jose could have gotten "assistance" from the Mexican consulate, brief for appellant at 19, we have no notion of what such "assistance" would have been. Moreover, there is no evidence of how that "assistance" in these proceedings would be different from, or better than, having a duly licensed attorney representing him at all times—as he did. Thus, there is simply no basis to conclude that Jose was prejudiced by DHHS' failure to notify the Mexican consulate.

[10] Recognizing that at its core, due process involves notice of proceedings affecting a person and an opportunity to be heard in such proceedings, it is clear that Jose was not denied due process. Further, there is no basis to find that he suffered any actual prejudice from the State's failure to notify the Mexican consulate. Therefore, while we find that this assignment of error lacks merit, we cannot help commenting that DHHS should put in place procedures to ensure that the dictates of § 43-3804 (Reissue 2008) are followed.

Remaining Assignments of Error.

[11-13] Jose's brief contains four other assignments of error. However, none of these assignments of error are argued in his brief. Errors that are assigned but not argued will not be addressed by an appellate court. *Epp v. Lauby*, 271 Neb. 640, 715 N.W.2d 501 (2006). In the absence of plain error, an appellate court considers only claimed errors which are both assigned and discussed. *In re Trust of Rosenberg*, 273 Neb. 59, 727 N.W.2d 430 (2007). Section 43-292(7) specifically provides that termination of parental rights is appropriate if "[t]he juvenile has been in an out-of-home placement for fifteen or more months of the most recent twenty-two months." Antonio was removed from Jose's care in March 2006 and was not subsequently returned to his care at any time. Gisela was never in Jose's care. The evidence was undisputed that Antonio and Gisela were in an out-of-home placement for

more than 15 months of the 22 months prior to the State's motion to terminate Jose's parental rights. Section 43-292 specifically requires that in a proceeding for termination of parental rights, the court must find such termination to be in the child's best interests. *In re Interest of Kindra S.*, 14 Neb. App. 202, 705 N.W.2d 792 (2005). This requirement ensures that there are ample safeguards in place to ensure that termination of parental rights is not based solely on the duration of out-of-home placement. *Id.* There was considerable evidence that the children had been present during incidents of domestic abuse between Jose and the mother, and the court's review orders made it very clear that Jose's presence created safety concerns for the children and their mother. There had been very little contact between the children and Jose during the more than 2 years that the children were in State custody. The DHHS caseworker opined that termination of Jose's parental rights was in the best interests of the children because of the domestic violence and the lack of contact with his children. After reviewing the record in its entirety, we find that the court's determination that there was sufficient evidence that termination of Jose's parental rights was in the children's best interests was not plain error. We will not address these assignments of error any further.

CONCLUSION

Because we have determined that the State's failure to comply with the Vienna Convention did not result in a denial of Jose's due process rights, we affirm the order of the separate juvenile court terminating Jose's parental rights to Antonio and Gisela.

AFFIRMED.

SIEVERS, Judge, participating on briefs.

STATE OF NEBRASKA, APPELLEE, V. JORGE CORTES-LOPEZ, APPELLANT.

789 N.W.2d 522

Filed June 8, 2010. No. A-09-840.

1. **Jury Instructions.** Whether jury instructions given by a trial court are correct is a question of law.
2. **Judgments: Appeal and Error.** When dispositive issues on appeal present questions of law, an appellate court has an obligation to reach an independent conclusion irrespective of the decision of the court below.
3. **Jury Instructions: Proof: Appeal and Error.** In an appeal based on a claim of an erroneous jury instruction, the appellant has the burden to show that the questioned instruction was prejudicial or otherwise adversely affected a substantial right of the appellant.
4. **Jury Instructions: Pleadings: Evidence.** Whether requested to do so or not, a trial court has the duty to instruct the jury on issues presented by the pleadings and the evidence.
5. **Jury Instructions.** The trial court is required to give an instruction where there is any evidence, which could be believed by the trier of fact, in support of a legally cognizable theory of defense.
6. **Judgments: Appeal and Error.** A proper result will not be reversed merely because it was reached for the wrong reason.
7. **Jury Instructions: Appeal and Error.** A jury instruction which directs the attention of the jury to, and unduly emphasizes, a part of the evidence is erroneous and should be refused.
8. **Trial: Motions for Mistrial: Waiver: Appeal and Error.** When a party has knowledge during trial of irregularity or misconduct, the party must timely assert his or her right to a mistrial. One may not waive an error, gamble on a favorable result, and, upon obtaining an unfavorable result, assert the previously waived error.

Appeal from the District Court for Madison County: JAMES G. KUBE, Judge. Affirmed.

Mark D. Albin, of Albin Law Office, for appellant.

Jon Bruning, Attorney General, and Kimberly A. Klein for appellee.

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

CASSEL, Judge.

INTRODUCTION

After the district court instructed the jury in this criminal case, the jury requested a dictionary definition of "terroristic

threat." Instead, the court provided a supplemental instruction which amended the original instruction on the elements of terroristic threats to add that it could also be committed "in reckless disregard of the risk of causing such terror." Because there was evidence to support a theory that Jorge Cortes-Lopez committed the crime recklessly and the amended instruction did not prejudice Cortes-Lopez, we affirm.

BACKGROUND

The State charged Cortes-Lopez in an amended information with terroristic threats and assault in the third degree based upon events occurring on September 13, 2008, while Rafael Perez and Cortes-Lopez were working at a packing plant.

Perez testified that while he was cutting hams on the "loin line" and Cortes-Lopez was learning how to cut hams on the training table, Cortes-Lopez kept staring at Perez, which made Perez nervous. Perez testified that Cortes-Lopez then approached Perez, said he was going to kill Perez with the knife that he had at his side, and put his finger on Perez' throat. Perez testified that he was scared and that he reported the incident to his trainer when Cortes-Lopez walked away. Perez testified that later that day, Cortes-Lopez came up to him in the cafeteria, Cortes-Lopez slapped him a couple of times, and then Perez got up and ran. While Perez was running away, he noticed that Cortes-Lopez threw Perez' hardhat at Perez. Other witnesses in the cafeteria similarly testified that Cortes-Lopez yelled at Perez, slapped Perez two or three times, and picked up a hardhat and threw it toward the area where Perez was.

The interpreter who translated the conversations of a deputy sheriff and Cortes-Lopez between Spanish and English on the day of the incident recalled that Cortes-Lopez denied threatening Perez but admitted talking to him and poking him in the chest "to kind of back off." The interpreter testified that Cortes-Lopez denied hitting Perez. The deputy sheriff testified that Cortes-Lopez told him that when Cortes-Lopez went to speak with Perez about Perez' staring at Cortes-Lopez, Perez "got into like a fighting type of stance, and [Cortes-Lopez] was afraid that . . . Perez was going to attack him so he said

he slapped him a couple times and then threw a [hardhat] at him."

When the State rested, Cortes-Lopez moved for a directed verdict. The prosecutor asked the court to overrule the motion, stating that "there certainly was testimony by . . . Perez that statements were made that it was a threat to kill. The jury can infer from the evidence that was meant to terrorize or recklessly made. And that's enough to make a prima facie case." The court overruled the motion.

Cortes-Lopez testified that he spoke with Perez a number of times about why Perez was staring at him. Cortes-Lopez explained that he did not "know whether [Perez was] gay or not" and that Cortes-Lopez felt his "honor as a man was being offended." Cortes-Lopez denied threatening to kill Perez. He admitted slapping Perez, but testified that it was not his intent to slap him. Cortes-Lopez testified that while they were in the cafeteria, it looked as though Perez was going to throw his hardhat at Cortes-Lopez, so when the hardhat slipped out of Perez' hand, Cortes-Lopez hit Perez with his left hand and then grabbed the hardhat. Cortes-Lopez denied poking Perez in the chest.

After the evidence had been adduced, the court conducted a jury instruction conference and neither party had any objections to the proposed instructions or requested additions. Following closing arguments—which are not in the record—the court read the jury instructions to the jury. Jury instruction No. 4 provided in part as follows:

> The elements of the crime of **Terroristic Threats** (Count I) are:
>
> (1) That [Cortes-Lopez] threatened to commit a crime of violence;
>
> (2) That [Cortes-Lopez] did so with intent to terrorize . . . Perez; and
>
> (3) That [Cortes-Lopez] did so on or about September 13, 2008, in Madison County, Nebraska.

Instruction No. 5 provided in part: "The crime of terroristic threats does not require an intent to actually execute the threat made or that the recipient of the threat actually feel terrorized.

A threat may be written, oral, physical, or any combination thereof."

The court submitted the case to the jury at 11:24 a.m. At 12:45 p.m., the court advised the parties that the jury had sent a question asking if it may have the dictionary definition of "terroristic threat." The court stated:

> Initially my response was going to be simply to refer to Instruction No. 4. Instruction No. 4 gave them the elements of the crime, and that is essentially the definition of terroristic threats, when a person threatens to commit any crime of violence with the intent to terrorize another, which is the element that we gave them in Instruction No. 4.
>
> The problem is when I went to review this, it also states that it could be in reckless disregard of the risk causing such terror. In Instruction No. 5 we told them that the crime of terroristic threats did not require an intent to actually execute the threat. We did not include anything in there about reckless.
>
> So my proposed response that I will ask each of you to respond to is to amend Instruction No. 4, and specifically that portion of the elements of terroristic threats contained in . . . subparagraph 2 which says that [Cortes-Lopez] did so with the intent to terrorize . . . Perez, and the additional language is, "or in reckless disregard of the risk causing such terror", which is pursuant to statute and it's also pursuant to the language in the Complaint. It was simply my error in not including that reckless disregard of causing such terror language.
>
> So my intent is to amend Instruction No. 4, submit that to them, with a response to their question that says, you are to refer to Amended Instruction No. 4.

The prosecutor agreed with the court and its proposed amended instruction. Cortes-Lopez' counsel, however, stated:

> I would not be in agreeance . . . only for the mere fact that the instruction that was given to them was, and is basically at the time it was given, the definition per the statute. I would agree that it was minus the reckless disregard of causing such terror part. However, I don't know if

> that would necessarily answer the question the jury has as to what the definition of terroristic threat is. I think rather answering the question, not with an amended instruction, but rather terroristic threat is defined in the instructions by the elements and by how it is worded in Instruction No. 4 as it stands.
>
> I would hate to jeopardize especially confusing the jury more by adding another term to the definition trying to define it better for them. I think that would possibly cause more jury misunderstanding or cause more questions.
>
> So at this time I would object to the amendment and simply answer that defined in Instruction 4, as Instruction 4 was given to them by the Court, and I don't think the instruction needs to be amended.

The court stated that "[t]he instructions as we gave them says [sic] that [Cortes-Lopez] did so with the intent to terrorize . . . Perez. If you look at Instruction No. 5, it says that the crime of terroristic threats does not require an intent to actually execute the threat. That's contradictory." Cortes-Lopez' counsel renewed the objection to allowing the amended instruction. At 1 p.m., the court provided the jury with supplemental instruction No. 1, which instructed the jury to refer to the amended instruction No. 4. The only difference between the original and amended instructions is that the amended instruction added to (2) "or in reckless disregard of the risk of causing such terror." By 1:40 p.m., the jury had reached a unanimous verdict of guilty on each count. The court subsequently sentenced Cortes-Lopez.

Cortes-Lopez timely appeals.

ASSIGNMENT OF ERROR

Cortes-Lopez assigns that the district court erred in giving a supplemental jury instruction which was an incorrect statement of law as applied to the facts of the case, was not offered by the prosecution, and was given over his objection.

STANDARD OF REVIEW

[1,2] Whether jury instructions given by a trial court are correct is a question of law. *State v. Bormann*, 279 Neb. 320, 777

N.W.2d 829 (2010). When dispositive issues on appeal present questions of law, an appellate court has an obligation to reach an independent conclusion irrespective of the decision of the court below. *Id.*

[3] In an appeal based on a claim of an erroneous jury instruction, the appellant has the burden to show that the questioned instruction was prejudicial or otherwise adversely affected a substantial right of the appellant. *State v. Vela*, 279 Neb. 94, 777 N.W.2d 266 (2010).

ANALYSIS

[4] Whether requested to do so or not, a trial court has the duty to instruct the jury on issues presented by the pleadings and the evidence. *State v. Contreras*, 268 Neb. 797, 688 N.W.2d 580 (2004). Thus, even though neither party requested the instruction at issue, we find no merit in Cortes-Lopez' argument that "the trial judge overstepped his judicial role and acted in fact in a prosecutorial manner." Brief for appellant at 9.

The State charged Cortes-Lopez with the crime of terroristic threats as defined by Neb. Rev. Stat. § 28-311.01(1) (Reissue 2008):

> (1) A person commits terroristic threats if he or she threatens to commit any crime of violence:
>
> (a) With the intent to terrorize another;
>
> (b) With the intent of causing the evacuation of a building, place of assembly, or facility of public transportation; or
>
> (c) In reckless disregard of the risk of causing such terror or evacuation.

The information charged Cortes-Lopez with terroristic threats, using the statutory language and stating all three alternatives. Thus, the issue of reckless disregard was presented by the pleadings. Therefore, if the evidence supported the reckless disregard alternative, the trial judge was required to instruct the jury on the issue.

Initially, in instructing the jury as to the elements of the crime of terroristic threats, the court included only the language from § 28-311.01(1)(a). In response to the jury's question seeking a

dictionary definition of "terroristic threat," the court amended its instruction to add the language of § 28-311.01(1)(c) (with the exception of the words "or evacuation"). Generally, in giving instructions to the jury, it is proper for the court to describe the offense in the language of the statute. *State v. Davlin*, 272 Neb. 139, 719 N.W.2d 243 (2006). Even though the amended instruction was a correct statement of the law, two issues are presented: (1) whether the evidence supported a "reckless disregard" theory and (2) whether the amended instruction unduly emphasized this theory so as to cause prejudice.

[5] The trial court is required to give an instruction where there is any evidence, which could be believed by the trier of fact, in support of a legally cognizable theory of defense. *State v. Nesbitt*, 264 Neb. 612, 650 N.W.2d 766 (2002). Here, a reasonable jury could conclude that Cortes-Lopez did not intend to terrorize Perez, but, rather, intended only to act in a way demonstrating that he was "a man a hundred percent." If the jury accepted this version of the events, the jury would have been required, under the charge asserted in the operative information, to consider whether Cortes-Lopez did so in reckless disregard of the possibility that Perez would be terrorized. However slight this evidence may have been, it justified the giving of the amended instruction to include "reckless disregard."

[6] We note that when the trial court explained its reasons to counsel for giving the proposed amended instruction, the court did not mention that the evidence warranted the "reckless disregard" language. Rather, the court stated that the statutory language states the crime could be committed "in reckless disregard of the risk causing such terror" and that instruction No. 5 stated "the crime of terroristic threats did not require an intent to actually execute the threat. We did not include anything in there about reckless." We find nothing contradictory about the original instructions Nos. 4 and 5. The pertinent language of the original instruction No. 4 described the requisite intent where the threat is made intentionally—i.e., that the actor intended to terrorize the victim. The pertinent sentence of instruction No. 5 elaborated on this in two ways, both of which are correct and supported by case law. First, it explained that

the actor does not have to intend to actually carry out the threat. See *State v. Saltzman*, 235 Neb. 964, 458 N.W.2d 239 (1990) (crime of terroristic threats does not require intent to execute threats made). It also informed the jury that the victim does not have to actually be terrorized. See *id.* Although we disagree with the district court's stated reason for giving the amended instruction, the evidence supported doing so. A proper result will not be reversed merely because it was reached for the wrong reason. *In re Trust Created by Cease*, 267 Neb. 753, 677 N.W.2d 495 (2004).

Cortes-Lopez also argues that "the instruction was prejudicial because the Court did not answer the question and the Court so acted in a quasi prosecutorial manner by pursuing a tactic or strategy not pursued by trial prosecution." Brief for appellant at 10. We observe that the giving of additional instructions after the jury has begun deliberations is authorized by statute. See Neb. Rev. Stat. § 25-1116 (Reissue 2008). See, also, *State v. Hudson*, 277 Neb. 182, 761 N.W.2d 536 (2009) (if it becomes necessary to give further instructions to jury during deliberations, proper practice is to call jury into open court and to give any additional instructions in writing in presence of parties or their counsel).

[7,8] In an appeal based on a claim of an erroneous jury instruction, the appellant has the burden to show that the questioned instruction was prejudicial or otherwise adversely affected a substantial right of the appellant. *State v. Alford*, 278 Neb. 818, 774 N.W.2d 394 (2009). A jury instruction which directs the attention of the jury to, and unduly emphasizes, a part of the evidence is erroneous and should be refused. *State v. Nesbitt*, 264 Neb. 612, 650 N.W.2d 766 (2002). Here, the court read to the jury the entirety of the amended instruction No. 4, which included the elements of assault in the third degree and the effect of the jury's findings. We cannot say that the amended instruction unduly emphasized part of the evidence. Further, although Cortes-Lopez objected to the proposed amended instruction, he never moved for a mistrial. When a party has knowledge during trial of irregularity or misconduct, the party must timely assert his or her right to a mistrial. One may not waive an error, gamble on a favorable result, and,

upon obtaining an unfavorable result, assert the previously waived error. *State v. Hudson*, 268 Neb. 151, 680 N.W.2d 603 (2004). We conclude that Cortes-Lopez has failed to establish that he was prejudiced by the amended instruction.

CONCLUSION

We conclude that under the circumstances presented in the instant case, the court did not err in giving an amended instruction during the jury's deliberations.

AFFIRMED.

IN RE TRUST CREATED BY JOE W. & EVA E. SOCHA. ROBERT SOCHA, APPELLEE, V. LARRY E. SOCHA AND BONITA CARRAHER, SUCCESSOR COTRUSTEES, APPELLANTS.

783 N.W.2d 800

Filed June 29, 2010. No. A-09-616.

1. **Trusts: Executors and Administrators.** Neb. Rev. Stat. § 30-3862(a) (Reissue 2008) specifically provides that a beneficiary may request the court to remove a trustee.
2. ____: ____. Neb. Rev. Stat. § 30-3862 (Reissue 2008) provides that a court may remove a trustee if, among other reasons, the trustee has committed a serious breach of trust or if because of unfitness, unwillingness, or persistent failure to administer the trust effectively, the court finds that removal of the trustee best serves the interests of the beneficiaries.
3. **Attorney Fees: Appeal and Error.** Attorney fees may be awarded when an appeal was frivolous, vexatiously taken, or interposed solely for delay or harassment.

Appeal from the County Court for Greeley County: ALAN L. BRODBECK, Judge. Affirmed.

Michael D. Kozlik, of Harris Kuhn Law Firm, L.L.P., for appellants.

Robert F. Peterson and Kathleen M. Foster, of Laughlin, Peterson & Lang, for appellee.

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

IRWIN, Judge.

I. INTRODUCTION

Larry E. Socha and Bonita Carraher (collectively Appellants), successor cotrustees of the Joe W. and Eva E. Socha Living Revocable Trust, appeal an order of the county court for Greeley County, Nebraska, removing them as cotrustees and appointing a new successor trustee. On appeal, Appellants have asserted a variety of errors which, together, challenge the sufficiency of the evidence to support the court's removal of them as cotrustees. We find the evidence sufficient and affirm.

II. BACKGROUND

Appellants, as well as Robert Socha, are among the children of Joe W. Socha and Eva E. Socha. Joe and Eva created a living revocable trust, and Appellants, as well as Robert, were among the beneficiaries. Joe passed away in 2005, and Eva acted as trustee after Joe's passing. Eva passed away in 2007, and Appellants were named successor cotrustees by the trust.

On September 25, 2008, Robert filed a petition for a trust administration proceeding in the county court. In the petition, Robert alleged that he was an interested party because he is a beneficiary of the trust. Robert alleged that Appellants had failed to provide the beneficiaries with relevant information relating to administration of the trust and had failed to provide a statement of the accounts, despite reasonable requests. Robert requested that the court remove Appellants as successor cotrustees and replace them with a trustee to wind up and close the trust.

On April 2, 2009, an evidentiary hearing was held. During that hearing, the court heard testimony on behalf of the parties and received a variety of exhibits. On May 26, the court entered an order. The court found that Appellants had failed to act in the best interests of the trust by failing to close it and distribute its assets to the beneficiaries. The court also found that the evidence presented at the hearing indicated that Appellants did not intend to distribute the assets of the trust in the foreseeable future. The court removed Appellants as cotrustees and appointed a new trustee. This appeal followed.

III. ASSIGNMENTS OF ERROR

Appellants have asserted numerous errors, several with multiple subparts, that we consolidate for discussion to two. First, Appellants assert that Robert lacked standing to bring this action. Second, Appellants assert that the county court erred in finding sufficient evidence and grounds for removing them as successor cotrustees.

IV. ANALYSIS

1. Standard of Review

The first issue apparent in this case is the appropriate standard of review. The existing authority in this jurisdiction appears to present conflicting guidance on the appropriate standard for reviewing determinations to remove trustees and appoint successor trustees.

In *In re Loyal W. Sheen Family Trust*, 263 Neb. 477, 640 N.W.2d 653 (2002), the Nebraska Supreme Court was presented with a challenge to the removal of trustees. The court indicated that at that time, trust administration proceedings were brought pursuant to the Nebraska Probate Code, and that appeals of matters arising under the probate code are reviewed for error on the record. In discussing the trustee removal issue, the court concluded that the evidence supported the county court's factual findings and found that there was no error on the record.

Effective in 2003, Nebraska adopted the Nebraska Uniform Trust Code. See Neb. Rev. Stat. §§ 30-3801 through 30-38,110 (Reissue 2008). The Nebraska Uniform Trust Code specifically provides that appellate review continues to be governed by the Nebraska Probate Code. § 30-3821.

In *In re Trust of Rosenberg*, 273 Neb. 59, 727 N.W.2d 430 (2007), the Nebraska Supreme Court was again presented with a challenge to the denial of a request for removal of a trustee. This time, the court indicated that appeals involving the administration of a trust are equity matters and are reviewable in an appellate court de novo on the record, while also recognizing that in the absence of an equity question, an appellate court reviews probate matters for error on the record. In discussing the lower court's failure to remove a successor trustee

and appoint a disinterested successor, the court applied the Nebraska Uniform Trust Code. The court concluded that there was competent evidence to support the lower court's denial of the request for removal, consistent with an application of the error on the record standard of review.

In *In re Charles C. Wells Revocable Trust*, 15 Neb. App. 624, 734 N.W.2d 323 (2007), this court was presented with a challenge to the removal of a cotrustee. This court cited *In re Trust of Rosenberg, supra*, in setting forth both the de novo and the error on the record standards of review. In discussing the trustee removal issue, this court applied the Nebraska Uniform Trust Code. This court concluded that there was competent evidence to support the lower court's removal of the cotrustee, consistent with application of the error on the record standard of review.

In *Sherman v. Sherman*, 16 Neb. App. 766, 751 N.W.2d 168 (2008), this court was presented with a challenge to the removal of trustees. This court cited *In re Loyal W. Sheen Family Trust, supra*, in setting forth the error on the record standard of review. In discussing the trustee removal issue, this court found that there had been a variety of serious breaches of the trustees' duties and that removal was appropriate. This court did not specifically mention the error on the record standard of review in the discussion.

This line of cases indicates that on the one hand, trust administration proceedings are considered equitable matters and are to be reviewed de novo on the record. See *In re Trust of Rosenberg, supra*. Trust administration proceedings are brought before the appellate court pursuant to the Nebraska Probate Code. See § 30-3821. Appeals brought pursuant to the Nebraska Probate Code are, in the absence of equity questions, reviewed for error appearing on the record. See *In re Trust of Rosenberg, supra*. As a result, we seem to be left with the paradoxical result that an appeal challenging the removal of a trustee and the appointment of a successor is an equitable matter reviewed de novo, but, in the absence of an equitable question, is to be reviewed for error on the record. A review of the prior authority indicates consistent application of the error on

the record standard of review, the equitable nature of the trust administration proceeding notwithstanding.

We conclude that we need not specifically resolve the question of which standard of review is correct in the present case. The record presented in this case demonstrates that the lower court's removal of the successor cotrustees was correct regardless of whether we review the decision de novo on the record or review the decision for error on the record.

2. Standing

[1] Appellants assert that Robert lacked standing to bring this action seeking removal. Appellants' argument in this regard seems to be that because Appellants have not completed the administration of the trust and closed the trust, the beneficiaries do not have a present right to bring an action seeking to have the trust closed and seeking to remove Appellants. Section 30-3862(a) specifically provides that "a beneficiary may request the court to remove a trustee." Robert is a beneficiary. This assignment of error is meritless.

3. Removal

The primary assertion of error by Appellants is that the court erred in removing them as trustees. Ultimately, we conclude that the evidence in the record is conflicting and that the ultimate decision on removal rested on credibility determinations we cannot appropriately overturn on appeal. There was competent evidence to support the lower court's decision to remove Appellants, and even on a de novo review, the decision should be affirmed.

[2] Section 30-3862 provides that a court may remove a trustee if, among other reasons, the trustee has committed a serious breach of trust or if because of unfitness, unwillingness, or persistent failure to administer the trust effectively, the court finds that removal of the trustee best serves the interests of the beneficiaries. Both of these grounds for removal were discussed by this court in *In re Charles C. Wells Revocable Trust*, 15 Neb. App. 624, 734 N.W.2d 323 (2007). In that case, we noted that removal on the basis of a serious breach of trust could be supported by evidence of either a single act

that causes significant harm or involves flagrant misconduct or a series of smaller breaches which, when considered together, justify removal.

In this case, Appellants are in the unusual position of being both cotrustees and cobeneficiaries, as was the appellant in *In re Charles C. Wells Revocable Trust*. A review of the record in this case reveals that there is a great deal of discord in this family, which discord has been magnified by the administration of the trust. The evidence and testimony are in conflict concerning the actions and motives of Appellants and the other beneficiaries of the trust.

There is no dispute that Appellants had not closed the trust or distributed the remaining assets of the trust when this action was filed. Appellants asserted that they had not done so because they desired to keep the trust open for a period of 3 years to pass after the death of the settlor to ensure that no other legal claims could be filed against the estate for which claims the trust could be liable. However, there was evidence presented that there were no outstanding claims and that nobody had any reason to believe that there could be some unknown claim brought at a later time. Meanwhile, Appellants were receiving distributions from the trust to pay for their own administration expenses and were apparently hiring family members to perform other services related to the trust, such as housekeeping, resulting in further distributions of trust assets to specific members of Appellants' families. There was also evidence adduced that some of the assets of the trust had been sold and purchased by Appellants. There is conflicting evidence about Appellants' actions and motives concerning prior distributions of the trust assets and future plans for distribution of the trust assets, and this conflicting evidence would support a finding of impropriety by Appellants.

In addition to evidence that disbursements of trust assets had, at the time of trial, been made to Appellants and family members of Appellants in the form of trust administration fees and payment for other services to the trust, but had not been made to the beneficiaries as a whole, there was also a dispute concerning Appellants' compliance with requests for documents concerning the administration of the trust. Although

Appellants alleged that they had provided all requested documentation, both Robert and one other beneficiary testified that documents and financial records had been requested but never provided, and a number of exhibits used at trial had been disclosed or prepared the very day of trial. In short, although there is conflicting evidence in this regard, there is competent evidence to support a finding that Appellants did not cooperate with the beneficiaries in providing requested documents and financial records concerning Appellants' administration of the trust, and the ultimate conclusion rests on credibility determinations that under a de novo review justify some deference to the initial finder of fact.

Finally, there was also testimony in the record that one of Appellants had told another beneficiary that he could tie the trust up for a lengthy period of time, that he could "'bleed'" all the beneficiaries, and that he did not believe the settlors really wanted some of the named beneficiaries to receive anything from the trust. Appellants denied making these statements. Again, there is competent evidence to support a finding of impropriety by Appellants, and the ultimate conclusion depends largely on credibility matters.

There is competent evidence which supports a finding that Appellants have failed to close the trust and distribute assets to beneficiaries other than themselves and their family members. There is competent evidence which supports a finding that Appellants had plans to keep the trust open for a period of 3 years despite nothing to indicate any outstanding claims. There is competent evidence which supports a finding that Appellants failed to produce documents and financial records concerning administration of the trust at the request of beneficiaries. There is competent evidence which supports a finding that Appellants threatened to "tie up" the trust and "'bleed'" the assets of the trust to prevent some beneficiaries from receiving any assets. With respect to each of these matters, the record includes some disputed testimony and credibility questions. Whether we review the matter for errors appearing on the record or we review the matter de novo on the record, we find that the district court's decision to remove Appellants as trustees was not reversible error under § 30-3862.

4. Attorney Fees

[3] Robert asserts in his brief on appeal that he is entitled to attorney fees related to this appeal because the appeal was frivolous, vexatiously taken, or interposed solely for delay or harassment. See Neb. Rev. Stat. §§ 25-824(4) and 30-1601(6) (Reissue 2008). Although we find no merit to Appellants' assertions on appeal, the existence of controverted testimony and the lack of clarity concerning the appropriate standard of review lead us to conclude that we cannot find that this appeal was frivolous, vexatious, or brought solely for delay or harassment. We find no merit to Robert's assertion that he is entitled to attorney fees.

V. CONCLUSION

We find no merit to Appellants' assertions of error on appeal. We also find no merit to Robert's assertion that he is entitled to attorney fees. We affirm.

Affirmed.

Susan Kaye Thompson, appellant, v. Gary Dean Thompson, appellee.

785 N.W.2d 159

Filed July 6, 2010. No. A-09-612.

1. **Divorce: Pensions.** A qualified domestic relations order implements a trial court's decision of how a pension is to be divided incident to divorce or dissolution.
2. **Divorce: Pensions: Final Orders: Appeal and Error.** A divorce decree is a final, appealable order, regardless of whether it calls for a qualified domestic relations order that has not yet issued; the qualified domestic relations order merely implements the divorce decree.
3. **Divorce: Pensions: Property Division: Jurisdiction.** A qualified domestic relations order is merely an order in aid of execution on the property division ordered in the divorce or dissolution decree; it does not constitute a modification, and the court does not lack jurisdiction to issue it.
4. **Divorce: Pensions: Jurisdiction: Appeal and Error.** When a divorce decree is appealed and there is no stay of the judgment pending appeal, the trial court is not divested of jurisdiction to issue a qualified domestic relations order consistent with the decree, because the order merely executes orders previously specified in the divorce decree.

5. **Supersedeas Bonds: Appeal and Error.** The basic function of a supersedeas bond is for an appellant to stay execution on a judgment during appeal, and it suspends further proceedings on the judgment during the pendency of the appeal.

Appeal from the District Court for Douglas County: GREGORY M. SCHATZ, Judge. Motion to vacate overruled.

Stephanie Weber Milone for appellant.

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

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

SIEVERS, Judge.

On May 11, 2010, we issued our opinion in this case, reported at *Thompson v. Thompson, ante* p. 363, 782 N.W.2d 607 (2010), regarding the decree that dissolved the marriage of Susan Kaye Thompson and Gary Dean Thompson. In that opinion, we found that the trial court had erred with respect to its division of Susan's 401K account by dividing such equally and we ordered a division of 67 percent to Susan and 33 percent to Gary.

We now have before us a motion to vacate the qualified domestic relations order (QDRO) entered by the district court for Douglas County, Nebraska, on November 20, 2009, dividing Susan's 401K account in accordance with its decree of dissolution. The November 20 QDRO was entered while this case was pending on appeal to this court. We take the somewhat unusual measure of issuing a published opinion on a motion because of the unusual circumstances presented by the motion, coupled with our previous opinions in *Fry v. Fry, ante* p. 75, 775 N.W.2d 438 (2009), and *Klimek v. Klimek, ante* p. 82, 775 N.W.2d 444 (2009), which both encouraged trial courts to enter QDRO's simultaneously with decrees of dissolution or as soon as possible following the entry of a decree.

Our mandate has not yet issued, due to the pendency of the motion to vacate the QDRO of November 20, 2009. Accordingly, while we still have jurisdiction, we decline to vacate the trial court's QDRO of November 20.

In reaching this conclusion, we first examine the question of whether the trial court had jurisdiction to enter such QDRO, even though the case was pending on appeal, which appeal raised through proper assignments of error the claim that the trial court's division of Susan's 401K account was an abuse of discretion and incorrect.

We have found no authority in Nebraska resolving the issue presented by the motion to vacate with respect to what should be done at this juncture and by which court. However, in *State ex rel. Sullivan v. Ramsey*, 124 Ohio St. 3d 355, 922 N.E.2d 214 (2010), the Ohio Supreme Court dealt with a similar issue, although the procedural background was more complicated. In *State ex rel. Sullivan*, the husband and wife were divorced in 1997, and that decree included the approval of a property settlement agreement which provided for a transfer via a QDRO of 25 percent of the husband's monthly retirement benefit to the wife from his "'interest in his retirement plan with the Civil Service Retirement System, pursuant to the provision of the Spouse Equity Act of 1984.'" 124 Ohio St. 3d at 356, 922 N.E.2d at 216. However, the contemplated QDRO was not ever entered, and in July 2006, the wife filed motions for approval of a QDRO, payment of retroactive benefits, and attorney fees. The trial judge, the appellant in the *State ex rel. Sullivan* case, entered a QDRO in January 2009 which provided that in the event the retirement plan administrator found that the distribution plan did not qualify, the parties could request an "'amendment or modification Order'" to be entered as a "'Nunc Pro Tunc if appropriate and Jurisdiction is hereby reserved for this purpose.'" 124 Ohio St. 3d at 357, 922 N.E.2d at 217.

The husband appealed the entry of this QDRO to the Ohio Court of Appeals, but while that appeal was pending, the trial judge issued an amended QDRO which, while not changing the monthly benefit, contained some different recitations about the legal authority under which it was entered. The Ohio Supreme Court found three differences between the original QDRO and the amended QDRO; for example, the amended QDRO provided that it was entered under the Employee Retirement Income Security Act of 1974, whereas the original QDRO did

not mention such act. The other differences between the two opinions are not pertinent for our purposes.

Three weeks after the issuance of the amended QDRO, the husband filed for a writ of prohibition with the court of appeals to vacate the amended QDRO and to prevent the trial judge from taking any further action that interfered with or was inconsistent with "the appellate court's ability to affirm, modify, or reverse" the original January 9, 2009, judgment and QDRO. *State ex rel. Sullivan*, 124 Ohio St. 3d at 358, 922 N.E.2d at 218. The court of appeals immediately granted the requested writ of prohibition, and the trial judge appealed the writ, resulting in the Ohio Supreme Court's opinion under discussion.

[1-4] In *State ex rel. Sullivan*, the Ohio Supreme Court recited the requirements for a writ of prohibition, which do not concern us, and then noted that it has consistently held that once an appeal is perfected, the trial court is divested of jurisdiction "'over matters that are inconsistent with the reviewing court's jurisdiction to reverse, modify, or affirm the judgment.'" 124 Ohio St. 3d at 358, 922 N.E.2d at 218. The Ohio court then discussed the nature and purpose of a QDRO:

> "The QDRO implements a trial court's decision of how a pension is to be divided incident to divorce or dissolution." *Wilson v. Wilson*, 116 Ohio St.3d 268, 2007-Ohio-6056, 878 N.E.2d 16, ¶ 7. "[A] divorce decree is a final, appealable order, regardless of whether it calls for a QDRO that has not yet issued; the QDRO merely implements the divorce decree." *Id.* at ¶ 15. Consequently, "[a] QDRO is merely an order in aid of execution on the property division *ordered* in the divorce or dissolution decree. So long as the QDRO is consistent with the decree, it does not constitute a modification, which R.C. 3105.171(I) prohibits, and the court does not lack jurisdiction to issue it." (Emphasis sic.) *Bagley v. Bagley*, 181 Ohio App.3d 141, 2009-Ohio-688, 908 N.E.2d 469, ¶ 26. Therefore, when a divorce decree is appealed and there is no stay of the judgment pending appeal, the trial court is not divested of jurisdiction to issue a QDRO consistent

> with the decree because the order merely executes orders previously specified in the divorce decree.

State ex rel. Sullivan v. Ramsey, 124 Ohio St. 3d 355, 359, 922 N.E.2d 214, 219 (2010).

The *State ex rel. Sullivan* court found that because the amended QDRO issued by the trial judge was different in a number of respects from the original QDRO, the trial judge lacked jurisdiction to modify it while it was being appealed, citing *Albertson v. Ryder*, 85 Ohio App. 3d 765, 621 N.E.2d 480 (1993). Because the issuance of the amended QDRO was inconsistent with the court of appeals' jurisdiction to review the January 9, 2009, order and QDRO, the Ohio Supreme Court affirmed the grant by the court of appeals of the writ of prohibition against the trial judge.

Importantly, for the matter before us, the Ohio Supreme Court characterized the function of a QDRO as an "aid of execution on the property division ordered in the divorce or dissolution decree," *State ex rel. Sullivan*, 124 Ohio St. 3d at 359, 922 N.E.2d at 219 (emphasis omitted), a holding that is consistent with our decisions. See *Fry v. Fry, ante* p. 75, 775 N.W.2d 438 (2009) (QDRO is, generally speaking, simply enforcement device of decree of dissolution). See, also, *Klimek v. Klimek, ante* p. 82, 775 N.W.2d 444 (2009).

[5] It has long been the law that "[t]he right to have an execution issued is a valuable right, for this is the only means provided by law to enforce the judgment. This right can only be taken away by some act done in compliance with law. It can never be taken away by anything less." *Halmes v. Dovey*, 64 Neb. 122, 124-25, 89 N.W. 631, 632 (1902). The "taking away" of the right of execution is done by a supersedeas bond. The basic function of a supersedeas bond is for an appellant to stay execution on a judgment during appeal, and it suspends further proceedings on the judgment during the pendency of the appeal. See *In re Estate of Sehi*, 17 Neb. App. 697, 772 N.W.2d 103 (2009). See, also, *Tilt-Up Concrete v. Star City/Federal*, 261 Neb. 64, 621 N.W.2d 502 (2001).

Importantly, in the matter before us, Susan and Gary's divorce decree was not superseded. Thus, as a general proposition, either Susan or Gary could pursue execution on the

decree, given the lack of a supersedeas bond's being set and posted. Moreover, we note that there was no order entered pursuant to Neb. Rev. Stat. § 42-351(2) (Reissue 2008) in aid of appeal that would prevent execution generally, or the entry of a QDRO in particular, during the appeal. Thus, we conclude that the district court did in fact have jurisdiction to issue the QDRO of November 20, 2009. However, that being said, once our mandate is issued, the district court can do only what we have told it to do in our opinion and mandate. See *Smith-Helstrom v. Yonker*, 253 Neb. 189, 569 N.W.2d 243 (1997) (court to which mandate is directed has no power to do anything but to obey mandate; order of appellate court is conclusive on parties, and no judgment or order different from, or in addition to, that directed by appellate court can be entered by trial court). See, also, *Xerox Corp. v. Karnes*, 221 Neb. 691, 380 N.W.2d 277 (1986).

While the district court did have jurisdiction to issue the QDRO during the pendency of the appeal, the district court must now do what we have directed—divide Susan's 401K account, 67 percent to Susan and 33 percent to Gary—as detailed in our opinion of May 11, 2010. Accordingly, as a necessary adjunct of obeying our mandate, the district court must necessarily vacate its previous QDRO in order to enter a QDRO that complies with our mandate. Therefore, we hereby overrule the motion that this court vacate the QDRO entered by the district court on November 20, 2009, during the pendency of the appeal.

MOTION TO VACATE OVERRULED.

DAVID DOBROVOLNY, APPELLANT, V.
FORD MOTOR COMPANY, APPELLEE.
785 N.W.2d 858

Filed July 13, 2010. No. A-09-1118.

1. **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.

2. **Pleadings: Proof.** Complaints should be liberally construed in the plaintiff's favor and should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his or her claim which would entitle the plaintiff to relief.
3. **Products Liability: Strict Liability: Proof.** In order to recover in strict liability for the cost of repairs to the product, there must be proof that a sudden, violent event occurred which aggravated the inherent defect or caused it to manifest itself.
4. **Strict Liability.** In buyer's action to recover for damage to a vehicle, buyer's allegations that destruction of the vehicle was a sudden, violent event was sufficient to state a claim for strict liability.

Appeal from the District Court for Brown County: MARK D. KOZISEK, Judge. Reversed and remanded for further proceedings.

Thomas J. Walsh, Jr., of Walsh Law, P.C., for appellant.

John A. Svoboda, of Gross & Welch, P.C., L.L.O., for appellee.

IRWIN, SIEVERS, and CARLSON, Judges.

CARLSON, Judge.

INTRODUCTION

David Dobrovolny brought an action against Ford Motor Company (Ford) in the trial court after his vehicle caught fire. The district court dismissed Dobrovolny's action. Dobrovolny appeals. For the reasons set forth below, we reverse the trial court's order dismissing Dobrovolny's action and remand the cause for further proceedings.

BACKGROUND

Dobrovolny purchased his vehicle in February 2005. In an amended complaint filed July 21, 2009, Dobrovolny brought claims under breach of warranty, strict liability, and negligence. Dobrovolny alleged that in April 2006, his vehicle, while parked with the engine shut off, caught fire and was destroyed. Destruction of the vehicle was the only damage caused by the fire. Dobrovolny alleged that Ford was negligent in the design of the vehicle by failing to properly insulate the electrical system and other potential ignition sources from the combustible materials in the vehicle's engine.

Ford filed a motion to dismiss stating that Dobrovolny's complaint failed to state a cause of action upon which relief could be granted. A hearing on Ford's motion to dismiss was held on July 14, 2009. In an order filed October 7, the district court dismissed Dobrovolny's complaint, stating that actions for strict liability and negligence cannot be maintained when damages are confined to the defective property. The trial court also found that Dobrovolny's warranty claim was barred by the statute of limitations.

Dobrovolny appeals.

ASSIGNMENT OF ERROR

Dobrovolny's sole assignment of error is that the trial court erred in dismissing his cause of action against Ford under the theory of strict liability.

ANALYSIS

Dobrovolny argues that the trial court erred in dismissing his cause of action against Ford under the theory of strict liability for failure to state a claim upon which relief can be granted.

Pursuant to Neb. Ct. R. Pldg. § 6-1112(b)(6), Ford filed a motion to dismiss Dobrovolny's claims.

[1] 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. *McCully, Inc. v. Baccaro Ranch*, 279 Neb. 443, 778 N.W.2d 115 (2010).

[2] Complaints should be liberally construed in the plaintiff's favor and should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his or her claim which would entitle the plaintiff to relief. *Id.*

A hearing on Ford's motion to dismiss was held on July 14, 2009. In a subsequent order, the district court dismissed Dobrovolny's complaint, reasoning that under *National Crane Corp. v. Ohio Steel Tube Co.*, 213 Neb. 782, 332 N.W.2d 39 (1983), actions for strict liability cannot be maintained when damages are confined to the defective property.

On appeal, Dobrovolny attempts to distinguish his case from *National Crane Corp*. He asserts that the sole cause of the fire which destroyed the vehicle was the result of a "sudden, violent event," brief for appellant at 7, which takes his claim outside the general rule announced in *National Crane Corp., supra.* See *Hilt Truck Line v. Pullman, Inc*., 222 Neb. 65, 382 N.W.2d 310 (1986).

Ford argues that the only sudden, violent event alleged by Dobrovolny in his petition was the defect in the vehicle which caused the destruction of it by fire. Ford contends that since Dobrovolny alleged only that the defect caused the fire and made no allegation of any "event which aggravated the alleged defect or any outside event which caused the alleged defect to manifest itself," brief for appellee at 4, Dobrovolny has not shown a sudden, violent event, and that *National Crane Corp.* and *Hilt Truck Line* bar Dobrovolny's recovery under strict liability.

The Eighth Circuit Court of Appeals addressed a very similar argument in *Arabian Agri. Servs. Co. v. Chief Indus., Inc.*, 309 F.3d 479 (8th Cir. 2002). In that case, Arabian Agriculture Services Co. (AASC) brought a strict liability action against Chief Industries, Inc. (Chief), after some grain silos purchased by AASC from Chief collapsed. AASC alleged that the collapse was caused by inadequate and defective design. AASC's case against Chief was heard by a jury, and AASC was awarded damages.

On appeal, Chief argued that the trial court erred in denying its motion for judgment as a matter of law on the issue of strict liability. Noting that it reviewed Chief's claims de novo, the Eighth Circuit addressed Chief's argument that AASC failed to show that a sudden, violent event caused the silos to fall, citing *Hilt Truck Line, supra*.

In *Hilt Truck Line*, the plaintiffs brought an action against Pullman, Inc., alleging that the trailers they bought from Pullman had an inherent defective design. The plaintiffs sought to recover their repair costs under claims of strict liability and negligence. At trial, the plaintiffs produced evidence showing that their trailers were damaged by the corrosion of materials used in the trailers' construction. The

district court directed a verdict in Pullman's favor, and the plaintiffs appealed.

[3] The Nebraska Supreme Court affirmed the trial court's ruling, stating that the plaintiffs' strict liability claims failed as a matter of law. The Supreme Court further stated, "In Nebraska, in order to recover in strict liability for the cost of repairs to the product, there must be proof that a sudden, violent event occurred which aggravated the inherent defect or caused it to manifest itself." *Hilt Truck Line*, 222 Neb. at 67, 382 N.W.2d at 312.

In *Arabian Agri. Servs. Co., supra*, Chief contended that under Nebraska law, a sudden, violent event must cause the failure; the failure cannot itself be the sudden, violent event. The Eighth Circuit stated:

> We are not persuaded by Chief's interpretation. According to the Nebraska Supreme Court, it has, in essence, followed the "majority of courts that have considered the applicability of strict liability to recover damages to the defective product itself [and] have permitted use of the doctrine, at least where the damage occurred as a result of a sudden, violent event and not as a result of an inherent defect that reduced the property's value without inflicting physical harm to the product." [*National Crane Corp.*] *v. Ohio Steel Tube Co.*, 213 Neb. 782, [789,] 332 N.W.2d 39, 43 (1983) (citations omitted). Here, [AASC's] damages were not the result of a defect that merely reduced the value of the silos. Instead, the collapse of the silos could certainly be characterized as a "sudden, violent event" that inflicted "physical harm to the product." . . . We therefore conclude that because [AASC] presented sufficient evidence demonstrating that its damages occurred as the result of a sudden, violent event, the district court did not err in submitting the strict liability claim to the jury.

Arabian Agri. Servs. Co., 309 F.3d at 484 (citations omitted).

[4] Similarly, in the instant case, Dobrovolny does not allege that the fire merely reduced the value of his vehicle. Rather, he alleges that the fire that destroyed his vehicle was a sudden, violent event that inflicted physical harm to the

vehicle. We must liberally construe Dobrovolny's complaint in his favor and construe Dobrovolny's factual allegations in the light most favorable to him. After reviewing the record de novo, we conclude that Dobrovolny has stated a claim for strict liability against Ford and that the trial court erred in dismissing Dobrovolny's complaint. Therefore, we reverse the trial court's order dismissing Dobrovolny's complaint and remand Dobrovolny's action for further proceedings.

CONCLUSION

For the reasons set forth above, we conclude that the trial court erred in dismissing Dobrovolny's complaint, and therefore, we reverse, and remand for further proceedings.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

DOUGLAS K. GENGENBACH, APPELLANT, V. HAWKINS MFG., INC., AND TIMOTHY HOCK, APPELLEES.

785 N.W.2d 853

Filed July 13, 2010. No. A-09-1226.

1. **Injunction: Equity: Appeal and Error.** An action for injunction sounds in equity. In an appeal of an equity action, an appellate court tries the factual questions de novo on the record and reaches a conclusion independent of the findings of the trial court.
2. **Records: Appeal and Error.** It is incumbent upon the appellant to present a record supporting the errors assigned; absent such a record, an appellate court will affirm the lower court's decision regarding those errors.
3. **Summary Judgment: Records: Appeal and Error.** The only issue which will be considered on appeal of a summary judgment, absent the bill of exceptions, is the sufficiency of the pleadings to support the judgment.
4. **Deceptive Trade Practices: Injunction.** Under Nebraska's Uniform Deceptive Trade Practices Act, injunctive relief granted for the copying of an article is limited to the prevention of confusion or misunderstanding as to source.
5. **Appeal and Error.** To be considered by an appellate court, an error must be both specifically assigned and specifically argued in the brief of the party asserting the error.

Appeal from the District Court for Phelps County: TERRI S. HARDER, Judge. Affirmed.

Chad M. Neuens, of Neuens, Mitchell & Freese, P.L.L.C., and Bryan S. McQuay, of Person & McQuay Law Office, for appellant.

Jeffrey M. Cox, of Dier, Osborn & Cox, P.C., and Dennis L. Thomte, of Thomte Patent Law Office, L.L.C., for appellees.

MOORE and CASSEL, Judges.

CASSEL, Judge.

INTRODUCTION

In the district court, the inventor of a farm implement sought damages and injunctive relief against a manufacturer which first shared profits from the sale of the inventor's device and later, after the initial arrangement ended, produced and sold a slightly different product solely for its own profit. On appeal, the inventor first attacks the district court's partial summary judgment declaring as unenforceable oral agreements purportedly limiting the manufacturer's ability to sell the modified implement. Because we do not have a bill of exceptions for the summary judgment hearing, we cannot address this issue. The inventor also challenges the court's refusal, after a bench trial, to enjoin sale of the modified implement pursuant to the Uniform Deceptive Trade Practices Act (UDTPA). See Neb. Rev. Stat. § 87-301 et seq. (Reissue 2008 & Supp. 2009). Because the UDTPA does not authorize an injunction to prevent copying, we affirm.

BACKGROUND

Douglas K. Gengenbach designed a farm implement which attached to the corn head of a combine and served the purpose of making it easier for farmers to harvest downed corn. In very basic terms, the implement had an axle to which rotating metal paddles were attached and the paddles helped feed the corn plants into the combine.

In about 1999, Gengenbach found a manufacturer to make this implement. In 2000, Gengenbach applied for a patent for this device, which he named a "Sweeper Apparatus for a Corn Head Attachment." Gengenbach's relationship with the initial

manufacturer soured, and in 2005, Gengenbach reached an oral agreement to have Hawkins Mfg., Inc. (Hawkins), make his device. Timothy Hock, president of Hawkins, agreed that Hawkins and Gengenbach would split the profits from the sale of the device, that Hawkins would provide a yearly accounting of the profits, and that upon the termination of the agreement, Hawkins would no longer manufacture the device. Hawkins marketed the device as the "DG Paddle Reel." Gengenbach helped Hawkins market and make improvements to the product while it was manufactured by Hawkins.

According to Gengenbach, Hock was resistant to providing Gengenbach with an accounting of the 2006 profits, and this led to a new agreement. Gengenbach claimed that on January 17, 2007, Hock agreed that Hawkins would pay Gengenbach $80,000 to compensate him for 2006 profits and would provide Gengenbach with 30 to 40 DG Paddle Reels at a little more than "cost."

Gengenbach requested the manufacture of one DG Paddle Reel in April 2007 but made no further orders. According to Gengenbach, he did not make any further requests because by the time that most farmers would purchase a DG Paddle Reel, which was in July, August, or September, Hawkins was already marketing and selling Gengenbach's product as Hawkins' own.

In 2007, Hawkins began to manufacture and sell a product named the "Hawkins Corn Reel." Although it was nearly identical to the DG Paddle Reel, Hawkins did not provide Gengenbach with a portion of the profits. According to Hock, the only differences between the two products are that the new paddles contained two additional braces and that the space between the main paddle and bolt holes was changed. Hock opined that these changes did not make the product safer or operate better. Hawkins filed a lawsuit for noninfringement of Gengenbach's patent in federal district court, which action resulted in a settlement. In the settlement, the parties agreed that the Hawkins Corn Reel did not infringe on Gengenbach's patent.

As a result of Hawkins' manufacturing the Hawkins Corn Reel, Gengenbach found a new manufacturer and developed an

improved version of his product, which is marketed as a "Crop Sweeper." This product was improved from the DG Paddle Reel in a number of ways, including that the paddles have a new design and are plastic, the machine is partially made of lighter weight metal, and the machine has an improved positioning mechanism.

In September 2007, Gengenbach filed a complaint in the district court for Phelps County, Nebraska, alleging several causes of action against Hawkins and Hock, including three relating to breach of oral contract and another for an injunction under the UDTPA. In the complaint, Gengenbach based his breach of contract action on allegations that in 2005, Hawkins agreed that it would never manufacture the DG Paddle Reel after the termination of the agreement, and that in 2007, Hawkins agreed that its existing inventory would be used only to make DG Paddle Reels for Gengenbach's orders. Hawkins and Hock filed a motion for summary judgment, and Gengenbach filed a motion for partial summary judgment.

The district court granted Hawkins' and Hock's summary judgment motion as to many causes of action, including the breach of contract action. In the summary judgment order, the district court found that as a matter of law, the agreements which Gengenbach sought to enforce were not enforceable. As noted above, we do not have a bill of exceptions which contains the evidence adduced at the summary judgment hearing.

At a bench trial, the parties tried the three remaining causes of action, including Gengenbach's request for an injunction under the UDTPA. In its judgment, the district court found for Hawkins and Hock on the remaining causes of action.

Gengenbach timely appeals.

ASSIGNMENTS OF ERROR

Gengenbach assigns, restated, that the district court erred in (1) determining that the 2005 and 2007 agreements between Hawkins and himself were unenforceable as a matter of law in terms of space, time, and prohibited conduct; (2) determining that Hawkins has not breached the 2007 agreement; and (3) determining that Gengenbach was not entitled to an injunction

prohibiting Hawkins from manufacturing, marketing, and selling the Hawkins Corn Reel.

STANDARD OF REVIEW

[1] An action for injunction sounds in equity. In an appeal of an equity action, an appellate court tries the factual questions de novo on the record and reaches a conclusion independent of the findings of the trial court. *Conley v. Brazer*, 278 Neb. 508, 772 N.W.2d 545 (2009).

ANALYSIS

Oral Contracts.

Gengenbach's first two assignments of error pertain to the district court's decision to grant Hawkins' and Hock's summary judgment motion and thereby dismiss Gengenbach's causes of action based on oral contract. The district court's decision was based on the evidence adduced at a summary judgment hearing.

[2,3] Because Gengenbach has not provided us with a bill of exceptions for this hearing, we cannot review these assigned errors. It is incumbent upon the appellant to present a record supporting the errors assigned; absent such a record, an appellate court will affirm the lower court's decision regarding those errors. *In re Interest of Hope L. et al.*, 278 Neb. 869, 775 N.W.2d 384 (2009). The only issue which will be considered on appeal of a summary judgment, absent the bill of exceptions, is the sufficiency of the pleadings to support the judgment. *Hogan v. Garden County*, 264 Neb. 115, 646 N.W.2d 257 (2002). The pleadings are sufficient to support the judgment, and therefore, these assigned errors are without merit.

Nebraska's UDTPA.

Gengenbach next argues that the district court erred in denying his request for an injunction under the UDTPA. However, we conclude that under the UDTPA, the district court could not have granted Gengenbach the relief that Gengenbach now assigns the district court erred in failing to grant him.

Section 87-302 explains what constitutes a deceptive trade practice. We note that § 87-302 was amended in 2008; however,

the revision does not affect our analysis, and for simplicity, we cite to the current version of the statute, which provides, in pertinent part, as follows:

> (a) A person engages in a deceptive trade practice when, in the course of his or her business, vocation, or occupation, he or she:
>
> . . . .
>
> (2) Causes likelihood of confusion or of misunderstanding as to the source, sponsorship, approval, or certification of goods or services;
>
> (3) Causes likelihood of confusion or of misunderstanding as to affiliation, connection, or association with, or certification by, another.

In Gengenbach's appellate brief, he specifically assigned that the district court erred in failing to grant him an injunction which barred Hawkins "from manufacturing, marketing[,] and selling the Hawkins Corn Reel," and Gengenbach supports this assignment with an argument based on the UDTPA.

[4] However, the UDTPA does not permit the relief specifically sought by Gengenbach's assignment of error. The relief a party may obtain upon proving the existence of a deceptive trade practice, which is limited, is as follows:

> A person likely to be damaged by a deceptive trade practice of another may be granted an injunction against it under the principles of equity and on terms that the court considers reasonable. . . . *Relief granted for the copying of an article shall be limited to the prevention of confusion or misunderstanding as to source*.

§ 87-303(a) (emphasis supplied). A comment to the uniform act, from which act Nebraska's UDTPA is derived, provides further insight regarding the reason why relief is limited in the case where an article is copied. The comment states that "[a]mong the principles governing the scope of injunctions against misleading trade identification [is the principle of] state disability to enjoin the copying of articles because of the preemptive operation of the Federal patent and copyright laws." Unif. Deceptive Trade Prac. Act § 3, comment, 7A (part I) U.L.A. at 305 (1999).

We conclude that under the UDTPA, the district court could only grant an injunction to prevent confusion or misunderstanding regarding the product's source—but not to prevent the copying of a product. Therefore, we cannot reverse the district court's decision based on Gengenbach's present argument—that he was entitled to an injunction under the UDTPA to prevent Hawkins from continuing to produce and sell a product that was, with slight, inconsequential modifications, a copy of the DG Paddle Reel.

[5] We decline to consider whether Gengenbach may have been entitled to some other injunctive relief under the UDTPA, as both his assignment of error and his argument of the assigned error were specifically directed to an injunction to prohibit Hawkins from manufacturing, marketing, and selling the Hawkins Corn Reel. To be considered by an appellate court, an error must be both specifically assigned and specifically argued in the brief of the party asserting the error. *Obad v. State*, 277 Neb. 866, 766 N.W.2d 89 (2009).

CONCLUSION

Because Gengenbach has not provided a record sufficient to address his assigned errors regarding the district court's partial summary judgment refusing to enforce his oral contracts with Hawkins, we do not address these matters. The UDTPA does not authorize the injunctive relief which Gengenbach's assigned error specifically addresses, and we do not consider whether the UDTPA would entitle Gengenbach to other relief because we decline to consider errors not specifically assigned and argued. We therefore affirm the judgment of the district court.

AFFIRMED.

INBODY, Chief Judge, participating on briefs.

STATE OF NEBRASKA, APPELLEE, V. PATRICK O. DOYLE II, APPELLANT.

787 N.W.2d 254

Filed July 27, 2010. No. A-09-712.

1. **Criminal Law: Convictions: Evidence.** 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.
2. **Convictions: Evidence: Appeal and Error.** Regardless of whether the evidence is direct, circumstantial, or a combination thereof, an appellate court, in reviewing a criminal conviction, does not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence.
3. **Evidence: Appeal and Error.** Any conflicts in the evidence or questions concerning the credibility of witnesses are for the finder of fact to resolve.
4. **Convictions: Evidence: Appeal and Error.** 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.
5. **Constitutional Law: Courts: Jurisdiction: Statutes.** The Nebraska Court of Appeals cannot determine the constitutionality of a statute, yet when necessary to a decision in the case before it, the court does have jurisdiction to determine whether a constitutional question has been properly raised.
6. **Constitutional Law: Rules of the Supreme Court: Statutes: Appeal and Error.** To properly raise a challenge to the constitutionality of a statute, a litigant is required to strictly comply with Neb. Ct. R. App. P. § 2-109(E) (rev. 2008) and to properly raise and preserve the issue before the trial court.
7. **Injunction.** The test in evaluating a content-neutral injunction that restricts speech is whether the challenged provisions of the injunction burden no more speech than necessary to serve a significant government interest.

Appeal from the District Court for Lincoln County: DONALD E. ROWLANDS, Judge. Affirmed.

Charles R. Maser, of Truell, Murray & Maser, for appellant.

Jon Bruning, Attorney General, and George R. Love for appellee.

MOORE and CASSEL, Judges.

CASSEL, Judge.

INTRODUCTION

Patrick O. Doyle II appeals from his conviction and sentence for intentionally violating the "no contact" prohibition

of a domestic abuse protection order obtained by Doyle's wife. Upon being admitted to a hospital, he surreptitiously requested a nurse to call his wife. Shortly thereafter, the nurse did so. Doyle argues both that the evidence was insufficient to sustain a conviction and that his speech was constitutionally protected. Finding no merit to his arguments, we affirm.

BACKGROUND

On August 30, 2007, the district court for Lincoln County, Nebraska, entered a domestic abuse protection order against Doyle at the request of Linda Doyle (Linda), his wife. Among other provisions, the order prohibited Doyle from "threatening, assaulting, molesting, attacking, or otherwise disturbing the peace of [Linda]" and from "telephoning, contacting, or otherwise communicating with [Linda]" for a period of 1 year. A copy of the protection order was personally served upon Doyle by a deputy sheriff on the same date.

Viewed in the light most favorable to the State, the evidence shows that on February 14, 2008, Doyle was escorted to a hospital in Lexington, Nebraska, by two law enforcement officers. Misty Johnson, a licensed practical nurse on duty at the hospital, gathered the "admission paperwork" and, during her initial contact with Doyle, inquired if he wanted anyone "contacted" on his behalf. When Johnson asked Doyle this question, law enforcement officers were in the room with him and he responded "no." When Johnson needed to perform a physical examination of Doyle, she explained to the law enforcement officials what she was going to do and they left the room. Only seconds after the door was shut, Doyle told Johnson, "I want you to call my wife" or "[p]lease call my wife." Doyle provided Johnson with his wife's name and a telephone number.

After Johnson completed the examination, she left the room and called the number Doyle had specified. Johnson asked if it was Linda, and the person answering said "yes." Johnson identified herself and stated that she was an employee of the hospital and that "[Doyle] had asked [Johnson] to call." Linda did not immediately respond. Johnson then asked if Doyle was her husband, and she "kind of got kind of a yeah,

a really slow response." Johnson then stated that Doyle had been admitted to the hospital for abdominal pain, but that he was "okay." Linda responded "okay" and then ended the call without asking any questions of Johnson or making any inquiries about Doyle.

Johnson testified that Doyle was obviously in pain but that he was alert, oriented, and could answer questions asked of him. Johnson had not administered any narcotics to Doyle or observed any other health care workers doing so. At the time, Johnson obtained a complete medical history from Doyle and he gave consent for medical treatment. According to Johnson, Doyle appeared coherent. Johnson testified that Doyle never gave a specific purpose for the call to Linda and never stated that he needed insurance information from her.

Linda testified that she experienced marital problems with Doyle, separated from him in September 2006, and obtained a protection order against him at approximately that same time. In August 2007, she obtained another protection order against him—the one he was convicted of violating in the instant case. Linda testified that on February 14, 2008, Doyle had a father and siblings, but that his mother was no longer living. Linda knew that on that date, Doyle was residing in the jail in Lexington. Approximately 1 day after Linda left Doyle, she obtained a cellular telephone with a number she believed was unknown to Doyle, "so he could not contact [her]." Linda did not give the number to Doyle, and to avoid his obtaining it, she "didn't give it out to hardly anybody." Linda was at work, eating a meal during a break, when she received the call from Johnson. Linda did not recognize the incoming telephone number. She testified to the content of the call, which corresponded with Johnson's testimony. Linda stated that at the completion of the call, the telephone showed the call's duration as 37 seconds. Linda testified that when she hung up the telephone, she was "shaken, scared, [and] physically sick." She claimed to have been shocked by the call because, as far as she knew, Doyle did not have her telephone number. She testified that she then called the police, although on cross-examination she admitted that she waited until she completed her shift before notifying authorities.

The State charged Doyle with violation of a protection order, second offense, pursuant to Neb. Rev. Stat. § 42-924(1) (Reissue 2008). Although Doyle's motion to quash is not in the record, the bill of exceptions shows that on October 6, 2008, the district court heard argument on the motion. At the hearing, Doyle argued that the protection order restricted his freedom of speech and freedom of religion, in violation of both the U.S. Constitution and the Nebraska Constitution. The court overruled the motion at some unknown time and on April 28, 2009, memorialized the earlier denial of the motion. On November 3, 2008, Doyle entered a plea of not guilty, and the case was tried to a jury on May 5, 2009.

At the conclusion of the State's case, Doyle moved for a directed verdict. The court overruled the motion. Doyle rested without presenting any additional evidence, and the jury returned a unanimous verdict finding Doyle guilty. After later determining that Doyle had previously been convicted of violation of a protection order and, thus, that the instant conviction was a second offense, the court sentenced Doyle to 1½ to 3 years' imprisonment, with credit for 486 days served in jail awaiting trial and sentencing, and to pay the costs of the action.

Doyle timely appeals.

ASSIGNMENTS OF ERROR

Doyle makes two assignments of error. First, he claims the district court erred in denying his motion for a directed verdict on the basis of insufficient evidence. Second, he asserts the court erred in overruling his motion to quash, claiming that the speech was protected under the U.S. Constitution and the Nebraska Constitution.

STANDARD OF REVIEW

[1-4] 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. Hudson*, 279 Neb. 6, 775

N.W.2d 429 (2009). Regardless of whether the evidence is direct, circumstantial, or a combination thereof, an appellate court, in reviewing a criminal conviction, does not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence. *Id*. Any conflicts in the evidence or questions concerning the credibility of witnesses are for the finder of fact to resolve. *Id*. 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. *Id*.

ANALYSIS

Sufficiency of Evidence.

In order to prove a violation of § 42-924, the State must prove only three elements: (1) entry of the protection order pursuant to subsection (1) or (2) of that section, (2) service of the order on the defendant, and (3) knowing violation of the order. *State v. Rubek*, 11 Neb. App. 489, 653 N.W.2d 861 (2002). Doyle's argument on appeal addresses only the third element, i.e., whether his conduct constituted a knowing violation of the order.

Doyle admits that he "requested . . . that the nurse contact his wife," but argues that his actions did not intimidate, harass, or frighten Linda. Brief for appellant at 7. However, Linda testified that as a result of the call, she was "shaken, scared, [and] physically sick." Doyle attacks Linda's credibility, citing her delay in calling the police until after her shift ended. But, as we noted above, this court does not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence.

Doyle also argues that he "just wanted to get the message to his children that he was in the hospital and there was no need to worry." Brief for appellant at 7. As the State correctly responds, the protection order prohibited Doyle from telephoning, contacting, or otherwise communicating with Linda. Doyle's brief admits that he did so but attempts to justify the conduct. However, the order provides no exception for the circumstances in the instant case. The evidence was sufficient to establish a knowing violation of the order.

Free Speech Claim.

Doyle argues that the speech at issue is constitutionally protected because it was informational only. The First Amendment has never been treated as an absolute. See *Breard v. Alexandria*, 341 U.S. 622, 71 S. Ct. 920, 95 L. Ed. 1233 (1951), *overruled in part on other grounds, Schaumburg v. Citizens for Better Environ.*, 444 U.S. 620, 100 S. Ct. 826, 63 L. Ed. 2d 73 (1980). Freedom of speech does not mean that one can talk where, when, and how one chooses. See *id.*

[5,6] Doyle does not argue that § 42-924 is unconstitutional; rather, he asserts that the statute cannot be constitutionally applied to his speech, which he characterizes as merely communicating medical information to his wife. The Nebraska Court of Appeals cannot determine the constitutionality of a statute, yet when necessary to a decision in the case before it, the court does have jurisdiction to determine whether a constitutional question has been properly raised. *Clark v. Tyrrell*, 16 Neb. App. 692, 750 N.W.2d 364 (2008). And the Nebraska Supreme Court has held that the Court of Appeals has jurisdiction to determine, in limited circumstances, whether the constitutionality of a statute is implicated. See *State v. Nelson*, 274 Neb. 304, 739 N.W.2d 199 (2007). To properly raise a challenge to the constitutionality of a statute, a litigant is required to strictly comply with Neb. Ct. R. App. P. § 2-109(E) (rev. 2008) and to properly raise and preserve the issue before the trial court. *Clark, supra*. Doyle did not comply with § 2-109(E). Thus, he did not raise any question about the constitutionality of the statute, and our inquiry is focused solely on whether Doyle's conduct was constitutionally protected free speech.

Doyle relies solely on *State v. McKee*, 253 Neb. 100, 568 N.W.2d 559 (1997), to support his argument that his speech was protected. In *McKee*, the defendant was convicted for knowingly violating a protection order. On appeal, in determining whether § 42-924 was unconstitutional as applied, the Nebraska Supreme Court analyzed the defendant's speech separately from her conduct. The court determined as a matter of law that the defendant's speech was not threatening, intimidating, or terrifying; that it was thus protected by the First Amendment; that any application of the protection order which

would prohibit such speech would burden more speech than necessary to serve any relevant governmental interest; and that § 42-924 was applied to the defendant in an unconstitutional manner. Although the court found that the defendant's speech was protected, it found sufficient evidence to submit to the jury on the issue of whether defendant's conduct violated the protection order.

In the case before us, Linda, as the victim of domestic abuse, sought a protection order against Doyle. Before issuing the protection order, the court had to find that Linda stated facts showing that Doyle attempted to cause, or intentionally, knowingly, or recklessly caused, bodily injury to Linda or that Doyle, by physical menace, placed Linda in fear of imminent bodily injury. The court so found and, as authorized under § 42-924(1), issued a protection order prohibiting Doyle from, among other things, telephoning, contacting, or otherwise communicating with Linda. As the State points out, "the focus of [the] protection order is not the speech but the conduct of Doyle." Brief for appellee at 9. The subject of Doyle's communication is immaterial—he could violate the protection order by telephoning Linda and not saying anything at all.

[7] The test in evaluating a content-neutral injunction that restricts speech is "whether the challenged provisions of the injunction burden no more speech than necessary to serve a significant government interest." *Madsen v. Women's Health Center, Inc.*, 512 U.S. 753, 765, 114 S. Ct. 2516, 129 L. Ed. 2d 593 (1994). See *State v. McKee, supra*. The purpose of the protection order in this case—primarily to protect Linda from contact by Doyle—was completely unrelated to the suppression of ideas. The State has a compelling interest in protecting victims of domestic violence from continuing harassment and abuse. The protection order set forth what conduct was prohibited and did not sweep more broadly than necessary.

Other jurisdictions have upheld similar orders. In *State v. Hauge*, 547 N.W.2d 173 (S.D. 1996), a protection order instructed the defendant to not verbally contact his ex-wife in any manner, including telephone contact or contact through third parties and to not verbally abuse or threaten her. In determining that the State has a legitimate interest in shielding

victims of domestic violence from threats and intimidation, the Supreme Court of South Dakota stated that "[t]he cycle of violence so common to domestic abuse, includes attempts at reconciliation often amounting to nothing more than harassment" and that "[i]n the middle of domestic strife, preserving the mental and emotional health of the vulnerable must override other less compelling interests." 547 N.W.2d at 176. The court found that the protection order was not unconstitutionally overbroad or vague.

In *State v. Boyle*, 771 N.W.2d 604 (N.D. 2009), the Supreme Court of North Dakota considered whether a defendant engaged in constitutionally protected speech when he contacted his child's mother in violation of a restraining order. The court reasoned that the restraining order restricted the defendant's free speech rights by prohibiting contact with the child's mother except for the purpose of contacting the child and that only contact for the purpose of communicating with the child was protected activity. Because the defendant's contact at issue was not to communicate with the child, the court concluded that it was not constitutionally protected speech.

In *State v. Hardy*, 54 P.3d 645 (Utah App. 2002), the defendant's wife obtained a protective order which prohibited him from directly or indirectly contacting her. The defendant sent two letters to his wife's house which were addressed to their young children and was subsequently convicted by a jury of violating the protective order. The Court of Appeals of Utah reasoned that the State had a significant interest in protecting the health and well-being of its citizens, that the State created a procedure allowing victims of domestic violence to obtain protection orders against abusers, and that the court could prohibit the abuser from having any contact with the victims as part of that protection. The appellate court stated:

> Although [the statute at issue] appears to sweep broadly because it allows courts to prohibit all communication between two people, the statute is actually quite narrowly crafted. Before a protective order may issue, a court must first conclude that the parties to the protective order are cohabitants, and that a cohabitant has been "subjected to abuse or domestic violence, or . . . there is a substantial

> likelihood of immediate danger of abuse or domestic violence." [Citation omitted.] Without the particular relationship of "cohabitants" and without previous instances or the "substantial likelihood" of domestic violence or abuse, the court may not restrict the protective order respondent's right to speak and associate freely.

54 P.3d at 649.

A Massachusetts appellate court reasoned that a defendant convicted of violating an abuse prevention order would have been unsuccessful in his constitutional challenges on appeal, which he did not preserve, because

> [w]hile an abuser has a right to speak his mind freely in any number of forums, he has no right to seek out and contact the victim of his abuse, forcing that victim to endure his unwanted and destructive presence in her life—no matter how harmless or important the message he seeks to deliver.

Commonwealth v. Thompson, 45 Mass. App. 523, 525, 699 N.E.2d 847, 849 (1998).

We agree with the analysis of the numerous other courts considering this issue. Therefore, we hold that the domestic abuse protection order at issue in this case did not violate Doyle's First Amendment right to free speech or his similar rights under the Nebraska Constitution.

CONCLUSION

We conclude that the State adduced sufficient evidence to establish a knowing violation of the protection order by Doyle. Further, we conclude that Doyle's rights to free speech have not been infringed. His conduct in contacting Linda violated the protection order, and the protection order itself did not burden more speech than necessary to serve a significant government interest.

AFFIRMED.

INBODY, Chief Judge, participating on briefs.

CLINTON GARD AND PATRICIA GARD, APPELLANTS, V. CITY OF OMAHA, APPELLEE.

786 N.W.2d 688

Filed August 3, 2010. No. A-09-1266.

1. **Summary Judgment.** Summary judgment is proper when the pleadings and evidence admitted at the hearing disclose no genuine issue regarding any material fact or 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 was granted, giving that party the benefit of all reasonable inferences deducible from the evidence.
3. **Political Subdivisions Tort Claims Act: Limitations of Actions.** For purposes of Neb. Rev. Stat. § 13-919(1) (Reissue 2007), a cause of action accrues, thereby starting the period of limitations, when a potential plaintiff discovers, or in the exercise of reasonable diligence should discover, the political subdivision's negligence.
4. **Torts: Limitations of Actions.** When an individual is subject to a continuing, cumulative pattern of tortious conduct, capable of being terminated and involving continuing or repeated injury, the statute of limitations does not run until the date of the last injury or cessation of the wrongful action.
5. **Estoppel.** An equitable estoppel rests largely on the facts and circumstances of the particular case.
6. **Equity: Estoppel.** The doctrine of equitable estoppel will not be invoked against a governmental entity except under compelling circumstances where right and justice so demand.
7. ____: ____. Six elements must be satisfied for the doctrine of equitable estoppel to apply: (1) conduct which amounts to a false representation or concealment of material facts or, at least, which is calculated to convey the impression that the facts are otherwise than, and inconsistent with, those which the party subsequently attempts to assert; (2) the intention, or at least the expectation, that such conduct will be acted upon by, or influence, the other party or other persons; (3) knowledge, actual or constructive, of the real facts; (4) lack of knowledge and the means of knowledge of the truth as to the facts in question; (5) reliance, in good faith, upon the conduct or statements of the party to be estopped; and (6) action or inaction based thereon of such a character as to change the position or status of the party claiming the estoppel.
8. **Equity: Estoppel: Limitations of Actions.** The first prong of the equitable estoppel test is met when one lulls his or her adversary into a false sense of security, thereby causing that person to subject his or her claim to the bar of the statute of limitations, and then pleads the very delay caused by his or her conduct as a defense to the action when it is filed.

Appeal from the District Court for Douglas County: J. PATRICK MULLEN, Judge. Affirmed.

Clinton Gard, pro se.

Patricia Gard, pro se.

Alan M. Thelen, Deputy Omaha City Attorney, and Rosemarie R. Horvath for appellee.

MOORE and CASSEL, Judges.

CASSEL, Judge.

INTRODUCTION

After errant cars entered the backyard of Clinton Gard and Patricia Gard on two occasions, the Gards filed a claim with the City of Omaha (City) and, after it was denied, filed a lawsuit against the City. The district court concluded that the suit was barred by the statute of limitations and entered summary judgment in favor of the City. Because we conclude that the claim and the lawsuit were not timely filed, we affirm.

BACKGROUND

On January 12, 2001, the Gards purchased property located on North 121st Street in Omaha, Nebraska. Their property is located at the top of a T-intersection formed by Miracle Hills Drive (which runs generally east and west) and 120th Street (which runs north and south). Miracle Hills Drive has four westbound lanes which end at 120th Street; traffic in the two left-hand lanes is to turn left onto 120th Street, while traffic in the two right-hand lanes is to turn right. The intersection has traffic signals, including arrows indicating that traffic has to turn either left or right because the road ends.

On October 21, 2006, a drunk driver traveling westbound on Miracle Hills Drive failed to turn onto 120th Street and proceeded through the intersection and onto the Gards' property. The vehicle traveled through an existing tree line and a small retaining wall before crashing into the Gards' house. The Gards expressed concern to the City about the lack of a barrier to prevent errant traffic from entering their yard, but the City responded that it would not construct any type of barrier.

On April 24, 2007, two vehicles heading westbound on Miracle Hills Drive proceeded through the intersection and

came to a stop in the Gards' backyard. The Gards again communicated with the City about a barrier, but the City again refused to construct a barrier or offer any alternative to protect the Gards' property.

On April 22, 2008, the City received a claim filed by the Gards against the City under the Political Subdivisions Tort Claims Act (Act), seeking damages of $45,890. The City denied the claim on September 16.

On March 13, 2009, the Gards filed a complaint against the City. They alleged that the City had a duty to protect its citizens and property owners from harm and to not design intersections in such a manner as to increase the danger to the Gards, their guests, and their property. They alleged that the City was negligent in failing to provide any barrier or reasonable alternative between the intersection and the Gards' property. The Gards alleged that they had suffered damage to their property, diminution in value of their property, and loss of the use and enjoyment of their backyard. They requested that the court provide injunctive relief and order the City to install barriers to protect the Gards' property.

The City raised a number of affirmative defenses in its responsive pleading. Among the affirmative defenses alleged by the City were that the Gards failed to file a timely claim with the City as required by Neb. Rev. Stat. § 13-919(1) (Reissue 2007) and that the action was barred by the statute of limitations contained in that section. The City subsequently moved for summary judgment.

Evidence showed that the city council approved the construction of the turning lane improvements at the T-intersection in a resolution dated January 9, 2001. The changes included an additional left-turn lane for westbound traffic on Miracle Hills Drive and traffic signal modifications. The T-intersection was redesigned to better move increasing westbound traffic in the area.

Harry Owen, a traffic maintenance engineer employed by the City, stated in an affidavit that after he spoke with the Gards in October 2006, he checked the accident history for the intersection and discovered that this was the first accident of its kind reported at that location. On October 30, Owen wrote

a letter to the Gards explaining the City's position and stating that the placement of a guardrail would violate several federal standards that the City must follow. Owen received correspondence from the Gards on November 2 and December 1, and he e-mailed the Gards on December 26.

On April 25, 2007, the Gards wrote to the mayor's office. On May 7, a different traffic engineer with the City, Todd Pfitzer, wrote the Gards a letter explaining the reasoning behind the City's denial of their request for guardrails or barriers at the intersection. Pfitzer stated that he would order that the diamond-shaped signs with reflectors be increased to the maximum allowable size to emphasize to approaching traffic that the roadway does not continue west through the intersection. Pfitzer again wrote the Gards on October 2 to inform them that the Nebraska Department of Roads Safety Committee, which had heard the Gards' concerns, concluded that "not one solution could provide absolute and reasonable protection" to both the driver of the vehicle and the Gards' property and family. The letter informed the Gards that the City would not be installing a barrier along the west side of the intersection. On October 11, the Gards wrote Pfitzer and suggested that the City look at changing the flow of traffic on Miracle Hills Drive.

Patricia testified in a deposition that at the time the Gards purchased their house, 120th Street had two southbound turning lanes and one northbound lane. Later, an additional northbound turning lane was added at the intersection. Patricia also testified that the traffic light facing Miracle Hills Drive was a "lower light positioned on a pole" which was not visible above the tree line. It was replaced with a large pole off to the north side of the Gards' property with a "huge" suspended arm that extends over the intersection. She testified that as of October 30, 2006, she had concerns about the intersection, she had expressed the concerns to the City, and the City had rejected her proposed solutions. The Gards did not know of any law or regulation which would require the City to install something in between 120th Street and the Gards' backyard.

After receipt of exhibits relating to the motion for summary judgment, the court then took up the Gards' motion to compel

discovery, which they had filed approximately 1 week before the hearing. The City offered the affidavit of a construction engineer for the public works department who stated that he attempted to retrieve the department's construction file on the intersection redesign project as requested by the Gards, but that he was unable to locate it after a thorough search of the storage area and that "it apparently has not been retained." He reviewed information in the City's possession and determined that the project was bid in June 2001, that construction began in August, and that the construction was substantially completed sometime in April 2002. The court sustained the Gards' motion and ordered the City to search for requested documents and to supply them to the Gards if found.

On December 1, 2009, the district court entered an order granting summary judgment. The court determined that the Gards' claim accrued on October 21, 2006, when they became aware of the problem, and that the Gards failed to bring their claim in writing to the City within 1 year after the claim accrued. The court stated that the Gards' claim was outside the statute of limitations and that the court therefore lacked subject matter jurisdiction.

The Gards timely appeal.

ASSIGNMENTS OF ERROR

The Gards assign, consolidated, that the district court erred by (1) failing to apply the continuing tort doctrine to the running of the statute of limitations, (2) failing to apply the doctrine of equitable estoppel, (3) granting summary judgment when issues of material fact existed, and (4) granting summary judgment when evidence was still being obtained under a motion to compel discovery that had been sustained.

STANDARD OF REVIEW

[1] Summary judgment is proper when the pleadings and evidence admitted at the hearing disclose no genuine issue regarding any material fact or the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law. *Ballard v. Union Pacific RR. Co.*, 279 Neb. 638, 781 N.W.2d 47 (2010).

[2] In reviewing a summary judgment, an appellate court views the evidence in the light most favorable to the party against whom the judgment was granted, giving that party the benefit of all reasonable inferences deducible from the evidence. *City of Fremont v. Kotas*, 279 Neb. 720, 781 N.W.2d 456 (2010).

ANALYSIS

Whether Suit Is Barred.

The district court concluded that the Gards' suit was barred by the statute of limitations, and the Gards argue that it should not be barred for several reasons.

[3] Section 13-919(1) provides:

> Every claim against a political subdivision . . . shall be forever barred unless within one year after such claim accrued the claim is made in writing to the governing body. Except as otherwise provided in this section, all suits permitted by the act shall be forever barred unless begun within two years after such claim accrued.

The first question, then, is: When did the Gards' claim accrue? For purposes of § 13-919(1), a cause of action accrues, thereby starting the period of limitations, when a potential plaintiff discovers, or in the exercise of reasonable diligence should discover, the political subdivision's negligence. *Polinski v. Omaha Pub. Power Dist.*, 251 Neb. 14, 554 N.W.2d 636 (1996). The Gards' claim accrued on October 21, 2006, when the vehicle crashed through their yard and into their house. Thus, under § 13-919(1), they were required to submit a written claim by October 21, 2007, and to begin suit by October 21, 2008. The Gards did not submit their claim until April 2008 and did not file suit until March 2009. Thus, the Gards did not comply with the Act's time requirements.

We reject the Gards' contention that the last injury to them occurred on April 24, 2007, making their April 2008 claim timely. As discussed above, for purposes of the Act, the relevant question is when their cause of action accrued, not when they last suffered an injury.

The Gards' reliance upon a recent case is misplaced. In the Gards' reply brief, they cite to *Villanueva v. City of South Sioux*

City, 16 Neb. App. 288, 743 N.W.2d 771 (2008), and assert that they substantially complied with the notice requirements. The *Villanueva* case, however, dealt with requirements of Neb. Rev. Stat. § 13-905 (Reissue 2007) regarding the *content* of the claim. The instant case involves statutory *time limits* for *filing* of the claim and the lawsuit. In *Big Crow v. City of Rushville*, 266 Neb. 750, 754, 669 N.W.2d 63, 66-67 (2003), the Nebraska Supreme Court stated, "Because compliance with statutory time limits such as that set forth in [Neb. Rev. Stat.] § 13-906 [(Reissue 2007)] can be determined with precision, the doctrine of substantial compliance has no application in these circumstances." We think the same can be said of the statutory time limits in § 13-919; thus, substantial compliance does not apply in this case.

[4] We similarly find no relief for the Gards under the continuing tort theory. The Gards' complaint alleged that the City was negligent in failing to provide a barrier at the intersection. It is well accepted that when an individual is subject to a continuing, cumulative pattern of tortious conduct, capable of being terminated and involving continuing or repeated injury, the statute of limitations does not run until the date of the last injury or cessation of the wrongful action. *Alston v. Hormel Foods Corp.*, 273 Neb. 422, 730 N.W.2d 376 (2007). This "continuing tort doctrine" requires that a tortious act—not simply the continuing ill effects of prior tortious acts—fall within the limitation period. *Id.* The Gards argue that because the unsafe conditions at the intersection have not changed, the wrong continues and a claim is accruing every day. However, the necessary tortious act cannot merely be the failure to right a wrong committed outside the statute of limitations, because if it were, the statute of limitations would never run because a tort-feasor can undo all or part of the harm. See *id.* We do not view the City's alleged breach of a duty to erect a barrier each day as a continuing unlawful act; instead, it would be more akin to a failure to right a wrong that the Gards became aware of in October 2006—which is outside the statute of limitations. We observe that no Nebraska case law has applied the doctrine to claims brought under the Act, and we decline to do so in this case.

[5,6] The Gards additionally argue that equitable estoppel should apply and that ending their case on a statute of limitations ground due to a delay in the filing of their claim would cause a manifest injustice. An equitable estoppel rests largely on the facts and circumstances of the particular case. *Keene v. Teten*, 8 Neb. App. 819, 602 N.W.2d 29 (1999). The doctrine of equitable estoppel will not be invoked against a governmental entity except under compelling circumstances where right and justice so demand. *Lowe v. Lancaster Cty. Sch. Dist. 0001*, 17 Neb. App. 419, 766 N.W.2d 408 (2009). In such cases, the doctrine is to be applied with caution and only for the purpose of preventing manifest injustice. *Id.* Equitable estoppel is an affirmative defense and must be raised in the pleadings to be considered by a trial court and on appeal. *Victory Lake Marine v. Velduis*, 9 Neb. App. 815, 621 N.W.2d 306 (2000). In the case before us, although the Gards assert equitable estoppel in avoidance of the statute of limitations rather than as an affirmative defense, the same rule applies in this context. The Gards' pleadings do not sufficiently allege equitable estoppel. See, generally, *Bohl v. Buffalo Cty.*, 251 Neb. 492, 557 N.W.2d 668 (1997); *Woodard v. City of Lincoln*, 7 Neb. App. 11, 578 N.W.2d 892 (1998), *affirmed in part and in part reversed and remanded on other grounds* 256 Neb. 61, 588 N.W.2d 831 (1999). Cf. *Greer v. Chelewski*, 162 Neb. 450, 76 N.W.2d 438 (1956) (stating that party entitled to estoppel need not in all cases formally plead estoppel; if facts constituting estoppel are in any way sufficiently pleaded, party is entitled to benefit of law arising therefrom).

[7] Even if the Gards had adequately pleaded equitable estoppel, they cannot establish the elements for estoppel. Six elements must be satisfied for the doctrine of equitable estoppel to apply: (1) conduct which amounts to a false representation or concealment of material facts or, at least, which is calculated to convey the impression that the facts are otherwise than, and inconsistent with, those which the party subsequently attempts to assert; (2) the intention, or at least the expectation, that such conduct will be acted upon by, or influence, the other party or other persons; (3) knowledge, actual or constructive, of the real facts; (4) lack of knowledge and the means of knowledge of

the truth as to the facts in question; (5) reliance, in good faith, upon the conduct or statements of the party to be estopped; and (6) action or inaction based thereon of such a character as to change the position or status of the party claiming the estoppel. *Lowe, supra*.

[8] The first prong of the equitable estoppel test is met when one lulls his or her adversary into a false sense of security, thereby causing that person to subject his or her claim to the bar of the statute of limitations, and then pleads the very delay caused by his or her conduct as a defense to the action when it is filed. *Woodard v. City of Lincoln*, 256 Neb. 61, 588 N.W.2d 831 (1999). Here, however, the City has never indicated that it may erect a barrier. As early as October 30, 2006, Owen informed the Gards in writing that "placing any kind of a guardrail there would violate several Federal Standards that [the City] must follow" and that "[g]uardrails are specifically not to be used to protect private property abutting the roadway." Because one of the essential elements of equitable estoppel has not been satisfied, it does not apply in this case.

To summarize, we conclude that the Gards' claim was not timely filed and that their suit is barred based upon the time limits contained in § 13-919(1). We reject each of the theories they have asserted in an attempt to excuse the untimeliness of their filings.

Additional Evidence.

Finally, the Gards argue that the district court erred in granting summary judgment while evidence was still being received under their motion to compel, which the district court had sustained. They assert in their brief that they received documents from the City on approximately October 8 and November 23 and 25, 2009. These documents, however, are not in the record. The Gards further discuss a telephone call that they made to the court, but, again, our record contains nothing about this telephone call. More important though, the Gards admit that the final order disposed of the merits of their case on a statute of limitations defense. This additional evidence could not have affected the time of the filing of their claim or the time that they could have known that they had a claim, i.e.,

after the first accident on October 21, 2006. Accordingly, we find no error.

CONCLUSION

We conclude that the district court properly entered summary judgment in favor of the City, because the Gards did not meet the time requirements set forth in § 13-919(1) and the doctrines of continuing tort and equitable estoppel do not excuse their failure to file their lawsuit before the statute of limitations had expired.

AFFIRMED.

INBODY, Chief Judge, participating on briefs.

JOHN F. BECKMAN AND FARMERS MUTUAL INSURANCE COMPANY OF NEBRASKA, APPELLANTS, V. FEDERATED MUTUAL INSURANCE COMPANY, ALSO KNOWN AS AND DOING BUSINESS AS FEDERATED INSURANCE, ET AL., APPELLEES.

788 N.W.2d 806

Filed August 10, 2010. No. A-09-975.

1. **Summary Judgment: Appeal and Error.** An appellate court will affirm a lower court's granting of summary judgment if the pleadings and admissible evidence offered at the hearing show that there is no genuine issue as to any material facts 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. ____: ____. In reviewing a summary judgment, an appellate court views the evidence in the light most favorable to the party against whom the judgment was granted and gives such party the benefit of all reasonable inferences deducible from the evidence.
3. **Contracts: Judgments: Appeal and Error.** The meaning of a contract is a question of law, in connection with which an appellate court has an obligation to reach its conclusions independently of the determinations made by the court below.
4. **Insurance: Contracts: Motor Vehicles: Liability.** Where an excess insurance clause in a driver's automobile liability policy and a no-liability clause in the automobile owner's liability policy apparently conflict, the no-liability clause is ineffective and the driver's insurance excess.
5. **Insurance: Contracts.** If the terms of an insurance policy are clear and unambiguous, then those terms will be enforced.
6. **Summary Judgment: Appeal and Error.** When cross-motions for summary judgment have been ruled upon by the district court, the appellate court may determine the controversy that is the subject of those motions or may make an

order specifying the facts that appear without substantial controversy and direct such further proceedings as it deems just.

7. **Insurance: Contracts.** An insurer may limit its liability and impose restrictions and conditions upon its obligations under an insurance contract as long as the restrictions and conditions are not inconsistent with public policy or statute.

Appeal from the District Court for Washington County: DARVID D. QUIST, Judge. Reversed and remanded with direction.

Thomas A. Grennan and Francie C. Riedmann, of Gross & Welch, P.C., L.L.O., for appellants.

Michael G. Mullin and Amy L. Van Horne, of Kutak Rock, L.L.P., for appellees Federated Mutual Insurance Company and Sid Dillon Chevrolet-Oldsmobile-Pontiac, Inc.

MOORE and CASSEL, Judges.

CASSEL, Judge.

INTRODUCTION

This case is an insurance coverage dispute arising out of an accident in which the driver was operating a temporary substitute vehicle provided by a car dealership. Because both the policy insuring the driver and the dealership's policy insuring the vehicle purport to transfer liability to the other insurance policy, we conclude that the policies contain mutually repugnant language. We therefore apply the rule that in such situations, the policy covering the vehicle provides primary coverage and the policy covering the driver is excess. We reverse the district court's decision to the contrary and remand the cause with direction.

BACKGROUND

The facts in this case are not disputed. On July 31, 2006, John F. Beckman took his stepdaughter's vehicle to Sid Dillon Chevrolet-Oldsmobile-Pontiac, Inc. (Sid Dillon), to have repairs performed on the vehicle. Sid Dillon provided Beckman with a substitute vehicle, a 2005 Chevrolet Malibu owned by Sid Dillon, and gave him permission to operate the vehicle. On that same day, Beckman was involved in an accident with a bicyclist, Clinton R. Sedivy, while operating the Malibu.

At the time of the accident, Beckman was insured by Farmers Mutual Insurance Company of Nebraska (Farmers Mutual). At that time, Sid Dillon and the Malibu were insured by Federated Mutual Insurance Company (Federated).

As is pertinent to the instant case, Beckman's Farmers Mutual policy provided as follows regarding coverage:

> **COVERAGE FOR THE USE OF OTHER AUTOMOBILES**
>
> This liability coverage extends to the use, by an **insured**, of a **newly acquired automobile**, a **temporary substitute automobile**, or a **non-owned automobile**. . . .
>
> . . . .
>
> **IF THERE IS OTHER LIABILITY COVERAGE**
>
> . . . .
>
> 3. **Temporary Substitute Automobile, Non-Owned Automobile**, Trailer.
>
> If a **temporary substitute automobile** . . . has other vehicle liability coverage on it, then this coverage is excess.
>
> If a **temporary substitute automobile** . . . has other vehicle liability coverage on it, or is self-insured under any motor vehicle financial responsibility law, a motor carrier law or any similar law, then this coverage is excess over such insurance or self-insurance.

The Malibu fits Farmers Mutual's definition of a temporary substitute automobile.

In pertinent part, Sid Dillon's Federated policy covering the Malibu provides as follows regarding who is an insured under the policy:

> **3. Who Is An Insured**
>
> **a.** The following are "insureds" for covered "autos":
>
> **(1)** You for any covered "auto".
>
> **(2)** Anyone else while using with your permission a covered "auto" you own, hire or borrow except:
>
> . . . .
>
> **(d)** Your customers, if your business is shown in the Declarations as an "auto" dealership. However, if a customer of yours:

> **(i)** Has no other available insurance (whether primary, excess or contingent), they are an "insured" but only up to the compulsory or financial responsibility law limits where the covered "auto" is principally garaged.
>
> **(ii)** Has other available insurance (whether primary, excess or contingent) less than the compulsory or financial responsibility law limits where the covered "auto" is principally garaged, they are an "insured" only for the amount by which the compulsory or financial responsibility law limits exceed the limit of their other insurance.

On two occasions, Farmers Mutual tendered coverage for the accident to Federated. In letters dated October 17, 2007, and February 21, 2008, Federated denied tender.

For purposes of simplification, from this point forward, we refer to the appellants collectively as "Farmers Mutual" and we refer to the appellees collectively as "Federated."

On October 24, 2008, Farmers Mutual filed a complaint for declaratory judgment. Farmers Mutual requested that the court enter a judgment declaring the following:

> a. That the Federated policy provides the primary coverage as to the Sedivy claim;
>
> b. That Federated owes a defense to . . . Beckman herein;
>
> c. That the Farmers Mutual coverage is excess;
>
> d. That the defense costs incurred to date by Farmers Mutual in defending Beckman [in the case Sedivy filed against Beckman] shall be reimbursed by Federated; and
>
> e. That Federated owes indemnification to . . . Beckman herein, in the event that any judgment is entered against . . . Beckman in the [case Sedivy filed against Beckman].

Federated filed a motion to dismiss which alleged that Farmers Mutual had failed to state a valid claim for recovery under Nebraska law, and Farmers Mutual filed a motion for summary judgment. The court treated the motion filed by Federated as a summary judgment motion, because evidence was offered in support of the motion. Based upon the evidentiary record—which included both insurance policies, the complaint Sedivy had filed against Beckman, and a

stipulation of facts—the court granted summary judgment in favor of Federated.

Farmers Mutual timely appeals.

ASSIGNMENTS OF ERROR

Farmers Mutual makes five assignments of error, which we consolidate to the central question presented by this appeal: whether the district court erred in determining that Farmers Mutual's policy, rather than Federated's policy, afforded primary coverage under the undisputed facts.

STANDARD OF REVIEW

[1,2] An appellate court will affirm a lower court's granting of summary judgment if the pleadings and admissible evidence offered at the hearing show that there is no genuine issue as to any material facts 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. *Community Dev. Agency v. PRP Holdings*, 277 Neb. 1015, 767 N.W.2d 68 (2009). In reviewing a summary judgment, an appellate court views the evidence in the light most favorable to the party against whom the judgment was granted and gives such party the benefit of all reasonable inferences deducible from the evidence. *Id.*

[3] The meaning of a contract is a question of law, in connection with which an appellate court has an obligation to reach its conclusions independently of the determinations made by the court below. *Davenport Ltd. Partnership v. 75th & Dodge I, L.P.*, 279 Neb. 615, 780 N.W.2d 416 (2010).

ANALYSIS

The question before this court is whether the Farmers Mutual insurance policy or the Federated insurance policy provided primary coverage. The resolution of this question depends upon the effect of the clause in Federated's insurance policy that excludes as an insured all customers of an automobile repair shop, except those without sufficient liability insurance, and in that case, only to the extent required by law.

The district court concluded, and Federated now asserts in its appellate brief, that because Beckman had his own liability insurance policy sufficient to comply with financial

responsibility requirements, Beckman did not fit the definition of an insured under Federated's policy.

On appeal, Farmers Mutual argues that the district court erred in interpreting the Federated policy. Farmers Mutual asserts that the above-described term in the Federated policy is mutually repugnant with the term in the Farmers Mutual policy which provides that where the policyholder is driving a "non-owned" vehicle, the Farmers Mutual policy is excess coverage. If the two automobile insurance policies are mutually repugnant, longstanding Nebraska law places the responsibility for primary coverage on the insurance policy covering the vehicle, which in this case would be the Federated policy. See *Allied Mut. Ins. Co. v. Universal Underwriters Ins. Co.*, 265 Neb. 549, 657 N.W.2d 905 (2003).

Therefore, we must determine whether the doctrine of mutual repugnancy applies to the instant case. To better understand the purpose of this doctrine, we recount two distinct lines of Nebraska Supreme Court decisions. We first discuss the line of cases in which the Nebraska Supreme Court adopted and applied the principle of mutual repugnancy. Second, we discuss a line of cases in which the court determined that a permissive driver was not an insured under an insurance policy covering a loaned vehicle. Finally, we discuss *Allied Mut. Ins. Co. v. Universal Underwriters Ins. Co., supra*, in which the Nebraska Supreme Court discussed both lines of cases.

[4] The Nebraska Supreme Court first explicitly adopted the principle later termed mutual repugnancy in *Bituminous Cas. Corp. v. Andersen*, 184 Neb. 670, 171 N.W.2d 175 (1969). Although previous Nebraska Supreme Court cases on the same issue had reached a result consistent with the rule announced in *Bituminous Cas. Corp.*, they had not elucidated this rule in precise terms. See, *Farm Bureau Ins. Co. v. Allied Mut. Ins. Co.*, 180 Neb. 555, 143 N.W.2d 923 (1966); *Protective Fire & Cas. Co. v. Cornelius*, 176 Neb. 75, 125 N.W.2d 179 (1963); *Turpin v. Standard Reliance Ins. Co.*, 169 Neb. 233, 99 N.W.2d 26 (1959). In *Bituminous Cas. Corp.*, a driver whose automobile was in a repair shop was driving a vehicle loaned by the repair shop when he was involved in an accident. The driver's insurance policy provided that "'the insurance under

this policy with respect to loss arising out of . . . the use of any non-owned automobile shall be excess insurance over any other valid and collectible insurance.'" *Id.* at 671, 171 N.W.2d at 176. The policy covering the automobile defined an insured as

> "'any other person, but only if no other valid and collectible automobile liability insurance, either primary or excess, with limits of liability at least equal to the minimum limits specified by the financial responsibility law of the state in which the automobile is principally garaged, is available to such person; . . . .'"

Id. at 672, 171 N.W.2d at 176. The court discussed the fact that in other jurisdictions, where one policy contained an excess clause and the other policy contained a no-liability clause, courts had not treated such situations in a uniform manner. The court adopted the following rule to resolve such conflicts: "Where an excess insurance clause in a driver's automobile liability policy and a no-liability clause in the automobile owner's liability policy apparently conflict, the no-liability clause is ineffective and the driver's insurance excess." *Id.* at 673, 171 N.W.2d at 176. The court's stated rationale for adopting this rule was that "[n]eed exists for certainty, simplicity, and inexpensive administration in connection with these business relations among insurers." *Id.*

The Nebraska Supreme Court applied this rule to resolve a similar situation in *Jensen v. Universal Underwriters Ins. Co.*, 208 Neb. 487, 304 N.W.2d 51 (1981). In *Jensen*, a driver who had an automobile liability insurance policy through his employer was involved in an accident while driving a car temporarily loaned to him by an automobile repair shop. The repair shop had a separate policy covering the loaner vehicle. The driver's policy stated that "'[w]ith respect to a temporary substitute automobile, this insurance shall be excess insurance over any other valid and collectible insurance available to the insured.'" *Id.* at 491-92, 304 N.W.2d at 54 (emphasis omitted). The repair shop's policy covering the vehicle provided as follows regarding who was an insured:

> "Each of the following is an INSURED under this insurance to the extent set forth below: . . . (3) with respect

> to the AUTOMOBILE HAZARD; . . . (b) any other person while actually using an AUTOMOBILE covered by this Coverage part with the permission of the NAMED INSURED, provided that such other person (i) *has no automobile liability insurance policy of his (her) own, either primary or excess . . . .*" (Emphasis supplied.)

Id. at 491, 304 N.W.2d at 54. The court observed that this posed a conflict similar to the one in *Bituminous Cas. Corp. v. Andersen*, 184 Neb. 670, 171 N.W.2d 175 (1969), recited the above-quoted rule from *Bituminous Cas. Corp.*, and determined that the policy issued to the repair shop that covered the vehicle provided primary coverage.

The Nebraska Supreme Court reached a similar conclusion in *State Farm Mut. Auto. Ins. Co. v. Cheeper's Rent-A-Car*, 259 Neb. 1003, 614 N.W.2d 302 (2000), under somewhat different circumstances. In *Cheeper's Rent-A-Car*, a driver, who was insured under her own policy, was involved in an accident while driving a rental car, which was covered by a separate rental policy. The driver's own policy "provided that when [the driver] was driving a rental vehicle covered by liability insurance, the [driver's own] coverage was 'excess over such insurance.'" *Id.* at 1011, 614 N.W.2d at 309. The rental car contract stated that the rental car was covered by insurance which was "'[i]n all cases . . . secondary'" to the driver's own liability insurance. *Id.* The court noted that each policy contained "language which purports to place the primary responsibility in terms of liability on the issuer of the opposing contract." *Id.* The court then applied the same rule regarding mutually repugnant language as was applied in *Jensen v. Universal Underwriters Ins. Co., supra*, and *Bituminous Cas. Corp. v. Andersen, supra.*

In a separate line of cases, the Nebraska Supreme Court explained when a policy covering a loaned vehicle may exclude a permissive driver from coverage. In *Universal Underwriters Ins. Co. v. Farm Bureau Ins. Co.*, 243 Neb. 194, 498 N.W.2d 333 (1993), the Nebraska Supreme Court determined that an insurance policy covering a vehicle owned by an automobile repair shop and loaned to a customer did not cover a customer

when she was involved in an accident. The policy covering the vehicle defined an insured as "'[a]ny other person or organization *required by law* to be an INSURED while using an AUTO covered by this Coverage Part within the scope of YOUR permission.' (Emphasis supplied.)" *Id.* at 199, 498 N.W.2d at 337. The court concluded that the policy on the vehicle did not cover the customer who had been loaned the vehicle, because Nebraska law did not require that such a driver be insured.

In *Leader Nat. Ins. v. American Hardware Ins.*, 249 Neb. 783, 545 N.W.2d 451 (1996), the Nebraska Supreme Court cited to *Universal Underwriters Ins. Co. v. Farm Bureau Ins. Co., supra*, to support its determination that a policy insuring a loaned vehicle specifically excluded a driver who had borrowed the vehicle as an insured. In *Leader Nat. Ins.*, a driver who was covered under his own insurance policy was involved in an accident while test-driving an automobile owned by a dealership. The dealership had a policy which covered its vehicle. The driver's insurance company filed a petition seeking subrogation from the dealership's insurer. The dealership's insurance policy covering the vehicle was attached to the petition, but the driver's insurance policy was not attached. The dealership's insurance policy defined who was an insured as follows:

> "(2) Anyone else while using with your permission a covered 'auto' you own, hire or borrow *except*:
>
> . . . .
>
> "(d) Your customers, if your business is shown in the Declarations as an 'auto' dealership. However, if a customer of yours:
>
> "(i) Has no other available insurance (whether primary, excess or contingent), they are an 'insured' but only up to the compulsory or financial responsibility law limits where the covered 'auto' is principally garaged.
>
> "(ii) Has other available insurance (whether primary, excess or contingent) less than the compulsory or financial responsibility law limits where the covered 'auto' is principally garaged, they are an 'insured' only for the amount by which the compulsory or financial

> responsibility law limits exceed the limits of their other insurance." (Emphasis supplied.)

Id. at 786, 545 N.W.2d at 454. We digress to note that, in all material respects, this language is the same as that contained in Federated's policy in the instant case. In addition, the petition in *Leader Nat. Ins.* alleged that the driver's insurance company insured the driver, defended the driver, and compensated third parties for damages. The court cited to *Universal Underwriters Ins. Co. v. Farm Bureau Ins. Co., supra*, in explaining that the dealership's insurance policy that insured only customers who had less vehicle liability insurance than the amount required by law was not inconsistent with "public policy or statute." *Leader Nat. Ins. v. American Hardware Ins.*, 249 Neb. at 788, 545 N.W.2d at 455. The court decided that based on the allegations of the petition, the driver was sufficiently insured, and that therefore, the dealership's insurer had no duty to cover the driver. The court's discussion of this specific issue was as follows:

> [The driver's insurance company's] amended petition alleges that [the driver's insurance company] insured [the driver], defended [the driver], and paid third parties for damages they suffered. It is evident that [the driver] was sufficiently insured as required by law and, in any event, was sufficiently insured to cover the damages he caused while driving [the dealership's] vehicle. [The dealership's policy covering the vehicle], which [policy] was attached to the amended petition, conclusively contradicts the amended petition's allegation that [the dealership's insurer] had the primary duty to defend [the driver]. Under [the dealership's policy covering the vehicle, the dealership's insurer] had no duty to defend [the driver].

Leader Nat. Ins. v. American Hardware Ins., 249 Neb. 783, 788, 545 N.W.2d 451, 455 (1996).

We now turn to the only Nebraska Supreme Court decision which discusses both lines of cases, which is *Allied Mut. Ins. Co. v. Universal Underwriters Ins. Co.*, 265 Neb. 549, 657 N.W.2d 905 (2003). In *Allied Mut. Ins. Co.*, a driver, who had his own automobile insurance policy, was involved in an

accident while driving a loaner vehicle covered by a dealership's separate insurance policy. The driver's policy provided that "'any insurance we provide for a vehicle you do not own shall be excess over any other collectible insurance.'" *Id.* at 553, 657 N.W.2d at 908. The dealership's policy provided as follows regarding who was an insured:

> "WHO IS AN INSURED, With respect to the AUTO HAZARD — the following insureds are added:
>
> "(5) any driver of a . . . SERVICE LOANER AUTO, but only within the scope of YOUR permission.
>
> ". . . THE MOST WE WILL PAY, item (1) — the following paragraph is added:
>
> "With respect to the AUTO HAZARD part (5) of WHO IS AN INSURED:
>
> "(a) If the permissive driver has no other insurance, the most WE will pay is the minimum financial responsibility law limits in the jurisdiction where the OCCURRENCE took pla[c]e.
>
> "(b) If the permissive driver has other insurance (whether primary, excess or contingent) that is less than the minimum financial responsibility law limits where the OCCURRENCE took place, the most WE will pay is the amount by which the minimum financial responsibility law limits exceed the limit of their other insurance."

Id. at 552, 657 N.W.2d at 907-08. The court concluded that the policies contained mutually repugnant language because "[b]oth transfer liability to the other existing policy of insurance." *Id.* at 553, 657 N.W.2d at 908. The court then applied the rule that in such circumstances, the vehicle owner's policy provides primary coverage and the driver's policy provides excess coverage. Later in the *Allied Mut. Ins. Co.* opinion, the court discussed the similarities between *Allied Mut. Ins. Co.* and *State Farm Mut. Auto. Ins. Co. v. Cheeper's Rent-A-Car*, 259 Neb. 1003, 614 N.W.2d 302 (2000); *Jensen v. Universal Underwriters Ins. Co.*, 208 Neb. 487, 304 N.W.2d 51 (1981); and *Farm Bureau Ins. Co. v. Allied Mut. Ins. Co.*, 180 Neb. 555, 143 N.W.2d 923 (1966).

The court also distinguished *Allied Mut. Ins. Co.* from *Leader Nat. Ins. v. American Hardware Ins.*, 249 Neb. 783,

545 N.W.2d 451 (1996), and *Universal Underwriters Ins. Co. v. Farm Bureau Ins. Co.*, 243 Neb. 194, 498 N.W.2d 333 (1993). The court approved of the district court's decision, which distinguished *Leader Nat. Ins.* from *Allied Mut. Ins. Co.* Apparently, the district court had distinguished *Leader Nat. Ins.* on the basis that the vehicle owner's policy in *Allied Mut. Ins. Co.* covered an automobile loaned to a customer while the customer's vehicle was in the repair shop, but that the policy in *Leader Nat. Ins.* did not. The Nebraska Supreme Court's summation of its reasoning in the *Leader Nat. Ins.* decision was as follows:

> This court concluded that customers of [the dealership] who with permission borrowed a vehicle owned by [the dealership] were insured only if the customers carried vehicle liability insurance less than that required by law. Since [the driver] was sufficiently insured as required by law to cover the damages he caused while driving the dealership's vehicle, [the driver] was not an insured under the policy issued by [the dealership's insurance company]. We concluded that [the dealership's insurance company] provided no coverage to [the driver] and that [the driver's insurance company] had the primary duty to defend him.

Allied Mut. Ins. Co. v. Universal Underwriters Ins. Co., 265 Neb. 549, 556, 657 N.W.2d 905, 910 (2003).

Farmers Mutual argues that *Leader Nat. Ins.* is entirely distinguishable from the instant case and that this case is controlled by *Jensen v. Universal Underwriters Ins. Co., supra*, and *Bituminous Cas. Corp. v. Andersen*, 184 Neb. 670, 171 N.W.2d 175 (1969). Federated argues that because the language in its policy is the same as the language in the policy in *Leader Nat. Ins.*, this case is controlled by *Leader Nat. Ins.* and the Nebraska Supreme Court's subsequent interpretation of *Leader Nat. Ins.* in *Allied Mut. Ins. Co.* Although none of these decisions have been overruled, we find no inconsistency in these decisions.

We acknowledge that the language in Federated's policy is the same as the language contained in the policy in *Leader Nat. Ins.* which the court determined excluded the driver as an

insured. However, this similarity does not control the outcome of the instant case for two reasons.

First, the court in *Leader Nat. Ins. v. American Hardware Ins., supra*, could not have addressed the issue of mutually repugnant language, because only one insurance policy was available. In *Leader Nat. Ins.*, only the policy covering the vehicle was attached to the petition. From the pleadings, it was clear that the driver had his own vehicle liability insurance policy and that this policy had paid damages to the extent required by motor vehicle responsibility law. There was no allegation that this policy contained a term which had the effect of transferring liability to any other policy. We do not speculate what the court's decision would have been had the driver's policy been attached to the complaint and contained a clause which served the purpose of transferring liability to another insurance policy. In the *Leader Nat. Ins.* opinion, the court did not have any opportunity to consider whether the two policies contained mutually repugnant language.

Second, *Leader Nat. Ins. v. American Hardware Ins.*, 249 Neb. 783, 545 N.W.2d 451 (1996), requires us to consider the coverage provided by the driver's policy, which in this case is different from that in *Leader Nat. Ins.* We recount that in *Leader Nat. Ins.*, the driver's policy, which was not attached to the petition filed by the driver's insurer, was alleged to have covered the damages and was not alleged to contain any applicable exclusion to coverage. Based on this information about the driver's policy, the *Leader Nat. Ins.* court determined that the policy covering the vehicle, which excluded the driver as an insured if he had adequate insurance, did not provide coverage. In the instant case, the driver's policy specifically stated that in the case of a loaned vehicle, its coverage was "excess" if the vehicle had other liability coverage. Because the *Leader Nat. Ins.* court determined that a term in the policy covering the vehicle, which was materially identical to the term in the instant case, required it to consider the extent of coverage provided by the driver's policy, we must consider the fact that the driver's policy in the instant case provided substantially different coverage than the driver's policy in *Leader Nat. Ins*.

Federated also argues that the court's discussion of *Leader Nat. Ins.* in *Allied Mut. Ins. Co. v. Universal Underwriters Ins. Co.*, 265 Neb. 549, 657 N.W.2d 905 (2003), requires that we conclude that Federated's policy, standing alone, excludes from coverage the driver of a loaner vehicle where the policy covering the vehicle is like the one in *Leader Nat. Ins*. Federated advances two arguments to support its position.

Federated first focuses its argument on the sentence in which the *Allied Mut. Ins. Co.* court stated that the *Leader Nat. Ins.* court's conclusion that the vehicle policy did not provide coverage was based on the fact that the driver "was sufficiently insured as required by law to cover the damages he caused." *Allied Mut. Ins. Co.*, 265 Neb. at 556, 657 N.W.2d at 910. This statement is true, but not a full explanation of what occurred in *Leader Nat. Ins*. In *Leader Nat. Ins.*, the driver was insured as required by law because his own insurer simply provided coverage and did not allege any applicable exclusions from coverage. The instant case is different because the driver's policy contains an exclusion which serves the explicit purpose of transferring primary liability to any other insurer when the driver is operating a temporary substitute vehicle. In the instant case, while the driver's policy would ultimately provide coverage if no other policy did so, there is a question as to whether this policy will actually be the one that provides the insurance coverage required by law.

Federated's focus then turns to the language from *Allied Mut. Ins. Co.* in which the Nebraska Supreme Court noted that the district court distinguished *Leader Nat. Ins. v. American Hardware Ins.*, 249 Neb. 783, 545 N.W.2d 451 (1996), from *Allied Mut. Ins. Co.* because the policy covering the vehicle in *Allied Mut. Ins. Co.* covered an automobile loaned for a customer's use while the customer's automobile was being repaired. Federated argues that this means the policy in *Leader Nat. Ins.*, which is materially the same as Federated's policy, excludes customers from coverage under the vehicle's policy. Again, the court's statement was true, but not a full explanation of what occurred in *Leader Nat. Ins*. In *Leader Nat. Ins.*, as we have already explained, the exclusion of the driver from coverage under the policy covering the vehicle was based in part

on the coverage provided by the driver's own insurance—not exclusively on the policy covering the vehicle. As we have stated above, the coverage provided by the driver's policy in the instant case is demonstrably different from that in *Leader Nat. Ins.*

We conclude that the instant case is controlled by the Nebraska Supreme Court's decisions in *Bituminous Cas. Corp. v. Andersen*, 184 Neb. 670, 171 N.W.2d 175 (1969), and *Jensen v. Universal Underwriters Ins. Co.*, 208 Neb. 487, 304 N.W.2d 51 (1981). In *Bituminous Cas. Corp.*, *Jensen*, and the instant case, the policy insuring the driver provided that its coverage of a "non-owned" vehicle was "excess" where there was other coverage. In *Bituminous Cas. Corp.*, *Jensen*, and the instant case, the policy covering the vehicle also excluded from the definition of an insured someone who otherwise had a specified form of vehicle liability insurance.

[5] The only notable difference between *Bituminous Cas. Corp.* and *Jensen* on one hand and the instant case on the other hand is the design of the clause which specifies who is an insured under the policy covering the vehicle. In *Bituminous Cas. Corp.* and *Jensen*, the policy covering the vehicle includes permissive drivers, except those that have a specified form of automobile liability insurance policy. In contrast, in the instant case, the policy excludes from coverage customers of a dealership, except those who do not otherwise have an insurance policy sufficient to comply with motor vehicle responsibility law. Federated argues this difference requires that we decide the instant case differently from *Jensen*. We disagree. This particular argument elevates form over substance. In all three cases, the plain language of the insurance contract covering the vehicle separates those drivers who have the specified extent of insurance coverage under another contract from those who do not. If the terms of an insurance policy are clear and unambiguous, then those terms will be enforced. *State ex rel. Wagner v. United Nat. Ins. Co.*, 277 Neb. 308, 761 N.W.2d 916 (2009). We can find no reason why provisions which serve the same purpose should arbitrarily be assigned different meanings only because they use different language to reach the same result.

[6] We therefore conclude that the insurance contracts of Farmers Mutual and Federated contain mutually repugnant language and that in this instance, the policy covering the vehicle—the Federated policy—provides primary coverage. We reverse the district court's decision to grant summary judgment to Federated and direct the district court to enter summary judgment for Farmers Mutual. When cross-motions for summary judgment have been ruled upon by the district court, the appellate court may determine the controversy that is the subject of those motions or may make an order specifying the facts that appear without substantial controversy and direct such further proceedings as it deems just. *Loves v. World Ins. Co.*, 276 Neb. 936, 758 N.W.2d 640 (2008).

[7] In making this decision, we acknowledge that Federated has the freedom of contract to exclude coverage where public policy and statute permit. An insurer may limit its liability and impose restrictions and conditions upon its obligations under an insurance contract as long as the restrictions and conditions are not inconsistent with public policy or statute. *Kruid v. Farm Bureau Mut. Ins. Co.*, 17 Neb. App. 687, 770 N.W.2d 652 (2009). We recognize that pursuant to *Universal Underwriters Ins. Co. v. Farm Bureau Ins. Co.*, 243 Neb. 194, 498 N.W.2d 333 (1993), Federated may not have been obligated to issue an insurance policy that covered the driver of a loaner vehicle in the context of the instant case. However, Federated did issue a policy which required it to cover the drivers of loaner vehicles in the instances specified by its policy, and the principle of mutual repugnancy mandated that the Federated policy cover Beckman in this instance.

Further, adopting the position advocated by Federated—that we must reconcile conflicting clauses—would create unnecessary uncertainty regarding the meaning of such contracts. We quote from a treatise which sets forth the detrimental results of failing to apply the doctrine of mutual repugnancy:

> By allowing one clause to govern over another, the court may be allowing one insurer to profit at the expense of another insurer solely because the former insurer drafted a more clever other insurance clause. "[C]ourts which have permitted one of the litigants to emerge victorious

> in this 'battle of semantics' have done little to advance the cause of effective insurance coverage and have merely encouraged the insurance companies to continue their duel of legal specificity."

1 Allan D. Windt, Insurance Claims & Disputes § 7.01 at 526-27 (3d ed. 1995). Thus, sound policy reasons support the long-standing approach of the Nebraska Supreme Court in applying the doctrine of mutual repugnancy.

CONCLUSION

Because the Farmers Mutual policy and the Federated policy contain mutually repugnant language and Nebraska law requires that the vehicle's insurer, which is Federated, assume primary liability in this situation, we reverse the district court's entry of summary judgment in favor of Federated and remand the cause with direction to enter summary judgment in favor of Farmers Mutual.

REVERSED AND REMANDED WITH DIRECTION.

INBODY, Chief Judge, participating on briefs.

IN RE INTEREST OF EMMA J., A CHILD UNDER 18 YEARS OF AGE. STATE OF NEBRASKA, APPELLEE, V. GENEO J., APPELLANT.

789 N.W.2d 528

Filed August 10, 2010. No. A-09-1031.

SUPPLEMENTAL OPINION

Appeal from the Separate Juvenile Court of Lancaster County: REGGIE L. RYDER, Judge. Supplemental opinion: Former opinion modified. Motion for rehearing overruled.

Laura A. Lowe, P.C., for appellant.

Gary Lacey, Lancaster County Attorney, Barbara J. Armstead, Alicia B. Henderson, and Christopher Reid, Senior Certified Law Student, for appellee.

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

PER CURIAM.

Case No. A-09-1031 is before this court on the motion for rehearing filed by the State of Nebraska, appellee, regarding our opinion reported at *In re Interest of Emma J., ante* p. 389, 782 N.W.2d 330 (2010). We overrule the motion, but for purposes of clarification, we modify the opinion as follows:

That portion of the opinion designated "*Active Efforts and Expert Testimony*" in the analysis section and the portion designated "CONCLUSION," *id.* at 400-02, 782 N.W.2d at 338-39, are withdrawn, and the following language is substituted in their place:

> *Active Efforts and Expert Testimony.*
>
> Geneo next argues that the juvenile court erred in finding that the State made active efforts to provide remedial services and rehabilitative programs to prevent the breakup of the Indian family and that those efforts were unsuccessful, and in removing Emma from the family home and placing her in foster care without expert testimony as required under ICWA.
>
> The specific finding which Geneo contends was error is included in the September 30, 2009, adjudication order, wherein the juvenile court specifically found that active efforts had been made. However, there was no evidence adduced at the adjudication hearing regarding either active efforts or expert testimony. Thus, the juvenile court erred in making specific findings of fact in the September 30 order regarding issues not addressed at the adjudication hearing. However, upon our de novo review of the record, we find that said error was harmless and not prejudicial to Geneo, because the issue had previously been fully addressed in a hearing evidenced by a June 11 order found in the supplemental transcript.
>
> The supplemental transcript in this case, filed by the State, includes the June 11, 2009, order regarding a motion for temporary custody which indicates that after a hearing was held on the matter, the juvenile court found that active efforts had been made, including "a

pretreatment assessment, visitation for [Venessa], counseling services, and a comprehensive family assessment." The June 11 order further indicates that the juvenile court determined that Emma's therapist "is a professional person having substantial education and experience in the area of her specialty."

Therefore, the portion of the September 30, 2009, adjudication order regarding active efforts as to Emma's continued out-of-home placement was merely a continuation of the previously entered June 11 order and is not a final, appealable order as to the issue of Emma's continued out-of-home placement in the September 30 order. See *In re Interest of Enrique P. et al.*, 14 Neb. App. 453, 709 N.W.2d 676 (2006) (adjudication and disposition orders are final, appealable orders), and *In re Interest of Tayla R.*, 17 Neb. App. 595, 767 N.W.2d 127 (2009) (dispositional order which simply continues previous determination is not appealable order). In order to properly raise the out-of-home placement issue before this court, Geneo should have filed an appeal within 30 days of the June 11 order pursuant to Neb. Rev. Stat. § 25-1912 (Reissue 2008), and without such an appeal, Geneo cannot now claim that the juvenile court erred in its previous determination. See, also, *In re Interest of Andrew H. et al.*, 5 Neb. App. 716, 564 N.W.2d 611 (1997) (if order is not new, but merely continuation of previous order, it does not extend time for appeal).

CONCLUSION

In sum, we find that the proper burden of proof for the adjudication of an Indian child is by a preponderance of the evidence. In this case, the State proved by a preponderance of the evidence that Emma was a child within the meaning of § 43-247(3)(a). We further find that even though the juvenile court erred in making specific findings of fact regarding active efforts in the September 30, 2009, adjudication order, the error was harmless because the findings were merely a continuation from a previously entered order regarding out-of-home placement

and, therefore, were not reviewable in the instant appeal. Thus, we affirm the juvenile court's order of adjudication in its entirety.

AFFIRMED.

The remainder of the opinion shall remain unmodified.

FORMER OPINION MODIFIED.

MOTION FOR REHEARING OVERRULED.

E & E PROPERTY HOLDINGS, LLC, FORMERLY KNOWN AS ACCOMMODATION TITLEHOLDER TWENTY-ONE, LLC, APPELLEE AND CROSS-APPELLANT, V. UNIVERSAL COMPANIES, LLC, APPELLANT AND CROSS-APPELLEE.

788 N.W.2d 571

Filed August 17, 2010. No. A-09-940.

1. **Declaratory Judgments.** An action for declaratory judgment is sui generis; whether such action is to be treated as one at law or one in equity is to be determined by the nature of the dispute.
2. **Declaratory Judgments: Appeal and Error.** In an appeal from a declaratory judgment, an appellate court, regarding questions of law, has an obligation to reach its conclusion independently of the conclusion reached by the trial court.
3. ____: ____. Determinations of factual issues in a declaratory judgment action treated as an action at law will not be disturbed on appeal unless they are clearly wrong.
4. **Contracts: Declaratory Judgments.** When a dispute sounds in contract, the action for a declaratory judgment is to be treated as one at law.
5. **Contracts.** The meaning of a contract and whether a contract is ambiguous are questions of law.
6. **Contracts: Appeal and Error.** The interpretation of a contract involves a question of law, in connection with which an appellate court has an obligation to reach its conclusions independently of the determinations made by the court below.
7. **Breach of Contract: Damages.** A suit for damages arising from breach of a contract presents an action at law.
8. **Contracts.** A court interpreting a contract must first determine as a matter of law whether the contract is ambiguous.
9. **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.
10. **Contracts: Evidence.** If a contract is ambiguous, the meaning of the contract is a question of fact, and a court may consider extrinsic evidence to determine the meaning of the contract.

11. **Contracts.** A contract must receive a reasonable construction and must be construed as a whole, and if possible, effect must be given to every part of the contract.
12. **Contracts: Liability.** Two conditions must be met in order for an agreement to constitute a novation: (1) The agreement must completely extinguish the existing liability, and (2) a new liability must be substituted in its place.
13. **Breach of Contract: Damages.** In a breach of contract case, the ultimate objective of a damages award is to put the injured party in the same position the injured party would have occupied if the contract had been performed, that is, to make the injured party whole.

Appeal from the District Court for Lancaster County: ROBERT R. OTTE, Judge. Affirmed.

John M. Guthery and Derek A. Aldridge, of Perry, Guthery, Haase & Gessford, P.C., L.L.O., for appellant.

Craig C. Dirrim, of Woods & Aitken, L.L.P., for appellee.

MOORE and CASSEL, Judges.

PER CURIAM.

I. INTRODUCTION

Universal Companies, LLC (Universal), appeals the order of the Lancaster County District Court awarding E & E Property Holdings, LLC (E & E), a judgment in the amount of $100,000 pursuant to an escrow agreement between the parties. For the following reasons, we affirm.

II. STATEMENT OF FACTS

The dispute in this case arises from the purchase of a large cold-storage facility by Lincoln Poultry & Egg Company (Lincoln Poultry), a wholesale food service distributor, from Universal. Lincoln Poultry eventually assigned its rights to E & E Family Limited Partnership and then to Accommodation Titleholder Twenty-One, LLC, which was then renamed "E & E Property Holdings, LLC." The parties entered into a purchase agreement, which was a cooperative accumulation of the parties' discussions and negotiations regarding the sale of the facility. Included in the purchase agreement is section 3.D., which relates to possible repairs needed for the facility and provides:

i. Roof. In the event any work is required with respect to the roofing system including, but not limited to, the air/vapor barrier system, Buyer shall obtain a cost estimate for such work. Buyer shall be responsible for the first Twenty Five Thousand and No/100ths Dollars ($25,000.00) incurred in connection with such work and Seller shall be responsible for the next Fifty Thousand and No/100ths Dollars ($50,000.00) incurred in connection with such work. In the event the estimated cost of such work exceeds Fifty Thousand and No/100ths Dollars ($50,000.00), Buyer may, in its sole discretion, elect to terminate this Agreement in which event, the Earnest Money Deposit shall be promptly returned to Buyer, and neither Buyer nor Seller shall have any further obligation or liability to each other under this Agreement.

ii. Sprinkler System. In the event any work is required with respect to the sprinkler system, which work shall not include the installation or modification of in-rack sprinklers, Buyer shall obtain a cost estimate for such work. Buyer shall be responsible for the first Twenty Five Thousand and No/100ths Dollars ($25,000.00) incurred in connection with such work and Seller shall be responsible for the next Seventy Five Thousand and No/100ths Dollars ($75,000.00) incurred in connection with such work. In the event the estimated cost of such work exceeds Seventy Five Thousand and No/100ths Dollars ($75,000.00), Buyer may, in its sole discretion, elect to terminate this Agreement in which event, the Earnest Money Deposit shall be promptly returned to Buyer, and neither Buyer nor Seller shall have any further obligation or liability to each other under this Agreement.

iii. Sub-Floor. In the event any work is required with respect to any system protecting the sub-floor under the freezers, Buyer shall obtain a cost estimate for such work. Buyer shall be responsible for the first Twenty Five Thousand and No/100ths Dollars ($25,000.00) incurred in connection with such work and Seller shall be responsible for the next Twenty Five Thousand and No/100ths Dollars ($25,000.00) incurred in connection with such work. In

> the event the estimated cost of such work exceeds Twenty Five Thousand and No/100ths Dollars ($25,000.00), Buyer may, in its sole discretion, elect to terminate this Agreement in which event, the Earnest Money Deposit shall be promptly returned to Buyer, and neither Buyer nor Seller shall have any further obligation or liability to each other under this Agreement.
>
> In the event any work described in subsections (i), (ii) and/or (iii) is required, an amount equal to Seller's maximum liability with respect to such work (the "Escrowed Funds") shall be retained by the Title Company in escrow at Closing. The Escrowed Funds shall be disbursed to Buyer and/or its designee(s) from time to time by the Title Company upon receipt of invoices with respect to such work, in accordance with the allocation of costs set forth above. Upon completion of such work[, t]he Title Company shall release the remaining balance of the Escrowed Funds, if any, to Seller.

This purchase agreement was signed by representatives of both parties on May 5, 2006.

E & E purchased the facility for $5,850,000, and on August 1, 2006, in conjunction with the closing, the parties signed an escrow agreement which, in pertinent part, included the exact terms as set forth in section 3.D. of the purchase agreement above. However, unlike the purchase agreement, the escrow agreement contains an additional subsection, which provides:

> Upon the earlier of (i) receipt of written confirmation from Buyer that the roof, sprinkler and sub-floor repairs described in Section 3(D) of the Purchase Agreement have been completed or (ii) January 31, 2007, the Escrow Agent shall promptly deliver the remaining balance of the Escrowed Funds, if any, and all interest earned with respect thereto to Seller.

The escrow agreement also contains additional sections which indicated that the parties have agreed that, in the event of a conflict between provisions of the two agreements, the provisions of the escrow agreement shall prevail, and that time is of the essence in the performance of each party's obligations.

On January 31, 2007, Lincoln Poultry sent a letter via telecopy to the escrow agent, requesting disbursement from the escrow fund for repairs to the facility. The request includes disbursements of $48,480 for the roofing system, $75,000 for the sprinkler system, and $25,000 for the subfloor; attached to the request were the corresponding documents and invoices detailing the repairs and modifications to the facility. On the same day, Universal contacted the escrow agent and directed that no funds were to be released, because E & E had missed the deadline to submit any claim for release of the funds.

On July 6, 2007, E & E filed a complaint in Lancaster County District Court and alleged that Universal had breached the purchase agreement by failing to remit payment for the agreed-upon facility repairs. E & E requested that the court award a judgment for those costs and an award of not less than $100,000 in damages. E & E alleged that repairs and modifications for the sprinkler system totaled $111,778.30, repairs for the subfloor totaled $98,400, and the necessary repairs for the roof would cost $73,480.

Universal filed an answer and counterclaim which generally denied the allegations set forth in E & E's complaint and, further, alleged that E & E had not incurred any expenses for the roof and that the expenses which were incurred for the sprinkler system and subfloor were not covered by either the purchase or escrow agreement. Universal also alleged that the claim for those funds in escrow was untimely and requested a declaratory judgment for those funds, plus interest.

Trial was held on the matter, and Richard Evnen, the chief executive officer of Lincoln Poultry, testified that the escrow agreement was drafted jointly by representatives from both parties, such that E & E's counsel drafted the original draft and submitted it to Universal, which in turn made changes pursuant to negotiations and conversations with both parties. Evnen testified that the subfloor repairs were completed in 2006 and that the sprinkler repairs were completed in early 2007. Evnen explained that the repairs to the sprinkler system and cost associated with those repairs did not include the installation or modification of in-rack sprinklers as required in both agreements. Evnen testified that a cost estimate was obtained

for the roof system but that, at the time of trial, the repairs had not been made. Evnen testified that it was his understanding the claims had to be submitted to the escrow agent by January 31, 2007, not before, and that had he believed the claims had to be submitted before January 31, the invoices would have been submitted before that date. On cross-examination, Evnen explained that he had sent an e-mail which indicated that the roofing proposals needed to be presented before January 31, but that he wanted some additional time for the attorney to look at the submissions before they were given to the escrow agent.

John Jacobson, owner-manager of Universal, testified that he was the owner of the facility before it was sold to Lincoln Poultry and was the main person involved in the negotiations for the sale with Evnen and Lincoln Poultry. Jacobson explained that Evnen had some concerns with necessary repairs for the facility and that through the purchase agreement, Jacobson agreed to the dollar amounts indicated in section 3.D. of the purchase agreement. Jacobson indicated that, before closing on the facility, Evnen had a preliminary draft of the escrow agreement sent to Jacobson, but that the preliminary draft did not have a "sunset," or a date which repairs would be completed. Jacobson indicated it was his position that any repairs to the facility were required to be completed and invoiced before January 31, 2007, or the escrow funds were to be immediately returned to Universal. Jacobson testified that he believed Universal's obligation was extinguished at midnight on January 30, 2007.

The district court first determined that Universal's obligations to share in the costs of repairs and modifications necessary were governed by the escrow agreement and that the language of the escrow agreement regarding the January 31, 2007, deadline to submit invoices was ambiguous. The court found that the "language as to this deadline is awkward and capable of creating confusion . . . . If that ambiguity is not resolved in favor of [E & E, it] will have lost substantial rights that it bargained for." The court determined that Universal was aware the facility was in need of repairs and that those repairs were considered in the original negotiations.

The court found that to find the language was not ambiguous would have been clearly inequitable and that therefore, E & E's submission of invoices and demand for payment on January 31 were timely.

The district court next determined that the roof repairs were not completed and had not even been started and that thus, under the escrow agreement, E & E was not entitled to any payment for estimated repairs to the roof. However, the district court did determine that the repairs to the sprinklers and subfloor were completed and that thus, E & E was entitled to $75,000 and $25,000 from Universal per the escrow agreement.

Finally, the district court found that both parties were "sophisticated businesses with competent representation and counsel . . . and the Purchase Agreement . . . states that no inference in favor of any party should be drawn." The court concluded that, while there was no similar clause in the escrow agreement, the parties intended to close the multimillion-dollar transaction as contemplated in the purchase agreement, and that therefore, no inference would be drawn in favor of either party. The court also ordered that any funds remaining in the escrow account after payment of the judgment to E & E be disbursed to Universal. It is from this order that Universal has appealed and E & E has cross-appealed.

III. ASSIGNMENTS OF ERROR

Universal assigns, rephrased and consolidated, that the district court erred by (1) determining that the escrow agreement was ambiguous, (2) interpreting and constructing the alleged ambiguous portion of the escrow agreement, (3) finding that E & E was entitled to $75,000 from the escrowed funds for the sprinkler system and $25,000 for the subfloor, and (4) finding that no adverse inference should be drawn against E & E as drafter of the contract documents.

E & E has cross-appealed and assigns that the district court erred by concluding that the escrow agreement modified and replaced the purchase agreement and in failing to award damages for breach of the purchase agreement.

IV. STANDARD OF REVIEW

[1-3] An action for declaratory judgment is sui generis; whether such action is to be treated as one at law or one in equity is to be determined by the nature of the dispute. *State Farm Mut. Auto. Ins. Co. v. Allstate Ins. Co.*, 268 Neb. 439, 684 N.W.2d 14 (2004). In an appeal from a declaratory judgment, an appellate court, regarding questions of law, has an obligation to reach its conclusion independently of the conclusion reached by the trial court. *Id.* Determinations of factual issues in a declaratory judgment action treated as an action at law will not be disturbed on appeal unless they are clearly wrong. *Id.*

[4,5] When a dispute sounds in contract, the action for a declaratory judgment is to be treated as one at law. See *Spanish Oaks v. Hy-Vee*, 265 Neb. 133, 655 N.W.2d 390 (2003). The meaning of a contract and whether a contract is ambiguous are questions of law. *Pavers, Inc. v. Board of Regents*, 276 Neb. 559, 755 N.W.2d 400 (2008); *Kluver v. Deaver*, 271 Neb. 595, 714 N.W.2d 1 (2006).

[6] The interpretation of a contract involves a question of law, in connection with which an appellate court has an obligation to reach its conclusions independently of the determinations made by the court below. *Albert v. Heritage Admin. Servs.*, 277 Neb. 404, 763 N.W.2d 373 (2009).

[7] A suit for damages arising from breach of a contract presents an action at law. *Id.*

V. ANALYSIS

1. Universal's Appeal

(a) Contract Ambiguity

[8] Universal's first two assignments of error involve ambiguity and interpretation of the escrow agreement. A court interpreting a contract must first determine as a matter of law whether the contract is ambiguous. *State ex rel. Bruning v. R.J. Reynolds Tobacco Co.*, 275 Neb. 310, 746 N.W.2d 672 (2008); *Kluver v. Deaver, supra*. Thus, we first address Universal's contention that the district court erred in its determination

that the escrow agreement, specifically subsection 3.d., was ambiguous.

[9,10] 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. *Kluver v. Deaver, supra*. If a contract is ambiguous, the meaning of the contract is a question of fact, and a court may consider extrinsic evidence to determine the meaning of the contract. *Eagle Run Square II v. Lamar's Donuts Internat.*, 15 Neb. App. 972, 740 N.W.2d 43 (2007).

Subsection 3.d. of the escrow agreement requires that, upon the earlier occurrence of two events, the escrow agent shall promptly deliver the remaining balance of the escrow funds, with interest, to Universal. The two triggering events are "(i) receipt of written confirmation from [E & E] that the roof, sprinkler and sub-floor repairs described in Section 3(D) of the Purchase Agreement have been completed or (ii) January 31, 2007." Part (ii), setting forth the date of January 31, 2007, with no specific time requirement, creates an ambiguity as to whether E & E has to submit the required documents prior to January 31 or whether E & E has until the end of the day on January 31 to submit the required documents.

This subsection's ambiguity is further illustrated by both parties' interpretation of this section of the escrow agreement. At trial, Jacobson testified that it was Universal's position that the inclusion of January 31, 2007, required document submission before that date, whereas Evnen testified that E & E interpreted the same terms to mean that the document had to be submitted by that date, not before. Thus, clearly the inclusion in the escrow agreement of only the date "January 31, 2007," with no time-specific deadline is susceptible of at least two reasonable but conflicting interpretations.

[11] Next, Universal argues that the district court's interpretation and construction of the date in the agreement were erroneous. A contract must receive a reasonable construction and must be construed as a whole, and if possible, effect must be given to every part of the contract. *Kluver v. Deaver*, 271 Neb. 595, 714 N.W.2d 1 (2006).

Upon our review of the record, it is clear that the parties entered into a multimillion-dollar agreement for the purchase of this facility. The evidence in the record is undisputed that Universal knew repairs to the facility it was selling were necessary, and Universal assumed liability for the amounts for repairs as set forth in the purchase and escrow agreements. In sum, we find no error in the district court's determination that the language contained in subsection 3.d. of the escrow agreement was ambiguous and in its determination that the terms of the escrow agreement required submission of documents by the end of the day on January 31, 2007.

(b) E & E's Entitlement to $100,000 Escrow Funds

Universal contends that the district court erred by finding that E & E was entitled to $100,000 of the escrowed funds for sprinkler system and subfloor repairs, because E & E's submission of costs to the escrow agent was untimely and, further, because Universal was not obligated to pay $75,000 for the sprinkler work completed. Having determined above that the escrow agreement allowed for submission of the documents on January 31, 2007, as submitted by E & E, we need not further address Universal's contention that the district court erred in awarding a judgment due to untimely submission.

Therefore, the remaining issue is whether Universal was obligated to pay $75,000 for the sprinkler system repairs. Keeping in mind that the agreement between these parties must receive a reasonable construction and must be construed as a whole, and that, if possible, effect must be given to every part of the contract, the language of the purchase agreement provides that, regarding repairs to the sprinkler system, E & E was responsible for the first $25,000 of repairs and Universal was responsible for the next $75,000 "[i]n the event any work is required with respect to the sprinkler system, which work shall not include the installation or modification of in-rack sprinklers . . . ." The escrow agreement contains identical provisions. The record contains a cost estimate for sprinkler system repairs in the amount of $360,000 and an invoice dated January 9, 2007, for $111,778.30. A representative for the company in charge

of the repairs testified that those repairs invoiced had been finished in January and that the repairs did not include or involve in-rack sprinklers. In reviewing this evidence, we find there is nothing in the record to substantiate Universal's contention that it was not obligated to pay $75,000 to E & E for those repairs. Therefore, the district court did not err in awarding E & E judgment for said repairs and Universal's assignment of error is without merit.

(c) Adverse Inference

Universal also argues that the district court erred in finding that no adverse inference should be drawn against E & E as the drafter of the contract documents. In support of this contention, Universal cites to the case of *Lexington Ins. Co. v. Entrex Comm. Servs.*, 275 Neb. 702, 749 N.W.2d 124 (2008). Universal argues that *Lexington Ins. Co.* stands for the proposition that "Nebraska courts apply the general rule that when there is a question about the meaning of the contract's language, the contract will be construed against the party preparing it." Brief for appellant at 26-27. While we agree with this statement of the law, we find the facts of this case do not fall within the premise of many cases in which a contract is construed against the party preparing it. See, *Artex, Inc. v. Omaha Edible Oils, Inc.*, 231 Neb. 281, 436 N.W.2d 146 (1989); *Gard v. Pelican Publishing Co.*, 230 Neb. 656, 433 N.W.2d 175 (1988). We come to this conclusion based upon the record and testimony given that both parties were involved in the negotiation of the agreement terms, in addition to any changes or modifications necessary. In fact, a close review of the testimony given by Jacobson indicates that the first draft of the escrow agreement did not contain a date requirement in subsection 3.d. and that it was only upon his insistence that the January 31, 2007, date was added to the agreement at all. Thus, if this court were to apply the principles as Universal argues, the general rule would require us to construe the very terms of the agreement against Universal. The district court did not err by failing to draw an adverse inference against either party, and as such, we find that Universal's assignment of error is without merit.

2. E & E's Cross-Appeal

(a) Novation

On cross-appeal, E & E argues that the district court erred by concluding that the escrow agreement modified and replaced the purchase agreement, claiming that this resulted in novation.

[12] Two conditions must be met in order for an agreement to constitute a novation: (1) The agreement must completely extinguish the existing liability, and (2) a new liability must be substituted in its place. See, *Mackiewicz v. J.J. & Associates*, 245 Neb. 568, 514 N.W.2d 613 (1994); *Wheat Belt Pub. Power Dist. v. Batterman*, 234 Neb. 589, 452 N.W.2d 49 (1990); *Thomas v. George*, 105 Neb. 44, 178 N.W. 922 (1920), *modified* 105 Neb. 51, 181 N.W. 646 (1921).

A close review of the record indicates that the district court did not make any determination that a novation had occurred, and in fact, novation was neither pled nor presented to the trial court. Throughout the proceedings, E & E has maintained that the purchase agreement and the escrow agreement provided independent and separate obligations regarding the repairs to the facility, not that a novation had occurred. The district court determined that the escrow agreement modified the terms of the purchase agreement, but did not create a second separate and independent obligation.

Upon our review of the record, the testimony from both parties indicates that section 3.D. of the purchase agreement was drafted to indicate both parties were aware of necessary repairs to the facility and that, through negotiations, dollar amounts were placed concerning each party's liability as to those repairs. It is also clear from the testimony and evidence in the record that the escrow agreement was drafted in order to more clearly specify the terms of the anticipated repairs to the facility. The terms in both section 3 of the escrow agreement and section 3.D. of the purchase agreement are identical, except that there is no fourth subsection in the purchase agreement regarding the deadline for E & E to submit the required documents to the escrow agent in order to receive reimbursement for those repair costs. No determination was made that the purchase agreement

was extinguished or that new liability was created, and accordingly, E & E's claim that the district court erred in finding a novation had occurred is without merit.

(b) Damages

E & E also contends on cross-appeal that the district court erred by failing to award $148,480 in damages for Universal's breach of the purchase agreement, in addition to the $100,000 judgment awarded pursuant to the escrow agreement.

[13] In a breach of contract case, the ultimate objective of a damages award is to put the injured party in the same position the injured party would have occupied if the contract had been performed, that is, to make the injured party whole. *Aon Consulting v. Midlands Fin. Benefits*, 275 Neb. 642, 748 N.W.2d 626 (2008). To award E & E damages for breach of the purchase agreement, as suggested, would essentially be to allow E & E to collect double damages arising from one set of obligations. The district court did not err by declining to award E & E additional damages.

VI. CONCLUSION

In conclusion, we find that the district court did not err in determining that the escrow agreement was ambiguous and in its interpretation and construction that E & E's submission of the required documents to the escrow agent was timely. We further find that the district court did not err in awarding E & E a judgment of $25,000 for facility repairs to the subfloor and $75,000 for the sprinkler system and, additionally, by determining that no adverse inference be drawn against either party. Finally, we find that the issues raised by E & E on cross-appeal are without merit. Therefore, the judgment of the district court is affirmed in its entirety.

AFFIRMED.

INBODY, Chief Judge, participating on briefs.

STATE OF NEBRASKA, APPELLEE, V. AARON D. MANNING, APPELLANT.

789 N.W.2d 54

Filed August 17, 2010. No. A-09-1174.

1. **Motions to Vacate: Proof: Appeal and Error.** An appellate court will reverse a decision on a motion to vacate or modify a judgment only if the litigant shows that the district court abused its discretion.
2. **Postconviction: Final Orders.** An order denying a defendant's request for an evidentiary hearing on postconviction relief is a final order.
3. **Pleadings: Time: Appeal and Error.** The 30-day appeal period is tolled only by a timely motion for new trial, a timely motion to alter or amend a judgment, or a timely motion to set aside the verdict. All of such motions must be filed within 10 days of the entry of judgment in order to toll the 30-day time in which to appeal.
4. **Courts: Jurisdiction.** In civil cases, a court of general jurisdiction has inherent power to vacate or modify its own judgments at any time during the term at which they are rendered.
5. **Postconviction.** Postconviction relief is not part of a criminal proceeding and is considered civil in nature.
6. **Postconviction: Constitutional Law: Proof.** A defendant moving for postconviction relief must allege facts which, if proved, constitute a denial or violation of his or her rights under the Nebraska or U.S. Constitution.
7. **Postconviction: Statutes.** Postconviction relief statutes simply do not accord the opportunity to amend a pleading after the court determines that it is insufficient to necessitate an evidentiary hearing.
8. **Postconviction: Motions to Vacate: Appeal and Error.** In assessing whether the trial court abused its discretion in denying a motion to vacate, which sought to amend a postconviction motion after a final order had been entered dismissing the motion, it is not inappropriate to look at the nature of the proposed amendment.
9. **Postconviction: Sentences.** Neb. Rev. Stat. § 29-3001 (Reissue 2008) requires only that the postconviction motion be filed in the court where the sentence was imposed, not that it be heard by the sentencing judge.

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

Robert Wm. Chapin, Jr., for appellant.

Jon Bruning, Attorney General, and James D. Smith for appellee.

IRWIN, SIEVERS, and CARLSON, Judges.

SIEVERS, Judge.

INTRODUCTION

Aaron D. Manning pled no contest to two counts of attempted first degree murder and filed a direct appeal to this court, which we dismissed without opinion at Manning's request. See *State v. Manning*, 14 Neb. App. xliv (case No. A-05-1112, Dec. 19, 2005). He then filed a motion for postconviction relief. The district court for Buffalo County denied any relief without granting an evidentiary hearing. Manning did not file a timely motion to toll the running of the 30-day appeal time, but did file a "Motion to Vacate Judgment and Motion to Amend Motion for Postconviction Relief" (motion to vacate), which the district court denied. Manning then appealed to this court.

Because Manning's appeal is only from the district court's order denying his motion to vacate a final order denying postconviction relief, we cannot address any issues beyond the denial of the motion to vacate. Pursuant to our authority under Neb. Ct. R. App. P. § 2-111(B)(1) (rev. 2008), we have ordered this case submitted for decision without oral argument.

FACTUAL AND PROCEDURAL BACKGROUND

As the result of events on October 31, 2004, Manning was charged with two counts of attempted first degree murder and two counts of use of a weapon to commit a felony. Manning pled no contest to the two attempted first degree murder charges in exchange for the State's agreement to dismiss the weapon use charges. According to the State's factual basis, on Halloween in 2004, Manning went to a house in Odessa, Nebraska, where the wife and daughter of his friend Jim Haga resided. Manning's friend was estranged from his wife and daughter at that time. Manning was costumed as a surgeon and attacked both the wife and daughter with a scalpel. Manning cut both victims' necks and throats and the daughter's face. Neither victim died, but a doctor would have testified that the cuts were within millimeters of hitting either their jugular veins or carotid arteries. Manning did not stop his attack until after the daughter stabbed him with a knife and the surgical mask

he was wearing came off, allowing the victims to identify him. The district court sentenced Manning to 40 to 50 years' imprisonment on each count and ordered that the sentences be served concurrently. Manning filed a direct appeal with this court which was docketed as our case No. A-05-1112. Manning then filed a motion requesting that we dismiss this appeal, and we granted that motion.

It was not until July 30, 2009, that Manning filed the motion for postconviction relief that resulted in this appeal. Among other things, Manning alleged that he was "denied his right to exculpatory evidence in possession of [the State] which would have aided [Manning]." Manning alleged that there was evidence that he was part of a conspiracy and showed that he "abandoned and refuse[d] to go through with the conspiratorial act."

In an order dated September 11, 2009, the district court determined that Manning was not entitled to an evidentiary hearing and denied his motion for postconviction relief in its entirety. Specifically, the court denied Manning's request for postconviction relief as to the alleged exculpatory evidence because his motion "fails to set forth any factual basis and fails to describe the nature and content of the purported exculpatory evidence."

On October 5, 2009, Manning filed the motion to vacate that we referenced previously in our introduction. In the motion to vacate, Manning requested relief pursuant to Neb. Rev. Stat. § 25-2001(1) (Reissue 2008). Manning alleged certain facts known to the State, which Manning asserted were previously unknown to him. Manning believed these facts would have been helpful to him in the original criminal case. The facts were as follows: Haga was accused of "sexually molesting" his daughter and set to be tried in late 2004. A friend of Haga's wife received a threatening letter in 2005 advising her that she "made a huge f-ing mistake running to the police to report our friend," that "all involved will take the punishment," and that she should "watch out." In addition, this same friend of Haga's wife received a visit from two costumed men on October 31, 2004, at about the same time as Manning was committing the crime. The men asked who

was home and left after they learned that Haga's daughter was not there.

On October 28, 2009, the court denied Manning's motion to vacate filed on October 5. Manning filed the instant appeal on November 30.

ASSIGNMENTS OF ERROR

Manning assigns, as restated, that the district court erred in (1) denying his motion to vacate the judgment and denying postconviction relief, (2) not allowing him to amend his motion for postconviction relief, and (3) not permitting the sentencing judge to rule on his motions.

STANDARD OF REVIEW

[1] An appellate court will reverse a decision on a motion to vacate or modify a judgment only if the litigant shows that the district court abused its discretion. *Eihusen v. Eihusen*, 272 Neb. 462, 723 N.W.2d 60 (2006).

ANALYSIS

Jurisdiction.

The State asserts that our jurisdiction in the instant appeal is limited. We agree. Because Manning did not file a notice of appeal within 30 days of the September 11, 2009, order dismissing his postconviction motion, and because he did not file any timely motions to toll the appeal period, our appellate jurisdiction is limited to review of the district court's October 28 order denying Manning's motion to vacate.

[2,3] Pursuant to Neb. Rev. Stat. § 25-1912 (Reissue 2008), a party must file an appeal within 30 days of the entry of a judgment, decree, or final order. An order denying a defendant's request for an evidentiary hearing on postconviction relief is a final order. See *State v. Poindexter*, 277 Neb. 936, 766 N.W.2d 391 (2009). The 30-day appeal period is tolled only by a timely motion for new trial, a timely motion to alter or amend a judgment, or a timely motion to set aside the verdict. See § 25-1912(3). All of such motions must be filed within 10 days of the entry of judgment in order to toll the 30-day time in which to appeal. See Neb. Rev. Stat. §§ 25-1144.01, 25-1315.02, and 25-1329 (Reissue 2008).

Manning's motion to vacate the judgment, which also asked for leave to amend his motion for postconviction relief, was filed on October 5, 2009, obviously well outside the 10-day timeframe for a tolling motion. Therefore, this appeal is simply an appeal from the October 28 order denying the motion to vacate. Thus, we can only consider the arguments related to the October 28 order.

Motion to Vacate.

Manning asserts that the district court erred in denying his October 5, 2009, motion to vacate the district court's September 11 judgment. Specifically, Manning asserts that he is entitled to relief pursuant to § 25-2001. However, § 25-2001 does not apply to the instant case. Section 25-2001 pertains to the power of a district court to modify its judgments after the end of a term, but within 6 months of the entry of the judgment. The applicable district court rules specify that the term of the district court is the calendar year. See Rules of Dist. Ct. of Ninth Jud. Dist. 9-1 (rev. 1995). Because Manning's motion to vacate was filed in the same calendar year, § 25-2001 does not apply.

[4,5] Admittedly, a district court has broad inherent powers to vacate or modify its own judgment during term. In civil cases, a court of general jurisdiction has inherent power to vacate or modify its own judgments at any time during the term at which they are rendered. *Destiny 98 TD v. Miodowski*, 269 Neb. 427, 693 N.W.2d 278 (2005). Postconviction relief is not part of a criminal proceeding and is considered civil in nature. *State v. Pratt*, 273 Neb. 817, 733 N.W.2d 868 (2007). The district court's ability to modify a judgment during term is virtually unlimited. See *Eicher v. Mid America Fin. Invest. Corp.*, 275 Neb. 462, 748 N.W.2d 1 (2008).

Nonetheless, we find that the district court did not abuse its discretion in denying Manning's motion. Manning argues that the district court erred in denying his motion to vacate as to the issue of the exculpatory evidence which he asserts the State failed to provide to him prior to his plea. According to Manning's postconviction counsel, Manning's motion to vacate set forth, with more particularity, the nature of the problem

which Manning sought to plead in his postconviction motion. We quote counsel's comments to the court during the hearing on Manning's motion to vacate:

> Obviously from the initial pleading that was made, obviously the Court may have had some problem understanding what we were talking about in terms of where we thought there may be a problem in this case, and so as part of my motion [we have] detailed some of the — with a little bit more particulars, specifically what our problem is. Specifically, the fact that a letter was received by a friend of [Haga's wife]. And that on the same night [Haga's wife] was attacked by . . . Manning, that in fact there are people on the doorstep of [Haga's wife's friend], and shortly thereafter she received the letter which is attached as Exhibit A to my motion to vacate.

Counsel's quoted statement reveals that through the October 5, 2009, motion to vacate, Manning sought to allege with more particularity already known facts underlying Manning's request for postconviction relief.

[6] The district court initially denied this portion of Manning's postconviction motion because it did not include a factual basis. It is well known that the failure to include a factual basis is fatal to a claim for postconviction relief. A defendant moving for postconviction relief must allege facts which, if proved, constitute a denial or violation of his or her rights under the Nebraska or U.S. Constitution. *State v. Thomas*, 278 Neb. 248, 769 N.W.2d 357 (2009). Manning's original postconviction motion did not describe the nature of the allegedly exculpatory evidence the State supposedly withheld from Manning before he entered his plea. Accordingly, the problem which Manning sought to remedy was his own failure to draft an adequate postconviction motion. Given that postconviction counsel's quoted statement shows that Manning was aware of the allegedly withheld evidence at the time of filing the postconviction motion, we cannot conclude that the district court abused its discretion in denying Manning's motion to vacate—which was, in effect, a late-filed motion to amend to alleged facts known at the time of the pleading.

Amendment of Pleadings.

Manning also argues it is inequitable that he did not receive the opportunity to submit an amended postconviction motion once the court determined the pleading was insufficient, as is permitted in other civil cases. We suspect that Manning has in mind the former rule, now supplanted by notice pleading in civil cases: Upon the sustaining of a demurrer, a litigant must be given an opportunity to amend unless there is no reasonable possibility the defect can be cured to state a cause of action. See *Kubik v. Kubik*, 268 Neb. 337, 683 N.W.2d 330 (2004). Thus, this argument is based on a proposition rendered inapplicable by the adoption of notice pleading in Nebraska in all civil actions after January 1, 2003. See *id.* That said, postconviction relief under Neb. Rev. Stat. § 29-3001 (Reissue 2008) is a very narrow category of relief. *State v. Lotter*, 278 Neb. 466, 771 N.W.2d 551 (2009). And, such actions have their own pleading requirements.

[7,8] Section 29-3001 specifically provides that "[u]nless the motion and the files and records of the case show to the satisfaction of the court that the prisoner is entitled to no relief, the court shall . . . grant a prompt hearing thereon . . . ." Conversely, where no such showing is made, the request for a hearing is denied. See *State v. Thomas, supra*. Postconviction relief statutes simply do not accord the opportunity to amend a pleading after the court determines that it is insufficient to necessitate an evidentiary hearing. Manning has cited no legal authority which requires us to conclude otherwise. Finally, in assessing whether the trial court abused its discretion in denying the motion to vacate, which sought to amend the postconviction motion after a final order had been entered dismissing the motion, it is not inappropriate to look at the nature of the proposed amendment. Having done that, we fail to understand, and Manning does not explain, how the allegedly withheld information is in any way exculpatory, and would have made any difference on the fundamental question of whether he attempted to murder a mother and her daughter—as he admitted he did via his plea. For several reasons, there was no abuse of discretion in denying the motion to vacate.

Assignment of Sentencing Judge to Postconviction Proceedings.

[9] Manning asserts that § 29-3001 requires that the postconviction proceeding be heard by the judge that sentenced him. However, we conclude that this is not the case. Section 29-3001 provides that a prisoner "may file a verified [postconviction] motion at any time in the court which imposed such sentence." The plain language of § 29-3001 requires only that the postconviction motion be filed in the court where the sentence was imposed—not that it be heard by the sentencing judge. Therefore, this assignment of error is also without merit.

CONCLUSION

We conclude that the district court did not abuse its discretion in overruling Manning's motion to vacate the district court's final order denying postconviction relief. His other assigned errors lack merit.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V.
JASON M. PASSERINI, APPELLANT.
789 N.W.2d 60

Filed August 31, 2010. No. A-09-667.

1. **Investigative Stops: Warrantless Searches: Probable Cause: Appeal and Error.** When reviewing a district court's determinations of reasonable suspicion to conduct an investigatory stop and probable cause to conduct a warrantless search, ultimate determinations of reasonable suspicion and probable cause are reviewed de novo on the record. However, findings of historical fact to support that determination are reviewed for clear error, giving due weight to the inferences drawn from those facts by the trial court.
2. **Investigative Stops: Motor Vehicles: Probable Cause.** A traffic violation, no matter how minor, creates probable cause to stop the driver of a vehicle.
3. **Investigative Stops: Motor Vehicles: Police Officers and Sheriffs.** Once a vehicle is lawfully stopped, a law enforcement officer may conduct an investigation reasonably related in scope to the circumstances that justified the traffic stop.

4. ____: ____: ____. A traffic stop investigation may include asking the driver for an operator's license and registration, requesting that the driver sit in the patrol car, and asking the driver about the purpose and destination of his or her travel. Also, the officer may run a computer check to determine whether the vehicle involved in the stop has been stolen and whether there are outstanding warrants for any of its occupants.
5. **Investigative Stops: Motor Vehicles: Police Officers and Sheriffs: Probable Cause.** In order to expand the scope of a traffic stop and continue to detain the motorist for the time necessary to deploy a drug detection dog, an officer must have a reasonable, articulable suspicion that the person is involved in criminal activity beyond that which initially justified the interference.
6. **Probable Cause: Words and Phrases.** Reasonable suspicion entails some minimal level of objective justification for detention, something more than an inchoate and unparticularized hunch, but less than the level of suspicion required for probable cause.
7. **Investigative Stops: Police Officers and Sheriffs: Probable Cause.** Whether a police officer has a reasonable suspicion based on sufficient articulable facts depends on the totality of the circumstances and must be determined on a case-by-case basis.
8. ____: ____: ____. If reasonable suspicion exists, the court must then consider whether the detention was reasonable in the context of an investigative stop, considering both the length of the continued detention and the investigative methods employed.
9. **Investigative Stops: Motor Vehicles: Probable Cause.** When a determination is made to detain a person during a traffic stop, even where each factor considered independently is consistent with innocent activities, those same factors may amount to reasonable suspicion when considered collectively.
10. **Investigative Stops: Police Officers and Sheriffs: Probable Cause.** Although a motorist's nervousness is an appropriate factor for consideration within the totality of the circumstances of a prolonged traffic stop, its presence is of limited significance generally.
11. ____: ____: ____. An individual's criminal history may be a relevant factor when determining whether an officer has reasonable suspicion to detain an individual. However, such history cannot form the sole basis to determine reasonable suspicion to support detention.

Appeal from the District Court for Lancaster County: JEFFRE CHEUVRONT, Judge. Reversed and remanded with directions.

Robert B. Creager, of Anderson, Creager & Wittstruck, P.C., for appellant.

Jon Bruning, Attorney General, and Nathan A. Liss for appellee.

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

INBODY, Chief Judge.

I. INTRODUCTION

Jason M. Passerini appeals the decision of the Lancaster County District Court denying his motion to suppress evidence obtained as a result of a canine sniff search of the rental vehicle he drove. Passerini assigns error as to the motion to suppress, the reliability of the canine sniff, and the sufficiency of the subsequent conviction for possession of a controlled substance with the intent to deliver.

II. STATEMENT OF FACTS

On October 16, 2007, David Frye, a trooper with the Nebraska State Patrol, and Bradley Hulse, an officer with the Lincoln Police Department, observed a pickup truck traveling eastbound on Interstate 80, near Lincoln, Nebraska. Frye and Hulse observed a barcode on the rear window, which indicated to them that the truck was a rental vehicle. Frye and Hulse also indicated that it was unusual that the driver of the truck did not look in their direction in passing, but appeared to be tense and looked straight ahead, placing his hands "at ten and two" on the steering wheel. Frye pulled his cruiser near the truck, which slowed to approximately 5 miles an hour below the speed limit. Hulse observed that, after traveling behind the truck for approximately 6 miles and upon reaching the Waverly, Nebraska, exit on the interstate, the truck abruptly braked and exited without using its turn signal. Hulse observed the activation of the turn signal after the truck had left the interstate and traveled some distance on the exit ramp. Frye, still traveling on the interstate, pulled his cruiser to the median to allow traffic to pass and then proceeded to follow the truck.

The truck pulled up to a gas pump at a service station approximately 1½ miles from the interstate exit, at which time Frye activated his cruiser's overhead lights and made contact with the driver of the truck, Passerini. Frye approached Passerini and explained that he stopped him for failure to use his turn signal at the exit and that he was going to issue him a warning. Frye asked Passerini if he had any weapons on him,

and Passerini indicated to Frye that he had a small pocketknife. Frye had him place the pocketknife on the rear bumper of the truck, and Passerini consented to a pat-down search by Frye. Frye then asked that Passerini sit in the cruiser while he issued the warning.

While sitting in the cruiser, Frye questioned Passerini about why he had chosen the Waverly exit for gas and food versus the various other visible service stations and restaurants he passed. Frye also questioned Passerini regarding whether he had ever been cited for any weapons or drug offenses, and Passerini indicated that he was arrested for something in conjunction with filling out a gun permit, but was never convicted, and also had a charge as a juvenile which dealt with drugs.

Passerini indicated to Frye that he had been living in Reno, Nevada, with his uncle for the past several months and had been helping on his uncle's ranch. Passerini explained that he was traveling back to his home state of Pennsylvania to take care of his barn, which had burned down in August 2009. Frye continued to question Passerini about various subjects, and after 19 minutes had passed since the stop was initiated, Frye explained why he stopped Passerini and how it was a violation of Nebraska law. Frye then gave Passerini the warning and his vehicle rental papers and told Passerini that he was finished with the traffic stop. After 21 minutes had passed, Frye began to question Passerini again about his living situation and travel plans. Passerini interrupted Frye and asked Frye whether he was "done now." Frye indicated to Passerini that he was in fact done with the traffic stop but asked whether he had anything illegal in the truck and asked for consent to search the truck. Passerini told Frye that if the traffic stop was indeed over, he wanted to leave. Frye then began to question Passerini as to whether he supported law enforcement and the pursuit of terrorists and again asked for consent to search the truck. Passerini indicated that "he had already been searched" in Salt Lake City, Utah, and did not want to go through the process again. Again, Frye explained to Passerini that no one knows what a terrorist looks like and thus, that it was his job to search vehicles traveling on the interstate. Frye again asked for consent to search, which Passerini declined. Frye then asked

whether Passerini would consent to a canine search of the truck, to which Passerini again declined and indicated to Frye that, since Frye had said the stop was over, he was going to get his gas and food and leave.

Approximately 27 minutes after the initial stop, Frye replied, "[A]ctually right now you are detained. You're not free to go anywhere, based upon my suspicions I am now detaining you." Frye again asked for consent to search the truck, which Passerini denied. Frye then confronted Passerini about his criminal history after discovering from dispatch that Passerini had two prior contacts involving drugs (although it is unclear from the record when this information was received). After 29 minutes, Frye asked Passerini for consent to search the truck and Passerini again asked to leave. Frye again indicated to Passerini that he could not leave and contacted dispatch for assistance with a canine sniff of the truck.

After a brief silence, Frye again began to question Passerini about his prior drug offenses and contacted dispatch to speak directly with Frye and Passerini regarding the prior offenses discovered after running his name through the system. Frye also continued to question Passerini about his travel plans and history of living in Reno.

Approximately 48 minutes after the initial stop, 29 minutes after Frye first indicated that the reason for the initial traffic stop was finished and Passerini first indicated that he wanted to leave, Gordon Downing, a trooper with the Nebraska State Patrol, arrived with his drug detection dog. A canine sniff of the vehicle was immediately conducted. The dog alerted Downing to the pocketknife still located on the bumper of the truck and also alerted at the driver's-side window. Upon searching the truck, troopers located a suitcase, and several packaged bags of marijuana were located within the suitcase and seized. Passerini was arrested approximately 57 minutes after the initial stop and eventually charged with possession of a controlled substance with the intent to distribute.

On February 7, 2008, Passerini filed a motion to suppress evidence obtained as a result of the continued stop of his truck by the Nebraska State Patrol. The motion alleged that law enforcement lacked reasonable suspicion and violated his 4th

and 14th Amendment rights. Passerini also filed a "Motion for Daubert Hearing and Determination of Admissibility of Drug Dog Evidence," which motion alleged that the drug detection dog was unreliable and that as such, there was no probable cause for law enforcement to search the vehicle.

At the hearing, Frye testified that, on October 16, 2007, he was on patrol at the 27th Street exit on Interstate 80 with Hulse, who was on a "ride along." Frye testified that his attention was first drawn to the truck driven by Passerini because the truck had Nevada license plates and appeared to be a rental vehicle. Frye testified that the driver changed his behavior by sitting up straight and placing his hands "at ten and two," whereas most people look at the officer or stay relaxed if they do not see the officer. Frye pulled out of the median and followed the truck, eventually pulling alongside the truck. Frye indicated that he observed Passerini driving, that there was a dog in the truck with Passerini, and that Passerini did not look at him. Frye indicated that, based upon his experience, this was not normal behavior. Specifically, Frye testified that

> when he came by us when we were in the median, based on my training and experience, he appeared to be setting himself up to look good as he drove by, again, paying absolutely no averted attention to anything but straight ahead of him. Um, having his hands placed at ten and two which is not a natural driving position of comfort. Um, the — when I pulled up and pulled along side him, again, his not acknowledging our presence.

Frye testified that because of Passerini's posture and because he was driving a very clean rental vehicle, Frye was suspicious and began to follow Passerini with the intention that he might observe Passerini's committing a traffic violation so Frye could confirm or deny his suspicions.

Frye testified that just before the Waverly exit sign, Passerini tapped on the brakes of the truck and abruptly exited the interstate without utilizing his turn signal until the truck had already merged into the exit lane. Frye indicated that he maneuvered his cruiser across traffic and followed Passerini to a service station, where Frye initiated a traffic stop for failure to signal.

Frye began to question Passerini, and Passerini explained that he was from and had a home in Pennsylvania, but had gone to Reno to help his uncle. Frye also indicated that Passerini told him that, while in Nevada, he had become involved in rodeo and had been thrown from a bull and injured. Frye testified that Passerini indicated his barn in Pennsylvania had burned down in August and that he was going to check on the situation. Frye testified that Passerini's demeanor indicated to Frye that he was making up the story as he went along, which he felt was substantiated by the facts that Passerini indicated he was driving to Pennsylvania because he could not fly with his dog and because the rental truck was to be returned to Nevada. Frye indicated that Passerini was acting "nervous" and "fidgety," was rubbing his hands on his legs throughout the stop, and did not make much eye contact with him. Frye also thought circumstances were suspicious because Passerini told him he took the Waverly exit for food and gas, when he had just passed several "major interchanges where it was visible from the interstate." Frye testified that, when he handed Passerini his license and rental documents, Passerini's hands were trembling.

Frye also testified that there was significance in the fact that Passerini had a dog traveling with him, because there had been an increase in individuals involved in criminal activity utilizing pets and children to change the circumstances for law enforcement. Frye testified that Passerini also told different stories regarding his criminal history.

Frye testified that he issued a warning to Passerini for failure to use his turn signal and then requested to speak with him about his travel plans. Frye testified that he questioned Passerini as to whether there were illegal items in the truck but was never given a direct answer. Frye testified that it took approximately 4 or 5 minutes for Passerini to answer his request to search the truck and that he then detained Passerini for all of the reasons previously indicated in his testimony.

Hulse, the Lincoln police officer riding with Frye on October 16, 2007, testified that he observed the truck traveling eastbound on Interstate 80 and that he, like Frye, was alerted to the truck because of the rental barcode on the rear window. Hulse

testified that generally, when law enforcement is on patrol in the median of the interstate, drivers will immediately brake and make eye contact with law enforcement; however, the driver of this truck was very rigid, placing his hands "at ten and two" on the steering wheel and looking straight forward, never making eye contact. Hulse testified that Frye sped up from the median and drove next to the vehicle when the driver slowed down to approximately 5 miles an hour below the speed limit. Hulse also indicated that as the truck approached the Waverly exit, the truck abruptly braked and exited the interstate without signaling. Hulse indicated that Frye pulled the cruiser to the median, waited for traffic to clear, then exited, and that he then observed the truck with its turn signal on.

Downing testified that he had been employed as a trooper for 10 years and a "canine handler" for 3 years. Downing testified that in order to be a canine handler, he went through a 13-week certification course which consisted of narcotic detection and patrol certification. Downing explained that during narcotic detection, dogs are trained to detect the odors of marijuana, heroin, cocaine, and methamphetamine, and that during patrol certification, the dogs are taught apprehension work, building search, tracking, and evidence recovery. Downing testified that the certification was not individual certification, but for the trainer and dog team. Downing explained that there was a written test which required an 80-percent pass rate and that there was then a practical exercise, which requires a 4.0 or better on a scale of 1 to 6 (one being the highest) and which requires the dog to have a passing indication score on each of the four odors. Downing testified that he and his dog had been certified and continued to renew that certification annually.

Downing testified that on October 16, 2007, he received a request to assist troopers by having his dog conduct an exterior sniff of a vehicle for the odor of drugs. Downing testified that, on the scene, his dog immediately alerted at the pocketknife on the bumper of the truck and again at the driver's side of the truck. After a search of the truck, law enforcement located a suitcase containing several packages of marijuana.

The district court found that law enforcement had stopped Passerini for failing to signal his exit from the interstate in

a timely manner and thus had probable cause for the stop and were allowed to conduct an investigation related to the stop. The court further determined that Passerini's unusual behavior, his abrupt exit from the interstate, his nervousness when talking with Frye, the fact that Passerini was driving a rental truck, the inconsistencies in his statements about travel, and the previous drug-related contacts constituted reasonable suspicion to detain Passerini until the canine unit could arrive. The district court also found that the drug detection dog was reliable and that the expert testimony given to dispute the dog's reliability by an expert offered by Passerini was unpersuasive. The district court overruled Passerini's motion to suppress and implicitly overruled through its findings, although not specifically stated, the motion regarding the drug detection dog's reliability.

A bench trial was held on the matter. Passerini was found guilty of one count of possession of a controlled substance with the intent to deliver and was sentenced to 2 to 4 years' imprisonment with 10 days' credit for time served. Passerini has timely appealed.

III. ASSIGNMENTS OF ERROR

Passerini assigns, rephrased and consolidated, that the district court erred in overruling his motion to suppress, in determining that the drug detection dog was reliable, and in finding that there was sufficient evidence to find him guilty of possession of a controlled substance with the intent to deliver.

IV. STANDARD OF REVIEW

[1] When reviewing a district court's determinations of reasonable suspicion to conduct an investigatory stop and probable cause to conduct a warrantless search, ultimate determinations of reasonable suspicion and probable cause are reviewed de novo on the record. However, findings of historical fact to support that determination are reviewed for clear error, giving due weight to the inferences drawn from those facts by the trial court. *State v. Louthan*, 275 Neb. 101, 744 N.W.2d 454 (2008); *State v. Voichahoske*, 271 Neb. 64, 709 N.W.2d 659 (2006).

V. ANALYSIS

1. Denial of Passerini's Motion to Suppress

[2-5] No issue in this case as to the initial traffic stop of Passerini for failure to signal a turn has been raised. A traffic violation, no matter how minor, creates probable cause to stop the driver of a vehicle. *State v. Louthan, supra*. Once a vehicle is lawfully stopped, a law enforcement officer may conduct an investigation reasonably related in scope to the circumstances that justified the traffic stop. See *id*. This investigation may include asking the driver for an operator's license and registration, requesting that the driver sit in the patrol car, and asking the driver about the purpose and destination of his or her travel. Also, the officer may run a computer check to determine whether the vehicle involved in the stop has been stolen and whether there are outstanding warrants for any of its occupants. *Id*. The record in this case indicates that these investigative procedures were completed and that a warning was issued to Passerini within approximately 19 minutes after Frye stopped behind the truck and activated his cruiser's overhead lights.

[5-8] Passerini argues that the district court erred in determining that Frye had reasonable suspicion to further detain him once the initial traffic stop had been completed. In order to expand the scope of a traffic stop and continue to detain the motorist for the time necessary to deploy a drug detection dog, an officer must have a reasonable, articulable suspicion that the person is involved in criminal activity beyond that which initially justified the interference. S*tate v. Louthan, supra*. Reasonable suspicion entails some minimal level of objective justification for detention, something more than an inchoate and unparticularized hunch, but less than the level of suspicion required for probable cause. *Id*. Whether a police officer has a reasonable suspicion based on sufficient articulable facts depends on the totality of the circumstances. Reasonable suspicion must be determined on a case-by-case basis. *Id*. If reasonable suspicion exists, the court must then consider whether the detention was reasonable in the

context of an investigative stop, considering both the length of the continued detention and the investigative methods employed. *Id*.

The video of the traffic stop, which is a part of the record in this case, indicates that approximately 19 minutes after the stop, following a check of the driver's license and rental vehicle agreement, Frye gave Passerini a warning for failure to signal a turn and returned all of the rental papers to Passerini, telling him that as far as the traffic stop goes, "I am done." At that point, Passerini attempted to leave and Frye immediately began to again question Passerini about his travel plans. During the next approximately 8 minutes, the video clearly reflects that Frye made several attempts to obtain Passerini's consent to search the truck, each of which was denied by Passerini, who told Frye that he wanted to leave and get back on the road. Frye informed Passerini that he was being detained and was not free to leave and repeated his attempt to seek consent from Passerini to search the truck. Passerini again declined Frye's request and attempted to leave the cruiser. After an additional 2 minutes of discussion with Passerini, the video indicates that Frye told Passerini a second time that he was detained and placed a call to dispatch for a canine sniff.

[9] The district court determined that Frye had sufficient reasonable suspicion because of

> Passerini's unusual behavior when the officers' vehicle pulled along side on the Interstate, his abrupt exit from the highway, his nervousness when conversing with Frye, the fact that he was driving a rental vehicle, his inconsistencies and changes in his account of what he was doing in Reno and the reason(s) for returning to Pennsylvania and the fact that he had several prior drug related contacts, when considered together, constituted reasonable suspicion to detain Passerini further.

We examine each of these factors separately, mindful of the rule that when a determination is made to detain a person during a traffic stop, even where each factor considered independently is consistent with innocent activities, those same factors may amount to reasonable suspicion when considered collectively. *State v. Louthan*, 275 Neb. 101, 744 N.W.2d 454

(2008). See *State v. Voichahoske*, 271 Neb. 64, 709 N.W.2d 659 (2006).

(a) Unusual Behavior on Interstate

Frye and Hulse testified it was unusual that Passerini did not look at them in passing on the interstate and appeared to be tense and looked straight ahead and that further, he placed his hands "at ten and two" on the steering wheel. Furthermore, when the trooper's cruiser pulled near Passerini, he did not look at them and slowed his truck to approximately 5 miles an hour below the speed limit. The district court took into account these facts and indicated in its order that it was "unusual behavior." However, the record contains no evidence, nor has any authority been presented which would indicate to this court, that the behaviors described by law enforcement are actually "unusual" and, furthermore, appropriate to be considered in the analysis of reasonable suspicion. Therefore, we will not consider this testimony in our analysis.

(b) Abrupt Exit

Passerini's abrupt exit from the interstate was the circumstance under which the traffic stop was initiated, including the failure to signal a turn. Hulse testified that once the cruiser had exited the median, he and Frye followed Passerini's truck for approximately 6 miles, at which time Hulse observed Passerini tap on the brakes and then abruptly move off the interstate onto the Waverly exit ramp without signaling. Shortly thereafter, Frye and Hulse observed Passerini initiate his signal, but noted that he was already traveling on the exit ramp. Passerini traveled approximately 1½ miles from the exit to a service station, where he pulled up to a gas pump and Frye pulled behind him and activated his cruiser's overhead lights. Passerini indicated to Frye that he had exited at this particular exit for gas and food. This factor, in and of itself, does not support a determination of reasonable suspicion but may be considered with other factors.

(c) Nervousness

[10] Frye testified that throughout the traffic stop, Passerini was "nervous," "fidgety," and "rubbing his hands on his legs."

Although a motorist's nervousness is an appropriate factor for consideration within the totality of the circumstances of a prolonged traffic stop, its presence is of limited significance generally. *State v. Louthan, supra*; *State v. Lee*, 265 Neb. 663, 658 N.W.2d 669 (2003). See, also, *State v. Anderson*, 258 Neb. 627, 605 N.W.2d 124 (2000), *overruled on other grounds, State v. McCulloch*, 274 Neb. 636, 742 N.W.2d 727 (2007) (trembling hands, pulsing carotid artery, difficulty locating vehicle registration, and hesitancy to make eye contact are signs of nervousness which may be displayed by innocent travelers who are stopped and confronted by officer and standing alone did not afford officer basis for believing individual stopped was involved in criminal activity). Standing alone, the description of Passerini's nervousness would not support a determination of reasonable suspicion, and while it may be considered with other factors, it is of limited significance. See, *State v. Louthan*, 275 Neb. 101, 744 N.W.2d 454 (2008); *State v. Lee*, 265 Neb. 663, 658 N.W.2d 669 (2003).

(d) Rental Vehicle

Frye and Hulse both testified that they initially were drawn to Passerini because he was driving a truck with Nevada license plates which appeared to be a rental vehicle due to the barcode on the rear window of the truck and the "cleanliness of the vehicle." The record indicates that Passerini indicated to Frye that he had rented a truck in Reno, where he was temporarily living with his uncle and assisting him on his ranch. Passerini indicated to Frye that he rented a truck in order to bring back some building materials and a motorcycle from his home in Pennsylvania. Also included in the record is a copy of the rental agreement for the truck, indicating that the truck was rented in Reno, in the name "Jason Passerini" on October 11, 2007, to be returned on October 25 in Reno. The fact that Passerini was driving a rental vehicle is perfectly consistent with law-abiding activity, and furthermore, the matching names on the driver's license and rental agreement, coupled with the consistency of Passerini's story as to the timeframe of the trip and his plans to return to Reno should have dispelled, rather than created, further suspicion. See *State v. Anderson, supra*.

Thus, this factor alone would not support a determination of reasonable suspicion.

(e) Inconsistencies in Travel Plans

Frye testified that there were several inconsistencies in Passerini's statements regarding his travel plans, and the district court considered that as one factor which in totality amounted to reasonable suspicion. However, a closer look at the record and the video indicate that Passerini's story and description of his travel plans were consistent throughout the stop. Passerini told Frye that he was traveling from Reno to Pennsylvania. Passerini explained that he was originally from Pennsylvania and had been temporarily living in Nevada with his uncle and assisting him on his ranch. Passerini told Frye that in August, he was informed that his barn had burned down, and that he now was on his way to check out the situation and to pick up some equipment and a motorcycle to bring back to Nevada. Passerini explained that while in Nevada, his uncle had introduced him to the rodeo and he was thrown from a bull and injured around the time his barn burned down, and that this was the first opportunity he had to travel back to Pennsylvania. Thus, while we agree that inconsistent answers relating to the purpose of a trip or for being at a particular location is a factor which may be considered, this record presents no such inconsistencies in Passerini's given travel plans, and therefore, we will not consider this factor.

(f) Prior Drug-Related Contacts

The system check by dispatch on Passerini's criminal background revealed to Frye that Passerini had two drug-related contacts in 2000 and 2001. During the initial traffic stop, Frye questioned Passerini about his travel plans and also began an inquiry as to his criminal history. Frye first asked when was the last time Passerini had his license suspended, to which Passerini responded that it had never been suspended. Frye asked whether Passerini was on probation or parole, which he denied. Frye then asked whether Passerini had ever been arrested, and Passerini indicated that he had been arrested several years ago while renewing a gun permit but did not

remember specifics about the charge. Frye questioned Passerini whether he had been arrested for anything else, such as weapons or drug offenses, which Passerini again denied, but then Passerini responded that there had been a charge involving drugs when he was younger. At this time, Frye redirected questioning back to Passerini's travel plans.

Several minutes later, Frye issued Passerini a warning for failure to use his turn signal. After approximately 21 minutes, Frye indicated that he was done with the traffic stop and immediately began to question Passerini's travel plans as he had done before. Passerini interrupted Frye and inquired whether he was done, to which Frye responded that he was done with the traffic stop but wanted to know if there was anything illegal in the truck. Passerini again asked permission to leave, and Frye denied the request. After approximately 26 minutes and several attempts by Passerini to exit the cruiser, Frye informed Passerini that he had been detained and was not free to leave. Frye's testimony regarding further discussions concerning Passerini's drug contacts occurred several minutes after Passerini had already been informed that he was detained and not free to leave the cruiser.

[11] In our review of the facts of the case, an individual's criminal history is a factor when determining whether an officer has reasonable suspicion to detain an individual. *State v. Lee*, 265 Neb. 663, 658 N.W.2d 669 (2003). However, such history cannot form the sole basis to determine reasonable suspicion to support detention. *Id.*

(g) Totality of Circumstances

In sum, the circumstances which we view collectively consist of Passerini's lawfully operating a rental vehicle properly registered in his name, abruptly exiting the interstate, nervousness upon being detained and questioned, and prior drug-related contacts. Based upon our de novo review and considering the totality of the circumstances set forth above, we conclude that law enforcement did not have a reasonable, articulable suspicion that Passerini was involved in unlawful drug activity which would have been sufficient to justify the prolonged detention once the traffic stop had concluded.

Thus, while law enforcement's premonitions about Passerini may have eventually amounted to more than a "hunch," the fact that the "hunch" proved to be correct does not legitimize the circumstances. See *State v. Anderson*, 258 Neb. 627, 605 N.W.2d 124 (2000), *overruled on other grounds, State v. McCulloch*, 274 Neb. 636, 724 N.W.2d 727 (2007). Therefore, the district court erred in denying Passerini's motion to suppress, receiving evidence obtained in that search, and convicting Passerini of the offense of possession of a controlled substance with the intent to deliver. As such, we reverse the order of the district court and remand the cause with directions to set aside the judgment of conviction and remand for a new trial.

2. Passerini's Remaining Assignments of Error

Having determined that the district court improperly denied Passerini's motion to suppress, we need not address Passerini's other assignments of error. An appellate court is not obligated to engage in an analysis which is not needed to adjudicate the controversy before it. *Papillion Rural Fire Prot. Dist. v. City of Bellevue*, 274 Neb. 214, 739 N.W.2d 162 (2007).

VI. CONCLUSION

In conclusion, we find that the district court erred in denying Passerini's motion to suppress evidence based upon law enforcement's lack of reasonable suspicion to further detain Passerini once the traffic stop had concluded. Therefore, we reverse the order of the district court denying the motion to suppress and remand the cause with directions consistent with this opinion.

Reversed and remanded with directions.

Moore, Judge, dissenting.

I respectfully disagree with the majority opinion's conclusion that law enforcement did not have a reasonable, articulable suspicion to justify the detention of Passerini once the traffic stop had concluded. While I agree that any of the factors considered by the majority opinion, standing alone, would be insufficient to support a determination of reasonable suspicion,

my view of the totality of the circumstances leads me to believe that there was a reasonable, articulable suspicion sufficient for the prolonged detention of Passerini.

Factors that would independently be consistent with innocent activities may nonetheless amount to reasonable suspicion when considered collectively. *State v. Draganescu*, 276 Neb. 448, 755 N.W.2d 57 (2008). And, an individual's criminal history may be a relevant factor when determining whether an officer has reasonable suspicion to detain an individual. *State v. Lee*, 265 Neb. 663, 658 N.W.2d 669 (2003). When considered collectively under the totality of the circumstances, Passerini's abrupt exit from the interstate after the law enforcement officers began to follow and then pull alongside Passerini, Passerini's travel over 1½ miles off the interstate before stopping at a gas station, Passerini's nervousness upon being detained and questioned, and Passerini's prior drug arrests created a reasonable, articulable suspicion sufficient for the prolonged detention of Passerini once the traffic stop had concluded. I would affirm the decision of the district court to deny Passerini's motion to suppress.

ELENA DITMARS, APPELLEE, V.
CHALMER DITMARS, APPELLANT.

ELENA DITMARS ON BEHALF OF V.B., APPELLEE,
V. CHALMER DITMARS, APPELLANT.

788 N.W.2d 817

Filed September 14, 2010. Nos. A-10-009, A-10-010.

1. **Injunction.** A protection order pursuant to Neb. Rev. Stat. § 42-924 (Reissue 2008) is analogous to an injunction.
2. **Judgments: Appeal and Error.** The grant or denial of a protection order is reviewed de novo on the record.
3. ____: ____. In a de novo review, an appellate court reaches conclusions independent of the factual findings of the trial court. However, where the credible evidence is in conflict on a material issue of fact, the appellate court considers and may give weight to the circumstances that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another.

Appeal from the District Court for Lancaster County: JEAN A. LOVELL, County Judge. Reversed and remanded with directions.

Julie A. Effenbeck, of Law Office of Julie A. Effenbeck, for appellant.

Mark T. Bestul, of Legal Aid of Nebraska, for appellee.

IRWIN, SIEVERS, and CARLSON, Judges.

CARLSON, Judge.

INTRODUCTION

Elena Ditmars filed petitions for domestic abuse protection orders for herself and on behalf of her minor child, V.B., against her husband, Chalmer Ditmars. The Lancaster County District Court entered ex parte orders granting the requests. A hearing to show cause why the orders should not remain in effect was held, after which the court affirmed the protection orders. For the reasons set forth herein, we reverse, and remand with directions to vacate the protection orders and dismiss the actions. Pursuant to this court's authority under Neb. Ct. R. App. P. § 2-111(B)(1) (rev. 2008), this case was ordered submitted without oral argument.

STATEMENT OF FACTS

Elena and her 12-year-old son are recent immigrants from Ukraine. Elena and Chalmer were married in February 2009, and her son lived with them in rural Washington, Kansas. On November 6, 2009, Elena filed a petition in the district court for Lancaster County, Nebraska, requesting a domestic abuse protection order against Chalmer for herself and a separate such petition on behalf of her son. The preprinted affidavit forms ask the affiant to list the most recent incidents of domestic abuse, giving dates and times. In Elena's affidavit filed in behalf of herself, she states that in September 2009, Chalmer insisted she have sex with him on a daily basis. She stated that she gave in to him out of fear of what he might do to her son. She alleged that in April 2009, Chalmer was angry because she would not have sex with him. He then insisted that she and

her son go shooting with him; she refused and remained in the house with her son. Chalmer went outside to shoot targets on a fence, and after each shot, he would pretend to shoot at the house and "laugh like he was crazy." She also stated that "all the time," Chalmer monitored her cellular telephone usage and kept her isolated in a rural area.

Similar allegations appear in the affidavit filed on behalf of Elena's son, along with some additional statements that Elena was afraid Chalmer would strike her son in anger when he needed help with his homework because of his lack of English language skills. Elena also stated that Chalmer would deliberately "spin out" on dirt roads when the three were traveling in the car together.

The district court entered ex parte domestic abuse protection orders, finding that Elena had stated facts showing that Chalmer attempted to cause—or intentionally, knowingly, or recklessly caused—bodily injury to Elena and her son or, by physical menace, placed them in fear of imminent bodily injury. The orders excluded Chalmer from Elena and her son's residence and enjoined him from imposing any restraint on them or from threatening, assaulting, molesting, attacking, or contacting them. Chalmer requested a hearing to show cause why the orders should not remain in effect.

On December 4, 2009, the district court held a hearing allowing Chalmer to show cause why the protection orders should not remain in effect. Both Chalmer and Elena testified at the hearing.

Chalmer denied or explained away Elena's allegations. He admitted that he was at times disappointed when Elena denied him sex, but he stated that he never forced her to have sex or became abusive or threatening. He denied threatening her son and stated that the only time he skidded the car was while on icy or slick roads. Chalmer stated that Elena visited relatives in Ukraine from June 9 to September 3, 2009; that shortly after her return, on September 25, Elena left his household; and that he has had no subsequent contact with her, although he stated that he has tried to call and e-mail her to check on her well-being. He has since instituted divorce proceedings.

Elena testified through an interpreter, repeating many of her allegations. She acknowledged that she had had no contact with Chalmer since September 25, 2009, and was willing to cooperate in the divorce proceedings. Elena and her son now live in Nebraska.

On December 4, 2009, the court entered orders which affirmed the ex parte domestic abuse protection orders. The district court made no specific factual findings, but concluded that Elena had shown that Chalmer "(1) attempted to cause or intentionally, knowingly, or recklessly caused, bodily injury to [Elena and her son], or (2) by physical menace, placed [Elena and her son] in fear of imminent bodily injury." Chalmer now appeals.

ASSIGNMENTS OF ERROR

In each case, Chalmer asserts that the district court erred in determining that Elena produced sufficient evidence to grant the protection orders against him.

STANDARD OF REVIEW

[1-3] A protection order pursuant to Neb. Rev. Stat. § 42-924 (Reissue 2008) is analogous to an injunction. *Cloeter v. Cloeter*, 17 Neb. App. 741, 770 N.W.2d 660 (2009). Accordingly, the grant or denial of a protection order is reviewed de novo on the record. *Id.* In such de novo review, an appellate court reaches conclusions independent of the factual findings of the trial court. *Id.* However, where the credible evidence is in conflict on a material issue of fact, the appellate court considers and may give weight to the circumstances that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another. *Id.*

ANALYSIS

The Protection from Domestic Abuse Act (the Act), Neb. Rev. Stat. § 42-901 et seq. (Reissue 2008), allows any victim of domestic abuse to file a petition and affidavit for a protection order pursuant to § 42-924. Abuse is defined under § 42-903(1) as

> the occurrence of one or more of the following acts between household members:
>
> (a) Attempting to cause or intentionally and knowingly causing bodily injury with or without a dangerous instrument;
>
> (b) Placing, by physical menace, another person in fear of imminent bodily injury; or
>
> (c) Engaging in sexual contact or sexual penetration without consent as defined in section 28-318.

In the present case, the district court's preprinted orders state that Elena showed that Chalmer "(1) attempted to cause, or intentionally, knowingly, or recklessly caused, bodily injury to [Elena and her son], or (2) by physical menace, placed [Elena and her son] in fear of imminent bodily injury." However, Elena did not allege, nor does the record show, that Chalmer had caused bodily injury to her or her son. Accordingly, we limit our consideration to whether Elena has shown that Chalmer, by physical menace, placed her or her son in fear of imminent bodily injury as required by §§ 42-903(1)(b) and 42-924.

This court has recently concluded that imminent bodily injury within the context of the Act means an immediate, real threat to one's safety which places one in immediate danger of bodily injury, that is, bodily injury is likely to occur at any moment. *Cloeter v. Cloeter, supra.* In her affidavit, Elena alleged that Chalmer insisted she have sex with him on a daily basis and that he would threaten her when she refused him. Following one such incident, while Elena and her son remained in the house, Chalmer pretended to shoot at the house and laughed. Elena alleged that such incidents occurred in April and September 2009. Elena did not file her petitions until November 2009, after she and her son had moved to Nebraska.

Assuming without deciding that Elena's allegations rise to the level of abuse contemplated by the Act, we determine that the incidents alleged by Elena are too remote in time to support entry of a protection order. The allegations involve incidents that occurred months prior to Elena's filing the petitions. Moreover, Elena filed the petitions in Lancaster County,

after she and her son had moved away from Chalmer's home. It is undisputed that neither Elena nor her son has had any contact with Chalmer since they left the State of Kansas. It is also undisputed that Chalmer and Elena are both preparing to divorce.

We find that the record does not support a conclusion that Elena was placed in fear of imminent bodily injury. We reach this conclusion because of the combined facts that the incidents alleged occurred in another state and months prior to Elena's filing the petitions. The record does not support the district court's entry of protection orders for Elena and her son pursuant to § 42-924.

CONCLUSION

We find that the record does not support a conclusion that Elena was placed in fear of imminent bodily injury. We reach this conclusion because of the combined facts that the incidents alleged occurred in another state, they occurred several months prior to Elena's filing the petitions, the parties are physically separated in that they now reside in different states, and they have not had any contact with one another since Elena moved to Nebraska. In short, the facts upon which the protection orders rest are stale, and as a result, the proof of fear of an imminent bodily injury is insufficient. We conclude that the district court's orders affirming the domestic abuse protection orders should be reversed, and we direct the district court to enter an order dismissing the domestic abuse protection orders against Chalmer.

REVERSED AND REMANDED WITH DIRECTIONS.

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

789 N.W.2d 272

Filed October 5, 2010. No. A-10-265.

1. **Juvenile Courts: Appeal and Error.** An appellate court reviews juvenile cases de novo on the record and reaches its conclusions independently of the juvenile court's findings.
2. **Statutes: Appeal and Error.** To the extent an appeal calls for statutory interpretation or presents questions of law, an appellate court must reach an independent conclusion irrespective of the determination made by the court below.
3. **Trial: Expert Witnesses: Appeal and Error.** A trial court is allowed discretion in determining whether a witness is qualified to testify as an expert, and unless the court's finding is clearly erroneous, such a determination will not be disturbed on appeal.
4. **Juvenile Courts: Final Orders: Appeal and Error.** Generally, it has been held that adjudication and disposition orders are final, appealable orders.
5. **Collateral Attack: Jurisdiction.** Collateral attacks on previous proceedings are impermissible unless the attack is grounded upon the court's lack of jurisdiction over the parties or subject matter.
6. **Pleadings: Jurisdiction.** It is the rule in Nebraska that the sufficiency of a petition is not the test of jurisdiction.
7. **Pleadings: Judgments: Jurisdiction: Collateral Attack: Appeal and Error.** Even though a judicial body errs in holding that a petition is sufficient, if it had jurisdiction, such holding will not subject the judgment rendered to collateral attack.
8. **Pleadings: Judgments: Jurisdiction.** The sufficiency of the petition is not a test of jurisdiction; although it may be defective in substance, it will support a judgment if the court has authority to grant the relief demanded and the facts upon which the demand is based are intelligibly set forth.
9. **Indian Child Welfare Act: Jurisdiction.** A juvenile court having jurisdiction over the parties and the subject matter constitutes a court of competent jurisdiction within the meaning of Neb. Rev. Stat. § 43-1507 (Reissue 2008).
10. **Indian Child Welfare Act: Child Custody.** Under Neb. Rev. Stat. § 43-1505(4) (Reissue 2008), a party seeking to effect a foster care placement of an Indian child shall satisfy the court that active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that these efforts have proved unsuccessful.
11. **Rules of Evidence: Expert Witnesses.** Under Neb. Evid. R. 702, Neb. Rev. Stat. § 27-702 (Reissue 2008), a witness can testify concerning scientific, technical, or other specialized knowledge only if the witness qualifies as an expert.

Appeal from the Separate Juvenile Court of Lancaster County: REGGIE L. RYDER, Judge. Affirmed in part, and in part reversed and remanded for further proceedings.

Dennis R. Keefe, Lancaster County Public Defender, Valerie R. McHargue, and Margene M. Timm for appellant.

Gary Lacey, Lancaster County Attorney, Jenna L. Berg, and Christopher M. Reid, Senior Certified Law Student, for appellee.

Sarah E. Sujith, Special Assistant Attorney General, of Department of Health and Human Services, for appellee.

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

CASSEL, Judge.

INTRODUCTION

Several months and proceedings after the juvenile court adjudicated Ramon N., the court changed Ramon's placement, and Ramon then sought to invalidate the proceedings for failure to comply with the Nebraska Indian Child Welfare Act (ICWA). Ramon appeals from the court's order refusing to invalidate the earlier proceedings, applying ICWA going forward, and continuing Ramon's placement. We conclude that the absence of ICWA allegations in the petition does not support invalidating the adjudication, but we reverse the portion of the court's order continuing Ramon's out-of-home placement without receiving evidence of active efforts or testimony of a qualified expert, pursuant to Neb. Rev. Stat. § 43-1505 (Reissue 2008), and we remand for further proceedings.

BACKGROUND

On July 27, 2009, the State filed a petition seeking to adjudicate 16-year-old Ramon under Neb. Rev. Stat. § 43-247(3)(b) (Reissue 2008) because he had violated curfew and run from his home. The petition did not contain any allegations regarding his possible status as an Indian child or any references to ICWA.

On August 14, 2009, the juvenile court sustained a motion by Ramon's counsel to continue the adjudication hearing and proceeded to hear evidence regarding Ramon's placement. The State called Ramon's mother, Kellie N., who had asked the State to file an "ungovernable petition" concerning Ramon.

Kellie testified that Ramon had smoked what she believed to be marijuana in her presence, that he had been gone from her home on a number of days, and that she had called the police. On July 28, Kellie told Ramon to leave her home and he did so after packing his bags. Although Ramon told Kellie that he had been staying with his paternal grandmother, Kellie had not been able to verify that information. She believed that Ramon was in a dangerous situation because she did not know where he was and was unable to control his behavior. Kellie asked for Ramon to be placed in the temporary custody of the Nebraska Department of Health and Human Services (DHHS) for placement outside of her home. The court found that reasonable efforts had been made to allow Ramon's legal and physical custody to remain with his parents, but that doing so would be contrary to Ramon's health, safety, and welfare. The court therefore found that it was in Ramon's best interests to be placed in the temporary legal custody of DHHS in an out-of-home placement. Ramon was placed at an emergency shelter from August 14 to 28. On August 28, Ramon was placed with his paternal grandmother.

On September 4, 2009, the juvenile court adjudicated Ramon and set a dispositional hearing for October 8. A verbatim record of the adjudication hearing is not included in the bill of exceptions. On October 8, the court's journal entry and order stated that the matter was continued until November 16 and required the State to provide notice of the proceedings to the Oglala Sioux Tribe (Tribe). The State filed an ICWA notice with the juvenile court on October 9 and sent the notice to the Tribe via registered mail on October 14.

On February 16, 2010, the juvenile court conducted a hearing for review. No representative of the Tribe appeared for the hearing. Kellie testified that she would be willing to have Ramon reside with her again if he followed her rules. The court received a court report from DHHS, prepared on February 8, which stated that in September 2009, Kellie indicated the family was affiliated with the Tribe and Ramon was an enrolled member. Eric Zimmerman, an employee of DHHS who coauthored the court report, testified that Ramon was not making sufficient progress in his current placement, that

his school attendance had been poor, that he recently tested positive for marijuana and had not had a negative test since approximately mid-November 2009, and that he had been discharged from a substance abuse treatment program for poor attendance. The report recommended that Ramon remain placed with his paternal grandmother, but Zimmerman testified that the structure provided at a group home level would be beneficial to Ramon. The juvenile court found that reasonable efforts had been made to preserve and reunify the family but ordered that Ramon should remain with DHHS for appropriate care and placement. The court ordered that Ramon be placed at the "Staff Secure" facility of the Lancaster County Youth Services Center until the court approved a specific placement arranged by DHHS.

On February 18, 2010, Ramon filed a petition to invalidate the proceedings. He alleged that the petition to adjudicate did not plead facts under ICWA and that the court found it was in Ramon's best interests to be placed in an out-of-home placement without any expert testimony on whether serious emotional harm or physical damage to Ramon was likely to occur if he were not removed from the home, as required by ICWA.

On March 5, 2010, the juvenile court conducted a hearing on the petition. Again, no representative of the Tribe appeared. The court received into evidence Ramon's enrollment paper with the Tribe dated December 26, 2006. Kellie testified that she and Ramon were members of the Tribe and that she had testified to that fact in a previous case under § 43-247(3)(a).

The juvenile court overruled the petition but specifically found that ICWA applied effective March 5, 2010. The court stated that it considered the testimony of Kellie—as an enrolled member of the Tribe and as Ramon's biological parent—to be expert testimony. Based on Kellie's knowledge of the Tribe, Ramon, and the situation and based on the evidence presented on August 14, 2009, the juvenile court found that the continued custody of Ramon by his parents was likely to result in serious emotional or physical damage to Ramon. The court then received additional evidence as to placement.

Zimmerman testified that it was his understanding that Ramon was willing to be compliant with a placement at the Omaha Home for Boys, but that the facility needed to interview Ramon. The court continued the matter for a further "placement check" hearing.

Ramon timely appeals.

ASSIGNMENT OF ERROR

Ramon assigns that the juvenile court erred in overruling the petition to invalidate the proceedings.

STANDARD OF REVIEW

[1] An appellate court reviews juvenile cases de novo on the record and reaches its conclusions independently of the juvenile court's findings. *In re Interest of Jorge O.*, 280 Neb. 411, 786 N.W.2d 343 (2010).

[2] To the extent an appeal calls for statutory interpretation or presents questions of law, an appellate court must reach an independent conclusion irrespective of the determination made by the court below. *Id.*

[3] A trial court is allowed discretion in determining whether a witness is qualified to testify as an expert, and unless the court's finding is clearly erroneous, such a determination will not be disturbed on appeal. *In re Interest of C.W. et al.*, 239 Neb. 817, 479 N.W.2d 105 (1992), *disapproved on other grounds, In re Interest of Walter W.*, 274 Neb. 859, 744 N.W.2d 55 (2008).

ANALYSIS

At issue in this case is the juvenile court's denial of Ramon's petition to invalidate the proceedings. Any Indian child who is the subject of an action for foster care placement under state law may petition a court of competent jurisdiction to invalidate such action upon a showing that such action violated any provision of Neb. Rev. Stat. §§ 43-1504 to 43-1506 (Reissue 2008). See Neb. Rev. Stat. § 43-1507 (Reissue 2008).

We examine the two specific deficiencies argued by Ramon: pleading requirements at the adjudication stage and evidence of active efforts, including testimony of a qualified expert witness.

Pleading Requirements.

Ramon contends that because the petition for adjudication did not plead any language regarding ICWA, any proceedings under it should be invalidated. He cites to *In re Interest of Shayla H. et al.*, 17 Neb. App. 436, 764 N.W.2d 119 (2009), and *In re Interest of Dakota L. et al.*, 14 Neb. App. 559, 712 N.W.2d 583 (2006), in support of his argument that it is necessary to plead facts under ICWA in an action for adjudication of Indian children. In both those cases, an appeal was taken from the adjudication order. Ramon, on the other hand, did not appeal from the order adjudicating him, and the argument in his brief on this issue attacks only the petition for adjudication.

[4,5] The adjudication order was a final, appealable order from which no appeal was taken and ordinarily would not be subject to collateral attack except for lack of jurisdiction. Generally, it has been held that adjudication and disposition orders are final, appealable orders. *In re Interest of Enrique P. et al.*, 14 Neb. App. 453, 709 N.W.2d 676 (2006). Clearly, the adjudication order was a final order. We have stated that in the absence of a direct appeal from an adjudication order, a parent—or in this case, a child—may not question the existence of facts upon which the juvenile court asserted jurisdiction. See *id.* This is a corollary of the doctrine precluding most collateral attacks on final orders. Collateral attacks on previous proceedings are impermissible unless the attack is grounded upon the court's lack of jurisdiction over the parties or subject matter. *In re Interest of Joshua M. et al.*, 251 Neb. 614, 558 N.W.2d 548 (1997).

[6-8] Further, it is the rule in this jurisdiction that the sufficiency of a petition is not the test of jurisdiction. *Schilke v. School Dist. No. 107*, 207 Neb. 448, 299 N.W.2d 527 (1980). Even though a judicial body errs in holding that a petition is sufficient, if it had jurisdiction, such holding will not subject the judgment rendered to collateral attack. *Id.* The sufficiency of the petition is not a test of jurisdiction; although it may be defective in substance, it will support a judgment if the court has authority to grant the relief demanded and the facts upon which the demand is based are intelligibly set forth. *Id.*

Clearly, the juvenile court had jurisdiction of the parties and the subject matter at the time of the entry of the adjudication order.

[9] We recognize that § 43-1507 provides an enforcement remedy for ICWA violations, and we assume without deciding that this statutory remedy constitutes an additional basis for a collateral attack on final orders within the purview of this statute. While ICWA provides minimum federal standards in state Indian child custody proceedings, it does not oust states of their traditional jurisdiction over Indian children. See *Morrow v. Winslow*, 94 F.3d 1386 (10th Cir. 1996). A juvenile court having jurisdiction over the parties and the subject matter constitutes a court of competent jurisdiction within the meaning of § 43-1507.

We do not believe that the pleading requirement enforced on direct appeal in *In re Interest of Shayla H. et al.*, 17 Neb. App. 436, 764 N.W.2d 119 (2009), and *In re Interest of Dakota L. et al.*, 14 Neb. App. 559, 712 N.W.2d 583 (2006), constitutes a sufficient basis for a court to invoke § 43-1507 to invalidate an adjudication order, at least where no denial of the substantive protections of ICWA occurred in connection with the adjudication. We do not have the verbatim proceedings of the adjudication hearing before us, and Ramon has not directed our attention to any substantive violation of ICWA in connection with the adjudication or prior placements.

We find support for this conclusion in the text of § 43-1507. The statute allows the invalidation of "any action for foster care placement or termination of parental rights." *Id.* It does not, however, provide authorization for annulling an entire adjudication proceeding.

We find additional guidance in two cases bearing on the finality of adjudication orders. In *In re Interest of Enrique P. et al.*, 14 Neb. App. 453, 709 N.W.2d 676 (2006), which also involved a petition to invalidate, we noted that the mother did not appeal from the adjudication or dispositional orders and that she waited approximately 18 months to file the petition to invalidate despite clearly being aware of ICWA's applicability since the filing of the State's amended petition and through all of the hearings that she sought to invalidate. We

stated, "[B]ecause we conclude that any error with respect to these orders is harmless in this case, we need not determine whether our rules of error preservation or waiver preclude [the mother] from petitioning to invalidate previous court orders." *In re Interest of Enrique P. et al.*, 14 Neb. App. at 470, 709 N.W.2d at 689. In the later case of *In re Interest of Walter W.*, 274 Neb. 859, 744 N.W.2d 55 (2008), when the mother argued that the trial court erred at the adjudication stage because it did not make a finding of active efforts, the Nebraska Supreme Court stated that it would not address her arguments about alleged errors at the adjudication stage because the mother did not appeal the adjudication order. Applying this guidance to the instant case, it would follow that because Ramon did not appeal from the order adjudicating him, he cannot now challenge the absence of ICWA language in the petition.

We find additional support for our conclusion in a decision applying the ICWA provisions prospectively from the date Indian child status is established on the record. In *In re Adoption of Kenten H.*, 272 Neb. 846, 725 N.W.2d 548 (2007), a deputy county attorney gave notice of an adjudication hearing to the Iowa Tribe of Kansas and Nebraska and stated in an affidavit that the child was a member of or eligible for membership in that tribe. After the court adjudicated the child, a petition for adoption was filed which included an affidavit identifying the father as being affiliated with "'the Ute tribe.'" *Id.* at 849, 725 N.W.2d at 551. However, the adoptive parents alleged that the child was not an Indian child. Soon after the entry of the decree of adoption, the Iowa Tribe filed an entry of appearance and notice of intervention, which alleged that the child was enrolled in the tribe. The mother then sought to vacate the adoption under ICWA. The Nebraska Supreme Court stated, "[T]he critical issue in the instant case is not *whether* [the child] is an 'Indian child,' but, rather, *when* his status was established in these proceedings." *In re Adoption of Kenten H.*, 272 Neb. at 854, 725 N.W.2d at 554. Thus, the court determined that the provisions of ICWA and the federal Indian Child Welfare Act apply prospectively from the date Indian child status is established on the record, which occurred

when the Iowa Tribe entered its appearance shortly after entry of the decree of adoption.

We conclude that under the circumstances of the case before us, the juvenile court did not err in refusing to invalidate the final adjudication order because of the State's failure to comply with the ICWA pleading requirement recognized in *In re Interest of Shayla H. et al.*, 17 Neb. App. 436, 764 N.W.2d 119 (2009), and *In re Interest of Dakota L. et al.*, 14 Neb. App. 559, 712 N.W.2d 583 (2006).

Active Efforts and Qualified Expert Witness.

Ramon next argues that the court, after finding that ICWA applied effective March 5, 2010, erred in continuing his out-of-home placement without sufficient evidence regarding the ICWA requirements of active efforts and expert testimony. The argument in his brief on this issue attacks only the court's March 5 order.

[10] At the February 2010 dispositional review hearing, the juvenile court found that reasonable efforts were made to preserve and reunify the family, but that a "Staff Secure" placement was the least restrictive placement. Then, at the March 2010 hearing, the court found that the ICWA standards applied, but the court received no expert testimony or evidence of active efforts to support continued placement out of the home. Under § 43-1505(4), a party seeking to effect a foster care placement of an Indian child shall satisfy the court that active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that these efforts have proved unsuccessful. The ICWA requirement of "active efforts" requires more than the "reasonable efforts" standard applicable in non-ICWA cases, and at least some efforts should be culturally relevant. See, *id.*; *In re Interest of Walter W.*, 274 Neb. 859, 744 N.W.2d 55 (2008). In our view, the evidence in the record does not rise to the level of culturally relevant active efforts.

Under ICWA, qualified expert testimony is required on the issue of whether the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child. See § 43-1505(5). The juvenile

court stated in its March 5, 2010, order that it would ordinarily continue the hearing to provide an opportunity for the presentation of expert testimony. However, the court found that Kellie provided that evidence on August 14, 2009.

[11] The juvenile court's determination of whether Kellie qualifies as an expert under ICWA will be upheld unless the finding is clearly erroneous. Nebraska rules of evidence do not apply in dispositional hearings arising under the Nebraska Juvenile Code. See *In re Interest of Brettany M. et al.*, 11 Neb. App. 104, 644 N.W.2d 574 (2002). However, in determining whether admission or exclusion of particular evidence would violate fundamental due process, the Nebraska Evidence Rules serve as a guidepost. *In re Interest of Destiny A. et al.*, 274 Neb. 713, 742 N.W.2d 758 (2007). Under Neb. Evid. R. 702, Neb. Rev. Stat. § 27-702 (Reissue 2008), a witness can testify concerning scientific, technical, or other specialized knowledge only if the witness qualifies as an expert. *Orchard Hill Neighborhood v. Orchard Hill Mercantile*, 274 Neb. 154, 738 N.W.2d 820 (2007). Following the rule set forth in the standard of review section above, we review the juvenile court's decision treating Kellie as a qualified expert witness on ICWA issues for clear error.

The Nebraska Supreme Court has recognized the existence of guidelines to assist judges in determining whether a witness qualifies as an expert regarding ICWA issues. In *In re Interest of C.W. et al.*, 239 Neb. 817, 824, 479 N.W.2d 105, 111 (1992), *disapproved on other grounds, In re Interest of Walter W., supra*, the court noted that the Bureau of Indian Affairs had set forth the following guidelines under which expert witnesses will most likely meet the requirements of ICWA:

> "(i) A member of the Indian child's tribe who is recognized by the tribal community as knowledgeable in tribal customs as they pertain to family organization and childrearing practices.
>
> "(ii) A lay expert witness having substantial experience in the delivery of child and family services to Indians, and extensive knowledge of prevailing social and cultural standards in childrearing practices within the Indian child's tribe.

> "(iii) A professional person having substantial education and experience in the area of his or her specialty."

Under these guidelines, we conclude that the juvenile court's finding that Kellie was an expert was clearly erroneous. Kellie is a member of the Tribe. However, there is no evidence that the tribal community recognizes her as knowledgeable of Indian customs and childrearing practices or that she has "'substantial experience in the delivery of child and family services to Indians.'" *In re Interest of C.W. et al.*, 239 Neb. at 824, 479 N.W.2d at 111. Nor is there evidence that she is a professional person with substantial education and experience in an area of specialty. Instead, the court found that Kellie was an expert based only on the facts that she is a member of the Tribe and that she is Ramon's mother. We conclude these facts alone do not make her a qualified expert under ICWA. The juvenile court clearly erred in treating Kellie as a qualified expert under ICWA.

Because the evidence at the March 5, 2010, hearing did not establish active efforts or include testimony of a qualified expert, we conclude that the juvenile court erred in continuing Ramon's out-of-home placement. We reverse the juvenile court's order on this issue, and we therefore remand the matter to the juvenile court to allow the State to present qualified expert witness testimony and evidence of active efforts.

CONCLUSION

Upon our de novo review of the record and under the particular circumstances of this case, we conclude that Ramon cannot now utilize the absence of an ICWA allegation in the petition for adjudication to invalidate the adjudication pursuant to § 43-1507. We affirm the juvenile court's refusal to do so. We further conclude that because ICWA applied on and after March 5, 2010, the juvenile court erred in continuing Ramon's out-of-home placement without evidence of active efforts and testimony of a qualified expert witness. We therefore reverse the continuation of Ramon's out-of-home placement and remand the matter for further proceedings.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

Roger D. Teeters, appellee, v. Beverly Neth, director, State of Nebraska, Department of Motor Vehicles, appellant.

790 N.W.2d 213

Filed October 12, 2010. No. A-09-1127.

1. **Administrative Law: Judgments: Appeal and Error.** A judgment or 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.
2. ____: ____: ____. When reviewing an order of the 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.
3. **Judgments: Appeal and Error.** Whether a decision conforms to the law is by definition a question of law, in connection with which an appellate court reaches a conclusion independent of that reached by the lower court.
4. **Administrative Law: Motor Vehicles: Licenses and Permits: Revocation: Police Officers and Sheriffs: Jurisdiction: Appeal and Error.** When there is no dispute as to the information contained in the sworn report of an arresting officer, an appellate court must reach an independent conclusion whether the sworn report provided the required statutory information necessary to confer jurisdiction on the Department of Motor Vehicles to revoke a driver's license.
5. **Administrative Law: Motor Vehicles: Licenses and Permits: Revocation: Evidence: Jurisdiction.** The sworn report of the arresting officer is 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 order of revocation by the director of the Department of Motor Vehicles has prima facie validity.
6. **Administrative Law: Motor Vehicles: Licenses and Permits: Revocation: Police Officers and Sheriffs.** The Department of Motor Vehicles makes a prima facie case for license revocation once it establishes that the arresting officer provided his or her sworn report containing the required recitations to the director of the department.
7. **Administrative Law: Motor Vehicles: Licenses and Permits: Revocation: Police Officers and Sheriffs: Jurisdiction.** In an administrative license revocation proceeding, the arresting officer's sworn report must, at a minimum, contain the information specified in the applicable statute, in order to confer jurisdiction.

Appeal from the District Court for Dawson County: James E. Doyle IV, Judge. Reversed and remanded with directions.

Jon Bruning, Attorney General, and Milissa Johnson-Wiles for appellant.

David W. Jorgensen, of Nye, Hervert, Jorgensen & Watson, P.C., for appellee.

IRWIN, SIEVERS, and CARLSON, Judges.

CARLSON, Judge.

INTRODUCTION

Beverly Neth, the director of the Nebraska Department of Motor Vehicles (the Department), appeals the Dawson County District Court's decision reversing the revocation of Roger D. Teeters' driver's license, which reversal was based upon the court's finding that the sworn report offered at Teeters' administrative hearing did not include the information required by Neb. Rev. Stat. § 60-498.01(3) (Reissue 2004) and, as a result, did not confer jurisdiction on the director of the Department to revoke Teeters' driver's license. We find that the sworn report in this case was sufficient to confer jurisdiction on the director, and we reverse, and remand with directions.

BACKGROUND

On April 12, 2009, a police officer with the Lexington Police Department arrested Teeters for driving under the influence of alcohol. Teeters was notified that, effective 30 days from the date of his arrest, his driver's license would be automatically revoked. Teeters contested the automatic revocation, and an administrative license revocation hearing was held. At the hearing, the sworn report completed by the arresting officer was admitted into evidence. The sworn report stated that Teeters was arrested pursuant to Neb. Rev. Stat. § 60-6,197 (Reissue 2004), and the handwritten reasons for his arrest were as follows: "[O]bserved a vehicle violate the centerline three different times. Performed a traffic stop and detected the odor of alcoholic beverage on Teeter's [sic] breath. Teeters showed impairment during sobrieties." (Emphasis omitted.) The sworn report also stated that Teeters submitted to a chemical breath test indicating a blood alcohol content of .15 of 1 gram of alcohol per 210 liters of Teeters' breath. After the hearing, the hearing officer recommended that Teeters' driver's license be revoked for the statutory period. The director of the Department adopted the recommended order of the hearing

officer and revoked Teeters' driver's license for a period of 1 year.

Teeters appealed the revocation to the Dawson County District Court, which found that the sworn report did not include the information required by § 60-498.01(3) and, as a result, did not confer jurisdiction on the director of the Department to revoke Teeters' driver's license. Specifically, the court found that the sworn report did not identify Teeters as the driver of the vehicle. Thus, the district court reversed the director of the Department's order and directed that Teeters' driving privileges be reinstated. The director of the Department has timely appealed to this court.

ASSIGNMENT OF ERROR

The director of the Department assigns that the district court erred in finding that the sworn report did not meet the requirements of § 60-498.01(3), thus depriving the director of jurisdiction to revoke Teeters' driver's license.

STANDARD OF REVIEW

[1-3] A judgment or 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. *Walz v. Neth*, 17 Neb. App. 891, 773 N.W.2d 387 (2009). When reviewing an order of the 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. *Walz, supra.* Whether a decision conforms to the law is by definition a question of law, in connection with which an appellate court reaches a conclusion independent of that reached by the lower court. *Id.*

ANALYSIS

The director of the Department assigns that the district court erred in finding that the sworn report did not meet the requirements of § 60-498.01(3), thus depriving the director of the Department of jurisdiction to revoke Teeters' driver's license. Specifically, the director of the Department argues that the

district court erred in determining that the sworn report was insufficient because it did not identify Teeters as the driver of the vehicle stopped for violating the centerline. The director of the Department contends that inclusion of the arrested person's name under the "reasons for the arrest" portion of the sworn report is not required and would be superfluous given that the arrested person is identified on the top portion of the sworn report.

[4] In this case, there is no dispute as to the information contained in the sworn report. Therefore, this court must reach an independent conclusion whether the sworn report of the arresting officer provided the required statutory information necessary to confer jurisdiction on the director of the Department to revoke Teeters' driver's license. See *Betterman v. Department of Motor Vehicles*, 273 Neb. 178, 728 N.W.2d 570 (2007).

[5,6] The sworn report of the arresting officer is 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. *Barnett v. Department of Motor Vehicles*, 17 Neb. App. 795, 770 N.W.2d 672 (2009). The Department makes a prima facie case for license revocation once it establishes that the arresting officer provided his or her sworn report containing the required recitations. *Id.*

[7] In an administrative license revocation proceeding, the arresting officer's sworn report must, at a minimum, contain the information specified in the applicable statute, in order to confer jurisdiction. *Betterman, supra*. When a person submits to a chemical test of breath, as in the present case, the required recitations in the sworn report are (1) that the person was arrested as described in § 60-6,197(2)—reasonable grounds to believe such person was driving while under the influence of alcoholic liquor or drugs—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 specified in Neb. Rev. Stat. § 60-6,196 (Reissue 2004). See § 60-498.01(3).

The sole issue presented on appeal is whether the reasons for Teeters' arrest, as listed on the sworn report, are sufficient to indicate that Teeters was the driver of the vehicle stopped for violating the centerline. There are several Nebraska cases that have addressed similar issues in regard to what the arresting officer must include in the "reasons for the arrest" portion of the sworn report to be sufficient to confer jurisdiction.

In *Betterman*, the list of reasons for the arrest in the sworn report stated: "'[R]eckless driving. Driver displayed signs of alcohol intoxication. Refused all SFST and later breath test.'" 273 Neb. at 182, 728 N.W.2d at 578. The Nebraska Supreme Court concluded that the sworn report conveyed the information required by statute because "'[r]eckless driving'" was a valid reason for a stop of the vehicle and that because the arrested person displayed signs of alcohol intoxication, the officer had cause to allege he was driving a motor vehicle while under the influence of alcoholic liquor. *Id.* at 186, 728 N.W.2d at 581. We note that the "reasons for the arrest" in the sworn report in *Betterman* did not specifically identify the arrested person as the driver.

In contrast, this court determined in *Yenney v. Nebraska Dept. of Motor Vehicles*, 15 Neb. App. 446, 451, 729 N.W.2d 95, 99 (2007), that a sworn report was inadequate to establish a prima facie case for revocation where the report stated the reasons for arrest were as follows: "'[P]assed out in front of [the gas] Station, near front doors. Signs of alcohol intoxication.'" (Emphasis omitted.) This court concluded that the allegations were insufficient to confer jurisdiction, because the stated reasons for the arrest did not allege the presence of a motor vehicle, let alone whether the arrested person was located in or near the vehicle at the time of the arresting officer's arrival. The present case is different from the *Yenney* case because the sworn report at issue here indicates the presence of a motor vehicle, a traffic violation observed by the arresting officer, and a traffic stop of the vehicle.

In *Snyder v. Department of Motor Vehicles*, 274 Neb. 168, 169, 736 N.W.2d 731, 733 (2007), the Nebraska Supreme Court found that the stated reason for the arrest, "'Speeding (20 OVER)/D.U.I.,'" was sufficient to explain the initial traffic

stop but was insufficient to confer jurisdiction because it merely noted the officer's conclusion that the arrested person was guilty of driving under the influence, but provided no underlying factual reasons supporting the arrest. The result in *Snyder* was not based upon a failure of the sworn report to show that the arrested person was driving a motor vehicle; rather, the court found that the abbreviation "'D.U.I.,'" which is the common abbreviation for driving under the influence, was a conclusion, not a reason for arrest.

The case most similar to the one at hand is *Barnett v. Department of Motor Vehicles*, 17 Neb. App. 795, 770 N.W.2d 672 (2009), in which the arrested person argued that the sworn report was insufficient because it contained no statement indicating that he had been the driver of the vehicle. The list of reasons for the arrest in the sworn report stated: "'1 vehicle accident, odor of Alcoholic beverage Bloodshot watery eyes, Slurred Speech, Refused Field Sobriety. Refused PBT Refused Legal Blood, Refused Urine sample test.'" *Id.* at 797, 770 N.W.2d at 674. This court concluded that the sworn report was insufficient to confer jurisdiction because, similar to *Yenney, supra*, the reasons for arrest did not indicate or allow an inference that the arrested person was ever operating a motor vehicle. We noted that the arresting officer in *Barnett* did not make a traffic stop and failed to include sufficient factual allegations in the sworn report to indicate an allowable inference that the arrested person was the one who had been driving the vehicle involved in the one-vehicle accident.

The issue in the present case is similar to the issue in *Barnett, supra*, that being whether the sworn report was sufficient to identify the arrested individual as the driver of the vehicle. However, in the instant case, unlike in *Barnett* and *Yenney*, the sworn report indicates that the arresting officer made a traffic stop after observing a traffic violation. Specifically, the reasons for the arrest in the sworn report state: "[O]bserved a vehicle violate the centerline three different times. Performed a traffic stop and detected the odor of alcoholic beverage on Teeter's [sic] breath. Teeters showed impairment during sobrieties." (Emphasis omitted.) The reasons for the arrest in the instant

case allow an inference that Teeters was the driver of the vehicle stopped.

Further, the top portion of the sworn report identifies "Teeters, Roger D." as the individual arrested and states that "the above-named individual was arrested pursuant to Neb. Rev. Stat. § 60-6,197, and the reasons for the arrest are," which is followed by the reasons filled in by the arresting officer as stated above. While the "reasons for the arrest" portion does not specifically state that Teeters was the driver of the vehicle that violated the centerline, when the sworn report is considered in its entirety, it is apparent that Teeters was the driver of the vehicle. As the director of the Department contends, requiring further inclusion of Teeters' name under the "reasons for the arrest" would be superfluous. We further note that in none of the cases discussed above was the arrested individual identified by name as the driver in the "reasons for the arrest" portion of the sworn report.

We conclude that Teeters was sufficiently identified as the driver of the vehicle in the sworn report and that the district court erred in determining that the requirements of § 60-498.01(3) were not met.

CONCLUSION

We conclude the district court erred in determining that the sworn report did not meet the requirements of § 60-498.01(3) and that thus, the report did not confer jurisdiction on the director of the Department to revoke Teeters' driver's license. Accordingly, the district court erred in reversing the director of the Department's order of revocation. We reverse, and remand with directions to vacate the district court's order reinstating Teeters' driver's license. As a result, Teeters' driver's license will be revoked for a period of 1 year as ordered by the director of the Department.

REVERSED AND REMANDED WITH DIRECTIONS.

KENNETH G. FREEMAN, APPELLEE, V. BEVERLY NETH, DIRECTOR, STATE OF NEBRASKA, DEPARTMENT OF MOTOR VEHICLES, APPELLANT.

790 N.W.2d 218

Filed October 19, 2010. No. A-09-1159.

1. **Administrative Law: Final Orders: Appeal and Error.** Under the Administrative Procedure Act, Neb. Rev. Stat. §§ 84-901 to 84-920 (Reissue 2008 & Supp. 2009), an appellate court may reverse, vacate, or modify a district court's judgment or final order for errors appearing on the record.
2. **Administrative Law: Judgments: Appeal and Error.** 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.
3. **Administrative Law: Motor Vehicles: Jurisdiction: Proof: Appeal and Error.** Whether the sworn report of a law enforcement officer is sufficient to confer jurisdiction on the Department of Motor Vehicles is a question of law, and an appellate court reaches a conclusion independent of that reached by the lower court.
4. **Administrative Law: Motor Vehicles: Licenses and Permits: Police Officers and Sheriffs: Proof.** An arresting officer's sworn report triggers the administrative license revocation process by establishing a prima facie basis for revocation.
5. **Administrative Law: Motor Vehicles: Licenses and Permits: Revocation: Police Officers and Sheriffs: Proof.** In an administrative license revocation proceeding, the sworn report of the arresting officer must, at a minimum, contain the information specified in Neb. Rev. Stat. § 60-498.01(3) (Reissue 2004) in order to confer jurisdiction.
6. **Administrative Law: Drunk Driving: Licenses and Permits: Revocation: Time: Jurisdiction.** The 10-day time period for submitting a sworn report under Neb. Rev. Stat. § 60-498.01(5)(a) (Reissue 2004) is mandatory, and if the sworn report is submitted after the 10-day period, the Department of Motor Vehicles lacks jurisdiction to revoke a person's driver's license.
7. **Statutes: Appeal and Error.** Appellate courts give statutory language its plain and ordinary meaning and will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous.
8. **Administrative Law: Drunk Driving: Blood, Breath, and Urine Tests: Time.** For purposes of Neb. Rev. Stat. § 60-498.01(5)(a) (Reissue 2004), the test results are "received" on the date they are delivered to the law enforcement agency by which the arrest was effectuated and the arresting peace officer has 10 days thereafter to forward the sworn report to the director of the Department of Motor Vehicles.

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

Jon Bruning, Attorney General, and Melissa R. Vincent for appellant.

David W. Jorgensen, of Nye, Hervert, Jorgensen & Watson, P.C., for appellee.

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

MOORE, Judge.

INTRODUCTION

In this administrative license revocation appeal, we must answer the following question: Under Neb. Rev. Stat. § 60-498.01(5)(a) (Reissue 2004), when does a peace officer receive the results of a chemical test to trigger the 10-day time period for submitting a sworn report to the director of the Nebraska Department of Motor Vehicles (Department)? In this case, the peace officer was on vacation when the chemical test results were delivered to the police department and the peace officer did not submit the sworn report to the director of the Department, Beverly Neth, until after his return, which submission was more than 10 days after the test results were received by the police department. We find that the sworn report was not timely submitted and that the director lacked jurisdiction to revoke the driving privileges of Kenneth G. Freeman. Therefore, we affirm the order of the district court for Buffalo County, which reversed the order of revocation.

BACKGROUND

On July 8, 2009, Officer Dustin Strode of the Ravenna, Nebraska, police department stopped a vehicle driven by Freeman to inquire about the registration status of the vehicle. Strode knew that the vehicle belonged to Freeman and that Freeman had resided in Ravenna for more than 30 days, so Strode stopped the vehicle to speak with Freeman about the failure to license the vehicle. Upon contact with Freeman, Strode smelled a strong odor of alcohol emitting from the vehicle. Freeman admitted to Strode that he had been drinking that night. Strode asked Freeman to complete field sobriety tests, which Freeman failed. Freeman also showed impairment on a preliminary breath test. Based on his investigation, Strode

then placed Freeman under arrest for driving under the influence of alcohol.

Following the arrest, Freeman agreed to submit to a chemical blood test, and the test result indicated that Freeman's blood alcohol content was .12 of 1 gram of alcohol per 100 milliliters of blood.

Strode completed a sworn report detailing the incident and signed the sworn report in the presence of a notary. The sworn report shows that the blood test results were received on July 25, 2009, and that the sworn report was received by the Department on July 30. The sworn report was admitted into evidence at the administrative license revocation hearing on August 26, along with a copy of the blood test results and testimony from both Strode and the technician who tested the alcohol content of Freeman's blood. The sworn report shows that Freeman was arrested pursuant to Neb. Rev. Stat. § 60-6,197 (Reissue 2004) and that the handwritten reasons for the arrest were as follows: "Freeman was stopped for failing to register his vehicle in Nebraska, strong odor of alcohol, admission to consuming alcohol, impaired field sobriety, impaired PBT." (Emphasis omitted.) The report also shows that Freeman was directed to submit to a chemical test and that the result of the test was a blood alcohol content of .12 of 1 gram of alcohol per 100 milliliters of blood.

The evidence at the hearing shows that a blood sample was taken from Freeman on July 8, 2009, and was subsequently tested in a hospital laboratory. Upon completion of the testing, the technician faxed the results to the police department in Ravenna. Strode testified that the police department received the test results on July 17. Strode was on vacation on July 17 and did not return from vacation until July 25, at which time he completed the sworn report.

Following the hearing, the hearing officer issued proposed findings of fact and conclusions of law and recommended an order of revocation. The hearing officer considered Freeman's argument that the sworn report was not received by the director in a timely manner as required by § 60-498.01(5)(a). The hearing officer determined that on July 25, 2009, the report was received within the meaning of the statute when Strode

returned from vacation, as opposed to July 17, when the report was faxed to the police department, and was thus timely. The director adopted the hearing officer's recommendations on September 1 and revoked Freeman's driving privileges for 90 days effective September 2.

Freeman appealed to the district court, and on October 30, 2009, the court entered an order reversing the order of revocation. In considering the timeliness of the sworn report, the court stated that § 60-498.01(5)(a) requires an arresting officer to forward a sworn report to the director "within 10 days after receipt of the results of the chemical test by the officer." The court defined the issue before it as whether the arresting officer "received the testing reports . . . on the day he returned from vacation or the day that his office received the results." The court stated:

> Frankly[,] the Nebraska Statutes offer no assistance in defining the statutory phrase and the meaning of "after receipt of the results."[ ]The court having no statutory assistance finds that the plain meaning of words contained in a statute should be applied in determining the meaning of the statute. The word receipt is simply defined as the act or process of receiving. Receiving is defined as coming into possession of an item of property. Possession is defined as the act of taking control of property. The court finds that . . . Stro[de] received the test results when [they] came into his control. That occurred on the date the test results were placed on his desk at the police department. As such the test results were received on July 17th and it was necessary that the sworn report be received by the [Department] not later than July 28th.
>
> In considering the definition of receipt the court is not unmindful that . . . subparagraph (5)(b) of the same statute provides that in order to effectuate an appeal of the administrative order of revocation that the driver must complete the appeal petition form and deliver it to the [D]epartment or have it post marked within 10 days after receipt of the notice of revocation or the person's right to a hearing to contest the revocation is foreclosed. In its rules and regulations the [D]epartment arbitrarily establishes

> that an individual is deemed to have received the notice of revocation, which starts the appeal clock running, within 3 days after the mailing by certified or registered mail of the revocation notice. The [D]epartment allows no discussion concerning whether the arrested person was on vacation or in some way incapacitated and unable to receive his or her mail. The definitions of receipt used in favor of the [Department] having no latitude for the motorist, it would seem incongruous to allow vacation latitude to the [Department].

The director subsequently perfected an appeal to this court.

ASSIGNMENT OF ERROR

The director asserts that the district court erred in determining that the sworn report was untimely under § 60-498.01(5)(a) and thus insufficient to confer jurisdiction on the director to revoke Freeman's license.

STANDARD OF REVIEW

[1,2] Under the Administrative Procedure Act, Neb. Rev. Stat. §§ 84-901 to 84-920 (Reissue 2008 & Supp. 2009), an appellate court may reverse, vacate, or modify a district court's judgment or final order for errors appearing on the record. *Murray v. Neth*, 279 Neb. 947, 783 N.W.2d 424 (2010). 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.*

[3] Whether the sworn report of a law enforcement officer is sufficient to confer jurisdiction on the Department is a question of law, and an appellate court reaches a conclusion independent of that reached by the lower court. *Id.*

ANALYSIS

[4,5] The director asserts that the district court erred in determining that the sworn report was untimely under § 60-498.01(5)(a) and thus insufficient to confer jurisdiction on the director to revoke Freeman's license. An arresting officer's sworn report triggers the administrative license revocation

process by establishing a prima facie basis for revocation. *Murray v. Neth, supra*. In an administrative license revocation proceeding, the sworn report of the arresting officer must, at a minimum, contain the information specified in the statute in order to confer jurisdiction. *Id.* See § 60-498.01(3).

[6] Section 60-498.01(5)(a) provides:

> If the results of a chemical test indicate the presence of alcohol in a concentration specified in section 60-6,196, the results are not available to the arresting peace officer while the arrested person is in custody, and the notice of revocation has not been served as required by subsection (4) of this section, the peace officer shall forward to the director a sworn report containing the information prescribed by subsection (3) of this section within ten days after receipt of the results of the chemical test. If the sworn report is not received within ten days, the revocation shall not take effect.

This court has held that § 60-498.01(5)(a) requires that a sworn report include the date the officer received the blood test results "because without this information as a requirement of the sworn report, there is no way for the Department to determine, in any given case, whether the officer in fact submitted the sworn report within 10 days after obtaining the blood test results." *Stoetzel v. Neth*, 16 Neb. App. 348, 352, 744 N.W.2d 465, 468 (2008). The 10-day time period for submitting a sworn report under § 60-498.01(5)(a) is mandatory, and if the sworn report is submitted after the 10-day period, the director of the Department lacks jurisdiction to revoke a person's driver's license. *Stoetzel v. Neth, supra*. Accordingly, in this case, if Strode received the test results for purposes of § 60-498.01(5)(a) on July 17, 2009, when they were delivered to the police department, rather than on July 25, when he returned from vacation, the sworn report was untimely, and the director lacked jurisdiction to revoke Freeman's license.

As observed by the district court, the word "receipt" is used elsewhere in § 60-498.01. For example, subsection (6)(a) states in part, "The arrested person shall postmark or return to the director a petition within ten days after the *receipt* of the

notice of revocation if the arrested person desires a hearing." (Emphasis supplied.) Subsections (4) and (5)(b) both state that the petition form provided to the arrested person "shall clearly state on its face that the petition must be completed and delivered" to the Department or "postmarked within ten days after *receipt* or the person's right to a hearing to contest the revocation will be foreclosed." (Emphasis supplied.) The Department has defined "receipt" in connection with the receipt of the petition by the arrested person. The relevant administrative code provision provides:

> The date of *receipt* of the petition form shall be the date the arresting officer provides notice of revocation and the petition form to the [arrested person]. If the Director rather than the arresting officer provides the notice of revocation and petition form to the [arrested person], the *receipt* of the petition form shall be deemed to be *received* three (3) days after mailing of the petition by certified mail by the Director to the [arrested person]. If the petition form and notice is returned unclaimed, the Director may proceed as though no petition were filed.

247 Neb. Admin. Code, ch. 1, § 013.04 (2006) (emphasis supplied). In contrast, the Department has not defined "receipt" in connection with the time for the sworn report to be submitted by the peace officer to the Department.

The director draws our attention to the fact that under § 60-498.01, the sworn report must be submitted by the "arresting peace officer." See, *Arndt v. Department of Motor Vehicles*, 270 Neb. 172, 699 N.W.2d 39 (2005); *Connelly v. Department of Motor Vehicles*, 9 Neb. App. 708, 618 N.W.2d 715 (2000). The director argues that because the sworn report must be submitted by the arresting peace officer, actual, physical receipt by this officer is necessary to trigger the 10-day period for submission of the report to the Department. The director observes that an arresting officer has no control over when the motorist's blood sample is tested or when the results are delivered to him or her and asserts that the arresting officer cannot be reasonably expected to schedule vacations or other absences around the unknown arrival date of a blood test result from a laboratory. The director argues that the district

court's interpretation of § 60-498.01(5)(a) is unreasonable and undermines the effectiveness of the administrative license revocation statutes by allowing some motorists to escape an otherwise valid revocation based upon purely fortuitous circumstances, such as the vacation, offsite training, or illness of the arresting officer.

We are not persuaded by the director's arguments. The Department has chosen to define "receipt" with certainty without consideration of exigent circumstances that may face the driver in connection with the driver's deadline to file a petition. We can find no justification for recognizing exigent circumstances, such as a peace officer's absence for vacation, to extend the deadline for delivering the sworn report to the Department.

[7] Appellate courts give statutory language its plain and ordinary meaning and will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous. *Schuyler Apt. Partners v. Colfax Cty. Bd. of Equal.*, 279 Neb. 989, 783 N.W.2d 587 (2010). The language of § 60-498.01(5)(a) requires the peace officer to forward to the director a sworn report "within ten days after receipt of the results of the chemical test." The statute does not say that the receipt must be an actual, physical receipt by the peace officer, and we decline to read that meaning into the statute. Nor has the Department defined "receipt" as it suggests in the administrative code. The Nebraska Supreme Court has stated more than once that because of the significant procedural benefit the Legislature has conferred on the Department under § 60-498.01, strict compliance with the applicable rules and regulations is required. See, *Johnson v. Neth*, 276 Neb. 886, 758 N.W.2d 395 (2008); *Hahn v. Neth*, 270 Neb. 164, 699 N.W.2d 32 (2005), quoting *Morrissey v. Department of Motor Vehicles*, 264 Neb. 456, 647 N.W.2d 644 (2002). Further, to determine that "receipt" under this statute means an actual, physical receipt by the arresting officer creates uncertainty and the potential for abuse.

[8] We hold that for purposes of § 60-498.01(5)(a), the test results are "received" on the date they are delivered to the law enforcement agency by which the arrest was effectuated and

the arresting peace officer has 10 days thereafter to forward the sworn report to the director.

Although the sworn report recites that the blood test results were received on July 25, 2009, evidence was adduced at the hearing to rebut this averment and to indicate that the test results were received by the police department on July 17 and by Strode himself on July 25. Based upon the application of § 60-498.01(5)(a), the submission of the sworn report to the Department on July 30 was untimely. For this reason, we affirm the decision of the district court which reversed the revocation of Freeman's license by the director.

CONCLUSION

The sworn report was not timely submitted to the Department as required by § 60-498.01(5)(a), and therefore, the director of the Department did not have jurisdiction to administratively revoke Freeman's license. We affirm the decision of the district court, which reversed the order of revocation.

AFFIRMED.

RICHARD C. SCOTT, PERSONAL REPRESENTATIVE OF THE BRANDI J. BLOCK ESTATE, APPELLANT, V. SHAHBAZ KHAN, M.D., APPELLEE.

790 N.W.2d 9

Filed October 19, 2010. No. A-10-099.

1. **Summary Judgment.** Summary judgment is proper when the pleadings and 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 favorable inferences deducible from the evidence.
3. **Malpractice: Physician and Patient: Proof: Proximate Cause.** To make a prima facie case of medical malpractice, a plaintiff must show (1) the applicable standard of care, (2) that the defendant deviated from that standard of care, and (3) that this deviation was the proximate cause of the plaintiff's harm.

4. **Damages.** In awarding damages for physical discomfort and mental anguish, the fact finder must rely upon the totality of the circumstances surrounding the incident.
5. **Trial: Evidence: Witnesses.** The credibility of the evidence and the witnesses and the weight to be given all of these factors rest in the sound discretion of the fact finder.
6. **Actions: Decedents' Estates: Abatement, Survival, and Revival.** As an element of a decedent's personal injury action, conscious pre-fatal-injury fear and apprehension of impending death survives a decedent's death, under the provisions of Neb. Rev. Stat. § 25-1401 (Reissue 2008), and inures to the benefit of such decedent's estate.
7. **Negligence: Proximate Cause.** A defendant's negligence is not actionable unless it is a proximate cause of the plaintiff's injuries or is a cause that proximately contributed to them.
8. **Malpractice: Physician and Patient: Proof: Proximate Cause.** Proximate causation requires proof necessary to establish that the physician's deviation from the standard of care caused or contributed to the injury or damage to the plaintiff.
9. **Proximate Cause: Words and Phrases.** A proximate cause is a cause that produces a result in a natural and continuous sequence and without which the result would not have occurred.
10. ____: ____. A defendant's conduct is a proximate cause of an event if the event would not have occurred but for that conduct, but it is not a proximate cause if the event would have occurred without that conduct.
11. **Malpractice: Physicians and Surgeons: Expert Witnesses: Proof.** In a medical malpractice case, expert testimony is almost always required to prove causation.
12. **Expert Witnesses: Physicians and Surgeons.** "Magic words" indicating that an expert's opinion is based on a reasonable degree of medical certainty or probability are not necessary.
13. ____: ____. Medical expert testimony regarding causation based upon possibility or speculation is insufficient; it must be stated as being at least probable, in other words, more likely than not.
14. **Courts: Appeal and Error.** After receiving a mandate, a trial court is without power to affect rights and duties outside the scope of the remand from an appellate court.
15. **Courts: Judgments: Appeal and Error.** Ordinarily, the reversal of a judgment and remand for further proceedings, without specific directions to the trial court, is a general remand which places the parties in the same position as if a trial had not been had.
16. ____: ____: ____. If the undisputed facts are such that but one judgment could be rendered, the trial court should enter such judgment, notwithstanding the mandate did not so direct.
17. ____: ____: ____. Where, on appeal, a reversal is entered in an appellate court, if the record discloses that at the first trial the facts in issue have not been fully developed, or definitely settled, or may be said to be obscure, indefinite,

uncertain, or otherwise unsatisfactory, though indicating that the party aggrieved has sustained actual damage, the trial court, upon remand, in the absence of specific directions to the contrary, will accord to the litigants a retrial of the cause of action generally.

18. **Trial: Evidence: Appeal and Error.** Where evidence is cumulative to other evidence received by the court, its exclusion will not be considered prejudicial error.

Appeal from the District Court for Madison County: ROBERT B. ENSZ, Judge. Reversed.

David A. Domina and Brian E. Jorde, of Domina Law Group, P.C., L.L.O., for appellant.

Brien M. Welch and Amber L. Blohm, of Cassem, Tierney, Adams, Gotch & Douglas, for appellee.

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

MOORE, Judge.

INTRODUCTION

Richard C. Scott, personal representative of the estate of Brandi J. Block, appeals from the order of the district court for Madison County, which granted summary judgment in favor of Shahbaz Khan, M.D. This is the second appearance of this case before this court. Scott brought a wrongful death claim on behalf of Block's next of kin, based on Khan's alleged psychiatric negligence in his treatment of Block, and a claim on behalf of Block's estate for Block's conscious pain and suffering prior to her death, also based on Khan's alleged negligence. The district court granted Khan's motion for summary judgment, finding that the claim for conscious pain and suffering was simply "a non-economic damage component" of the wrongful death action and that while Scott had provided evidence of Khan's negligence, he had failed to show that Khan's negligence was a proximate cause of Block's death. Scott appealed. This court affirmed the lower court's grant of summary judgment on the wrongful death claim, but we reversed the court's decision with respect to the conscious pain and suffering claim and remanded it for further proceedings after finding that it was a separate claim, properly joined in the same suit with the wrongful death claim. On remand, Khan

again sought summary judgment, and the district court granted summary judgment in Khan's favor. In the present appeal, Scott asserts that the court erred in failing to receive a particular exhibit and in granting summary judgment on the conscious pain and suffering claim. Because there was a material issue of fact as to whether Block experienced any conscious pain and suffering and because the district court erred in failing to receive a particular exhibit, which created a material issue of fact as to whether Khan's negligence was a proximate cause of any conscious pain and suffering by Block, we reverse the grant of summary judgment in Khan's favor.

BACKGROUND

Block, who had previously been diagnosed with schizoaffective disorder, bipolar type, began treating with Khan, a psychiatrist, on February 20, 2007, after her former psychiatrist moved his practice. Block last saw Khan on June 25, the day before her death on June 26.

Scott filed a complaint in the district court on April 18, 2008. Scott alleged that Khan was negligent in his treatment of Block in various ways and set forth a claim for wrongful death on behalf of Block's next of kin and a claim on behalf of Block's estate for Block's conscious pain and suffering prior to her death. Khan answered, admitting that he had occasion to treat Block as a patient, but denying that he was negligent in any way.

Khan's first summary judgment motion was heard on February 27, 2009. The evidence presented at the hearing showed that Khan provided medical care to Block from February 20 to June 25, 2007. As a part of the care, Khan provided diagnostic examinations and developed a psychiatric treatment plan. During that time, Khan also prescribed various psychiatric medications. Block was compliant with taking the medications prescribed by Khan. There was no indication that Block committed suicide, and the evidence was undisputed that the exact mechanism of or medical reason for Block's death was unknown. Because of the procedural posture of this case, we do not further summarize the evidence presented at the first summary judgment hearing, but we do note that the

evidence offered by Scott in opposition to Khan's motion included the deposition of Dr. Carl Greiner taken on October 29, 2008, and Greiner's reports of March 12 and September 29, 2008.

The district court entered an order on March 12, 2009, granting Khan's motion for summary judgment. The court found that Scott's claim for conscious pain and suffering was "a non-economic damage component of the wrongful death action" and did not state "a separate theory of recovery." The court found that the uncontroverted evidence showed that the cause of Block's death was unknown. The court determined that Scott had provided evidence as to Khan's negligence, in opposition to the evidence provided by Khan, but that Scott had failed to show that Khan's negligence was a proximate cause of Block's death. Accordingly, the court granted summary judgment in Khan's favor and dismissed the complaint.

Scott appealed, and in a memorandum opinion, we affirmed the grant of summary judgment in Khan's favor on the wrongful death claim, finding no genuine issue of material fact as to whether Khan's negligence caused Block's wrongful death. See *Scott v. Khan*, No. A-09-349, 2009 WL 3298160 (Neb. App. Oct. 13, 2009) (selected for posting to court Web site) (*Khan I*). We determined, however, that the claim for Block's conscious pain and suffering was a separate claim, not recoverable under the wrongful death statutes, but properly brought by Block's estate under the survival statutes and joined with the wrongful death claim in the same lawsuit. Because the district court did not separately consider the pain and suffering claim, we reversed, and remanded that portion of the court's decision for further proceedings.

On November 18, 2009, the district court entered judgment on the mandate of this court and also entered an order scheduling trial to commence February 8, 2010.

On November 23, 2009, Khan filed a motion to enforce the judgment on the mandate and to reconsider Khan's motion for summary judgment. Khan asked the court, in light of the directions from and mandate of this court, to reconsider his previously filed motion for summary judgment and to grant summary judgment specifically on the claim for conscious pain

and suffering. Khan expressed his belief that it was premature for the court to set the matter for trial until after it had ruled on his motion for summary judgment, "in light of the directions from the Court of Appeals on remand."

The district court heard Khan's motion on December 11, 2009. Khan's attorney argued, based on his reading of this court's opinion in *Khan I*, that because the district court did not consider the separate cause of action for pain and suffering in the original motion for summary judgment,

> the Court of Appeals has sent it back to you with directions that you are now to consider that separate cause of action on the evidence that was submitted on the original motion for summary judgment. So I'm not renewing a motion for summary judgment, it's the original summary judgment, it's just that I think the Court of Appeals says that you now have to reconsider that motion and issue a decision on that separate cause of action.

Scott's attorney asked the court to judicially notice "all of the bill of exceptions and its contents" and offered one additional exhibit that was not offered at the first summary judgment hearing. Specifically, Scott offered exhibit 25, the December 8, 2009, affidavit of Greiner and Greiner's attached supplemental report of the same date. In his affidavit, Greiner incorporated by reference both the supplemental report and his previous report of September 2008. Greiner stated that his supplemental report was written "for the purpose of providing clarity" and that it expressed no new opinions. In the supplemental report, Greiner stated that the report was "designed to assure there can be no mistake about my opinions reached in my original report." Greiner opined that Khan committed professional negligence in that his care did not conform to the standards of practice and care required of him in the rendition of professional services to patients like Block. Greiner stated that Khan deviated from these standards by failing to appropriately consider Block's medical history; by failing to acquaint himself with, consider, and fully evaluate her changing medical circumstances and deterioration during the time of his care of Block; and by incorrectly medicating her. Greiner further stated that the medication errors made by Khan were

material in that they introduced medications into her body that tend to cause hallucinatory thinking, patient torment, psychiatric and physical symptoms and conditions, and exacerbated illness, which things befell Block. Greiner opined that Block suffered emotionally, mentally, and physically as a direct and proximate result of Khan's negligence. Finally, Greiner referenced his "original report," which detailed more fully the specific acts and omissions of Khan proximately causing Block's exacerbated mental and physical illnesses while in Khan's care.

Khan objected to the offer of exhibit 25, stating that to accept additional evidence would be contrary to the mandate of this court. Specifically, Khan's counsel stated, "The Court of Appeals did not send this case back for new trial, the Court of Appeals did not send the case back for additional evidence." The district court heard further arguments from both parties on the issue of whether this court's mandate allowed for the receipt of additional evidence on remand and reserved ruling on the offer of exhibit 25. The court vacated the order setting the matter for trial and took Khan's motion under advisement.

The district court entered an order on January 12, 2010, granting summary judgment in Khan's favor on the claim for Block's conscious pain and suffering. The court determined that its mandate was "to complete the task that [it] was given at the time the motion for summary judgment was [originally] submitted," that is, to pass upon the issue as to Block's conscious pain and suffering. The court considered the threshold question of whether it could consider additional evidence and found that, "based on this specific remand," it should not do so. The court noted that Scott at least implied that exhibit 25 was cumulative, referencing Scott's statement that "'Exhibit 25 wraps these altogether. It was offered to simplify and, supplement, and perhaps crystallize, but not to complete, a previous incomplete case for conscious pain and suffering. The case was complete without the exhibit.'" The court stated that cumulative evidence "is not admissible."

The district court then considered whether summary judgment should be granted on the claim for conscious pain and

suffering based on the evidence submitted at the February 2009 hearing and judicially noticed at the December 2009 hearing. The court observed that Scott's claim for Block's conscious pain and suffering was based on a theory of professional negligence, specifically, that Khan was negligent in failing to provide responsive care, proximately causing Block's conscious pain and suffering. The court determined that certain evidence submitted by Khan sufficed to make a prima facie case that he did not commit malpractice and that Greiner, in his deposition, opined that Khan was negligent in his assessment and treatment of Block and thus deviated from the standard of care. However, the court determined that there must be some evidence that Block had conscious pain and suffering prior to her death, attributable to Khan's negligence. The court found no evidence in Greiner's deposition or original reports that Block experienced any conscious pain and suffering prior to her death, "certainly none attributable to [Khan]." The court concluded that the evidence as to proximate cause was notably absent as to the claim of conscious pain and suffering. The court found that while Scott had provided evidence of Khan's negligence, he had failed to show that this negligence was a proximate cause of any conscious pain and suffering of Block. Accordingly, the court granted Khan's motion for summary judgment as to the conscious pain and suffering claim and dismissed the complaint. Scott subsequently perfected the present appeal to this court.

ASSIGNMENTS OF ERROR

Scott asserts, consolidated, restated, and reordered, that the district court erred in (1) finding that there were no genuine issues of material fact in connection with the claim for Block's conscious pain and suffering and (2) refusing to admit exhibit 25 into evidence based on its erroneous interpretation of this court's mandate.

STANDARD OF REVIEW

[1,2] Summary judgment is proper when the pleadings and 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. *Schlatz v. Bahensky*, 280 Neb. 180, 785 N.W.2d 825 (2010). 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 favorable inferences deducible from the evidence. *Id.*

The construction of a mandate issued by an appellate court presents a question of law. *Anderson v. Houston*, 277 Neb. 907, 766 N.W.2d 94 (2009). An appellate court reviews questions of law independently of the lower court's conclusion. *Id.*

ANALYSIS

Evidence of Conscious Pain and Suffering.

Scott asserts that the district court erred in finding that there were no genuine issues of material fact in connection with the claim for Block's conscious pain and suffering. We first consider whether the district court was correct in granting summary judgment to Khan based on the evidence admitted at the first summary judgment hearing. If the court erred in that regard, we need not consider Scott's second assignment of error. If the court's grant of summary judgment was correct based on the evidence considered by the court, we must then consider whether exhibit 25 was properly excluded.

[3] The claim for conscious pain and suffering is based on Khan's alleged psychiatric negligence or malpractice. To make a prima facie case of medical malpractice, a plaintiff must show (1) the applicable standard of care, (2) that the defendant deviated from that standard of care, and (3) that this deviation was the proximate cause of the plaintiff's harm. *Yoder v. Cotton*, 276 Neb. 954, 758 N.W.2d 630 (2008). In this case, the district court found evidence of Khan's negligence sufficient to overcome the motion for summary judgment, so the questions then become whether Block experienced any conscious pain and suffering and whether Khan's negligence was a proximate cause of any such pain and suffering.

In considering whether Block experienced any conscious pain and suffering, the court apparently limited its consideration to the previously admitted testimony and reports of

Greiner. The court stated that it found nothing in the evidence of Greiner indicating Block experienced any conscious pain and suffering prior to her death, certainly none attributable to Khan, and that any statement of Greiner's was at most speculative.

[4-6] In a personal injury action, the plaintiff may recover compensation for noneconomic damages, including such things as pain, suffering, mental suffering, and emotional distress. See Neb. Rev. Stat. § 25-21,185.08(3) (Reissue 2008). In a medical malpractice case, the Nebraska Supreme Court recognized that in awarding damages for physical discomfort and mental anguish, the fact finder must rely upon the totality of the circumstances surrounding the incident. *Woitalewicz v. Wyatt*, 229 Neb. 626, 428 N.W.2d 216 (1988). The credibility of the evidence and the witnesses and the weight to be given all of these factors rest in the sound discretion of the fact finder. *Id.* And, as an element of a decedent's personal injury action, conscious pre-fatal-injury fear and apprehension of impending death survives a decedent's death, under the provisions of Neb. Rev. Stat. § 25-1401 (Reissue 2008), and inures to the benefit of such decedent's estate. *Nelson v. Dolan*, 230 Neb. 848, 434 N.W.2d 25 (1989). See, also, *Brandon v. County of Richardson*, 252 Neb. 839, 566 N.W.2d 776 (1997).

The following commentary is helpful to an understanding of just what constitutes pain and suffering:

> Pain and suffering are usually among the most significant elements of damages in medical malpractice actions. In general, courts have not attempted to draw any distinctions between the elements of "pain" and "suffering." Rather, the unitary concept of "pain and suffering" has served as a convenient label under which a plaintiff may recover not only for physical pain but for fright, nervousness, grief, anxiety, worry, mortification, shock, humiliation, indignity, embarrassment, apprehension, terror or ordeal.
>
> Where the distinction is attempted, "pain" is often equated with the physical or physiological body processes and has been defined as "that specific perception that results in common from a variety of different forms

> of stimulation intense enough to injure the body at least minimally or transiently."
>
> "Suffering" for medico-legal purposes is sometimes classified as mental anguish, which has been said to include worry, concern, grief, humiliation, embarrassment, depression and other unpleasant mental sequelae which are not necessarily directly related to pain sensations.

3 David W. Louisell & Harold Williams, Medical Malpractice § 18.02[1] at 18-17 and 18-18 (2007). "The most common methods of establishing damages for pain and suffering are through the plaintiff's own testimony and other lay witnesses, who relate their observations of the plaintiff's declarations and expressions of pain." 3 Louisell & Williams, *supra*, § 18.02[4] at 18-42 and 18-42.1.

One of the exhibits available for the district court's review in this case was the deposition of Jeanice Block, Block's mother. Jeanice testified that when Block saw Khan in May 2007, she was agitated and saw and heard things that were not there. On the afternoon of June 25, when Block brought food to Jeanice at Jeanice's place of employment, Jeanice observed that Block was "really tired" and "looking like she was almost ready to just drop and fall." That evening when Jeanice returned home, she found Block sleeping on the floor and "sobbing."

Police reports of the investigation into Block's death were also admitted into evidence. Police reports show that when Jeanice returned from work, she found Block lying on the floor and Block did not want to move because her back was hurting. Jeanice told police that Block was "breathing real heavy and sweating profusely and desired not to go to bed as she felt the harder surface would help her back pain." Police on the scene the morning Block's death was discovered observed that the home was very hot with no air conditioning and that the windows were closed. Jeanice told police that Block was functioning well and able to hold a job prior to her treatment with Khan, but that since that time, she had been lethargic, had exhibited signs of psychosis, and had lost her employment. Jeanice told police that when Block brought food to her, Block "'looked like a zombie'" and did not want to eat, which Jeanice thought was unusual. Jeanice also described Block's

extreme mood swings since transferring to Khan's care and her recent experience of "seeing worms in her head." Medical records reviewed by police confirmed a doctor's visit by Block on June 15, 2007, where she spoke of "worms in her hair and pubic region." Another visit to the same doctor in June showed that the doctor considered Block paranoid and that he suggested she see Khan sooner than scheduled.

In Greiner's deposition, he described the records as showing that Block was disorganized, confused, hallucinating, and less able to care for herself. In explaining on what he based his opinion that Block was unable to care for herself, Greiner referenced Block's complaint to a physician that she had worms in her head, her discharge from employment, a caseworker's indication that Block was deteriorating and having a change in behavior, Jeanice's comment that Block was "doing horribly," and Khan's review that Block had positive and negative symptoms of schizophrenia.

In his report of March 12, 2008, Greiner set forth evidence of Block's worsening condition gleaned from the medical records. Greiner observed that Block's functioning worsened around March 2007, when she described to her therapist that "she could not take it anymore and felt that her medications may not be correct." In April 2007, Block's therapist noted that Block was irrational and irritable with increased paranoia, that Jeanice did not think Block's medications were working and was concerned that Block was deteriorating, and that Block, who experienced a menstrual period after not having any for some time, wondered if she was going to die. In May, Block was described as becoming more paranoid and irritable, having problems in maintaining hygiene, and being slower at her job. She also expressed her concern to a health care provider that she was infested by worms. Near the end of May, Block refused to come to the center where she received supportive social services and was described as not doing very well, paranoid, and not finishing her sentences. Block thought that there were bugs in her home and that a man put up a fan just to annoy her. In June, Block's caseworker was concerned that Block was not acting right and had had an abrupt change in personality. At this time, Block was reported as having

significant behavioral changes, was described as being overwhelmed by getting her room clean, and thought that clumps of worms in her hair fell into the toilet. Khan's notes of the June 25 visit indicate that Block's insight and judgment were poor and that she had racing thoughts, emotional instability, and a decreased need for sleep. Khan identified Block as being disorganized and confused, but not suicidal.

When viewing the evidence in the light most favorable to Scott and giving him the benefit of all reasonable inferences deducible from the evidence, we conclude that the above evidence was sufficient to create a material issue of fact as to whether Block experienced any conscious pain and suffering prior to her death, and the district court erred in concluding otherwise. The question then becomes whether the evidence considered by the court was sufficient to create a material issue of fact on the issue of proximate causation.

Evidence of Causation.

[7-11] A defendant's negligence is not actionable unless it is a proximate cause of the plaintiff's injuries or is a cause that proximately contributed to them. *Hamilton v. Bares*, 267 Neb. 816, 678 N.W.2d 74 (2004). Proximate causation requires proof necessary to establish that the physician's deviation from the standard of care caused or contributed to the injury or damage to the plaintiff. *Id.* A proximate cause is a cause that produces a result in a natural and continuous sequence and without which the result would not have occurred. *Radiology Servs. v. Hall*, 279 Neb. 553, 780 N.W.2d 17 (2010). A defendant's conduct is a proximate cause of an event if the event would not have occurred but for that conduct, but it is not a proximate cause if the event would have occurred without that conduct. *Worth v. Kolbeck*, 273 Neb. 163, 728 N.W.2d 282 (2007). In a medical malpractice case, expert testimony is almost always required to prove causation. *Yoder v. Cotton*, 276 Neb. 954, 758 N.W.2d 630 (2008).

[12,13] In his deposition, Greiner opined that on June 25, 2007, Block was not capable of taking care of herself. Greiner also opined that Khan was negligent in his assessment and treatment of Block and "in the negligence of assessing the

severity of her illness, in not hospitalizing her, that she was not able to care for herself and died." Greiner clearly felt that Khan's negligent assessment of the severity of Block's illness and failure to hospitalize her contributed to her inability to care for herself and led to her death. But this does not equate with an opinion to the requisite degree of medical certainty that Khan's negligence was a proximate cause of Block's conscious pain and suffering. Greiner's opinions, in the two reports attached as exhibits to his deposition, seem largely focused on whether Khan deviated from the standard of care. While it might be possible to infer from Greiner's deposition and the attached reports that he attributed Block's conscious pain and suffering to Khan's negligence, there is nothing in this evidence couching such an opinion in terms of probability, rather than in terms of possibility or speculation. "Magic words" indicating that an expert's opinion is based on a reasonable degree of medical certainty or probability are not necessary. *Richardson v. Children's Hosp.*, 280 Neb. 396, 787 N.W.2d 235 (2010). However, medical expert testimony regarding causation based upon possibility or speculation is insufficient; it must be stated as being at least "probable," in other words, more likely than not. *Fackler v. Genetzky*, 263 Neb. 68, 638 N.W.2d 521 (2002). We conclude that the district court did not err in its conclusion that the evidence, at least as presented at the first summary judgment hearing, did not support a conclusion that Khan's negligence was a proximate cause of any conscious pain and suffering by Block. Accordingly, we must turn our attention to the question of whether exhibit 25, which undeniably contains such a conclusion, expressed in the requisite terms of medical certainty, was properly excluded.

Admission of Exhibit 25.

[14-17] Scott asserts that the district court erred in refusing to admit exhibit 25 into evidence based on its erroneous interpretation of this court's mandate. After receiving a mandate, a trial court is without power to affect rights and duties outside the scope of the remand from an appellate court. *State ex rel. Wagner v. Gilbane Bldg. Co.*, 280 Neb. 223, 786 N.W.2d 330

(2010). Ordinarily, the reversal of a judgment and remand for further proceedings, without specific directions to the trial court, is a general remand which places the parties in the same position as if a trial had not been had. *Bohmont v. Moore*, 141 Neb. 91, 2 N.W.2d 599 (1942). But if the undisputed facts are such that but one judgment could be rendered, the trial court should enter such judgment, notwithstanding the mandate did not so direct. *Id.* Where, on appeal, a reversal is entered in an appellate court, if the record discloses that at the first trial the facts in issue have not been fully developed, or definitely settled, or may be said to be obscure, indefinite, uncertain, or otherwise unsatisfactory, though indicating that the party aggrieved has sustained actual damage, the trial court, upon remand, in the absence of specific directions to the contrary, will accord to the litigants a retrial of the cause of action generally. *Parish v. County Fire Ins. Co.*, 137 Neb. 385, 289 N.W. 765 (1940).

Khan directs our attention to the following:

> Where the case is remanded generally or for proceedings in accordance with the opinion of the appellate court, and neither entry of judgment nor a new trial is ordered, it may be proper to open the case for the reception of additional evidence, while, in other cases, it is proper for the lower court to decide the case without receiving additional evidence, as where on a reversal and remand the appellant does not claim any new or different evidence from that introduced at the previous trial, or where the evidence could have been made available to the court at the time of its original ruling, or when the trial court renders judgment on the findings of fact made on the first trial.

5 C.J.S. *Appeal and Error* § 1139 at 538 (2007). However, we also note:

> A decision reversing and remanding a judgment of the trial court generally permits and requires the granting of a new trial in the lower court, even where the reversal is without specific directions therefor.
>
> Whether the decision of the appellate court necessitates a new trial after remand depends on the intention of the

> appellate court, any doubt as to which is usually resolved in favor of a new trial.

5 C.J.S., *supra*, § 1163 at 563-64.

In *Khan I*, we concluded that the district court, following the original summary judgment proceedings, failed to consider the separate claim brought by Scott on behalf of Block's estate for Block's conscious pain and suffering, and we reversed, and remanded that portion of the court's decision for further proceedings. Our opinion and mandate did not specifically direct the lower court to consider only the evidence developed at the original hearing. We simply remanded for further proceedings.

In considering whether to admit exhibit 25, the district court referenced Neb. Rev. Stat. § 25-1334 (Reissue 2008), which provides in part in connection with summary judgment proceedings that "[t]he court may permit affidavits to be supplemented or opposed by depositions or by further affidavits." The court stated that the motion was previously submitted, and neither party requested that the evidence be supplemented by any additional evidence. While it may be true that neither party requested the evidence to be supplemented after the original summary judgment hearing but prior to the appeal, the effect of our reversal and remand for further proceedings was to place the parties in the same position as if a summary judgment hearing, at least on the issue of Block's conscious pain and suffering, had not been had. Scott's offer of exhibit 25 at the December 2009 hearing can be seen as a request to supplement the evidence.

[18] Another reason the district court declined to receive exhibit 25 was the view that it contained cumulative evidence. Where evidence is cumulative to other evidence received by the court, its exclusion will not be considered prejudicial error. *Campagna v. Higday*, 14 Neb. App. 749, 714 N.W.2d 770 (2006). Despite the statement in Greiner's affidavit that his supplemental report was executed for the purpose of providing clarity and that it expressed no new opinions, we are not convinced that the evidence in the report was cumulative to evidence found in Greiner's deposition and the reports attached to the deposition. In his supplemental report, Greiner states that

the medication errors made by Khan were material in that they introduced medications into Block's body that tend to cause hallucinatory thinking, patient torment, psychiatric and physical symptoms and conditions, and exacerbated illness. Greiner stated that "[t]hese things befell" Block and opined that Block suffered emotionally, mentally, and physically as a direct and proximate result of Khan's negligence. Based on the language of our mandate, we conclude that it was error for the district court to exclude exhibit 25 and that exhibit 25 creates a material issue of fact on the question of whether Khan's negligence was a proximate cause of any conscious pain and suffering on the part of Block. Accordingly, we reverse the grant of summary judgment in Khan's favor.

CONCLUSION

The district court erred in granting summary judgment in Khan's favor, and we reverse the grant of summary judgment.

REVERSED.

ROBERT B. REYNOLDS, APPELLANT, V. KEITH COUNTY BOARD OF EQUALIZATION, APPELLEE.

THERESA SHAW-ROTH AND RICHARD S. ROTH, APPELLANTS, V. KEITH COUNTY BOARD OF EQUALIZATION, APPELLEE.

790 N.W.2d 455

Filed October 26, 2010. Nos. A-09-1019, A-09-1020.

1. **Taxation: Judgments: Appeal and Error.** Appellate courts review decisions rendered by the Tax Equalization and Review Commission for errors appearing on the record.
2. **Judgments: Appeal and Error.** When reviewing a judgment for errors appearing on the record, an appellate court's inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable.
3. ____: ____. Questions of law arising during appellate review of the Tax Equalization and Review Commission decisions are reviewed de novo on the record.
4. **Governmental Subdivisions: Taxation: Property.** Real and personal property of the state and its governmental subdivisions that is leased to a private party for any purpose other than a public purpose shall be subject to property taxes as if the property were owned by the lessee.

5. **Taxation: Valuation.** Under Neb. Rev. Stat. § 77-1374 (Reissue 2009), improvements on leased public lands shall be assessed, together with the value of the lease, to the owner of the improvements as real property.
6. ____: ____. The purchase price of property, standing alone, is not conclusive of the actual value of the property for assessment purposes; it is only one factor to be considered in determining actual value.
7. **Taxation: Valuation: Words and Phrases.** Actual value may be determined using professionally accepted mass appraisal methods, including, but not limited to, the (1) sales comparison approach, (2) income approach, and (3) cost approach.
8. **Taxation: Valuation.** In tax valuation cases, actual value is largely a matter of opinion and without a precise yardstick for determination with complete accuracy.

Appeals from the Tax Equalization and Review Commission. Affirmed.

Michael D. Samuelson, of McGinley, O'Donnell, Reynolds & Korth, P.C., L.L.O., for appellants.

J. Blake Edwards, Keith County Attorney, for appellee.

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

CASSEL, Judge.

INTRODUCTION

At issue in these consolidated appeals are the valuations for property tax purposes of leasehold interests in public land. The taxpayers contend that because their respective leases were determined by protracted negotiations at arm's length, the resulting rentals necessarily meet or exceed market rent and thereby preclude their leaseholds, except for the buildings and improvements located on the leased land, from having taxable value. The Tax Equalization and Review Commission (TERC) correctly rejected this argument, and we affirm its final orders.

BACKGROUND

These appeals address residential lots located near Lake McConaughy in Keith County, Nebraska. Central Nebraska Public Power and Irrigation District (Central), a governmental subdivision of the State of Nebraska which owns the lake and adjoining recreational facilities, leases the lots to a nonprofit

corporation, which in turn subleases the particular lots to the respective taxpayers.

Robert B. Reynolds is the sublessee of "Lot 66 K-1." Theresa Shaw-Roth and Richard S. Roth are the sublessees of "Lot 3 K-3." We refer to these individuals collectively as the taxpayers.

The leases each state a term of 31 years with an additional year added at the end of any year if the leases have not been terminated. The term of each sublease is 30 years, with automatic renewals at the end of each year. Under the leases from Central to the nonprofit corporation, the taxpayers are classified as "Lake Front Sublessees," and the rent payable by such sublessees is 5 percent of the fair market value of the average lakefront lot as determined by an appraisal or appraisals, unless otherwise agreed. By written agreement with Central, the per annum rents payable by each of the lakefront sublessees from April 1, 2007, to March 31, 2008—which encompassed the January 1, 2008, valuation date at issue in these appeals—were $450. Increased rents were payable thereafter: $1,000 for 2008-09, $1,500 for 2009-10, and $2,000 for 2010-11 and annually thereafter until April 1, 2018.

The taxpayers did not take issue with the respective valuations of improvements on their properties, but contested the county's valuation of the land, i.e., the leasehold interests. For 2008, the chief appraiser for Keith County valued the Reynolds property at $389,245 (land value of $50,000 and improvement value of $339,245) and the Roth property at $167,680 (land value of $70,000 and improvement value of $97,680). After receipt of these proposed property valuations, the taxpayers filed property valuation protests with the Keith County Board of Equalization (Board) in which they requested that their land values be set at $20,000. The Board affirmed the assessment values used by the appraiser.

The taxpayers timely appealed the decisions to TERC. They alleged that the valuations affirmed by the Board did not determine the value of the lease as defined by Neb. Rev. Stat. § 77-1374 (Reissue 2009) or chapter 10 of the Nebraska Administrative Code and that the assessor did not follow

professionally accepted mass appraisal methodology. They agreed to a consolidated hearing on their respective appeals.

At the hearing, Reynolds and Roth each testified that they were only disputing the taxable values placed upon their leasehold interests. Reynolds testified that he was the president of the nonprofit corporation leasing the real estate from Central and testified at some length regarding the negotiations lasting 9 to 10 months with Central over the rentals to be paid by sublessees. In describing the negotiations, he testified that "[t]here was the threat of litigation constantly being held over our head and finally we agreed to the terms that appear in the addend[um] that is dated in 2007. That was as — it just fit so squarely into the definition of an arm's-length transaction . . . ." He testified that "we negotiated and agreed that this was the full value." Reynolds testified that the value of the lease was $0 because it was an arm's-length transaction. Roth testified that "at the time that this was done, we were in negotiation with Central . . . , and at the time that we were in that process, we had a lease fee that was below market, so I felt that there was value to the lease at that time, in all honesty." However, Roth testified that on January 1, 2008, the value of the lease was $0 "because we were paying market value."

The appraiser testified that the leasehold values of the "K properties" were established at $30,000, $50,000, or $70,000, based on criteria such as size, view, access, and "elbow room." He testified that the values "were driven off of the sold properties and we compared what sold and tried to make those properties — the leasehold values similar to the sold properties and determined that." The appraiser testified that in the K-1 area, a property with improvements valued at $24,260 sold for $52,000, so the amount attributed to the leasehold value was $30,000—the approximate difference between the improvement value and the sale price. He testified that another property sold for $110,000 and had an improvement value of $57,510, so he attributed to it a leasehold value of $50,000. The appraiser testified that he attributed a $70,000 leasehold value to all of the properties in the K-3 area and that he had used the cost approach to arrive at that amount: "[W]e took the

sale price minus the value of the improvements, which gave us an indication of value for the leasehold value."

Following a hearing, TERC affirmed the decisions of the Board. TERC found that the taxpayers had not produced competent evidence that the Board failed to faithfully perform its official duties and to act on sufficient competent evidence to justify its actions and had not adduced sufficient clear and convincing evidence that the Board's decisions were unreasonable or arbitrary. TERC affirmed the Board's decisions determining the actual values of the subject properties as of the January 1, 2008, assessment date.

The taxpayers timely appeal.

ASSIGNMENTS OF ERROR

The taxpayers allege that TERC erred in (1) finding that the Board's assessments were supported by competent evidence and were not unreasonable or arbitrary and that the taxpayers did not meet their burdens of proof; (2) affirming the Board's conclusions concerning the actual values of the subject properties on January 1, 2008, instead of determining the correct actual values of the properties for the tax year 2008; and (3) accepting the Board's methodology employed and values reached for the taxpayers' leasehold interests in the subject properties.

STANDARD OF REVIEW

[1-3] Appellate courts review decisions rendered by TERC for errors appearing on the record. *Vitalix, Inc. v. Box Butte Cty. Bd. of Equal.*, 280 Neb. 186, 786 N.W.2d 326 (2010). When reviewing a judgment for errors appearing on the record, an appellate court's inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable. *Id.* Questions of law arising during appellate review of TERC decisions are reviewed de novo on the record. *Id.*

ANALYSIS

The taxpayers correctly observe that leasehold interests are a taxable interest in real property and thus, we begin by recalling basic principles of law pertaining to real property taxation. In

Omaha Country Club v. Douglas Cty. Bd. of Equal., 11 Neb. App. 171, 179-80, 645 N.W.2d 821, 829 (2002), this court summarized as follows:

> Under Nebraska law, real property "shall mean all land, . . . improvements, . . . and all privileges pertaining to real property." 350 Neb. Admin. Code, ch. 10, § 001.01 (2000). Privileges related to real property [are] defined as "the right to sell, lease, use, give away, or enter and the right to refuse to do any of these. All rights may or may not be vested in one owner or interest holder." 350 Neb. Admin. Code, ch. 10, § 001.01F (2000).
>
> Nebraska law also provides that all real property not exempt from taxation is to be valued at its actual value. Neb. Rev. Stat. § 77-201(1) (Cum. Supp. 2000). Further, 350 Neb. Admin[.] Code, ch. 10, § 002.01A (2000), requires real property, except agricultural or horticultural land, to be valued at 100 percent of its actual value. For the purpose of taxing real property, actual value means the real property's market value in the ordinary course of business.

[4,5] As the taxpayers also observe, Nebraska statutes and regulations impose property taxation upon the lessee's interests in real estate owned by a governmental subdivision. "Property of public power districts and irrigation districts that is leased to a private party for purposes other than a public purpose . . . shall be subject to taxation as if the property was owned by the lessee." 350 Neb. Admin. Code, ch. 41, § 004.06 (2009). See, also, Neb. Admin. Code, ch. 15, § 003.05 (2009) ("[r]eal and personal property of the state and its governmental subdivisions that is leased to a private party for any purpose other than a public purpose shall be subject to property taxes as if the property was owned by the lessee"). Under § 77-1374, "Improvements on leased public lands shall be assessed, together with the value of the lease, to the owner of the improvements as real property." As we related above, the taxpayers do not contest the assessment of the value of improvements on their leased public land. Thus, they contest only the "value of the lease," to which the county refers as the "land." At issue in this appeal is the value of the

taxpayers' leasehold interests. They contended at the hearing that the appraiser and, consequently, the Board attributed to the taxpayers the value of the *land*, as if it were owned by the taxpayers, rather than the value of the *lease*. We reject the taxpayers' position for a number of reasons.

[6] First, an amount arrived at through an arm's-length transaction does not necessarily equate to market value. The taxpayers argued before TERC that their leasehold interests had no value because the rent negotiated was the result of an arm's-length transaction. "The market value of a leasehold interest depends on how contract rent compares to market rent . . . ." *The Appraisal of Real Estate*, Appraisal Inst. 634 (13th ed. 2008). "A leasehold interest may have value if contract rent is less than market rent, creating a rental advantage for the tenant." *Id.* at 114-15. "It should be noted that the terms and the market reaction to those terms could cause the sum of the values of the leased fee and leasehold interests to be different than the value of a fee simple interest as if no lease existed." *Id.* at 112. TERC stated, "The argument of the [t]axpayer[s] is essentially the same argument that a purchaser might make that his or her purchase price is the market value of the property. Purchase price does not, however, equal market value, although it may be considered when a determination of market value is made." We agree. The purchase price of property, standing alone, is not conclusive of the actual value of the property for assessment purposes; it is only one factor to be considered in determining actual value. *US Ecology v. Boyd Cty. Bd. of Equal.*, 256 Neb. 7, 588 N.W.2d 575 (1999). Similarly, we conclude that negotiated rent, while a factor to be evaluated, is not determinative of the market value of the leasehold.

Second, the taxpayers did not provide sufficient evidence to support use of the discounted cashflow method to estimate the value of their leasehold interests. The discounted cashflow analysis is an accepted method of valuation within the income capitalization approach to value. Uniform Standards of Professional Appraisal Practice, Statement on Appraisal Standards No. 2 (Appraisal Standards Bd. of Appraisal Found. 2010), available at http://www.uspap.org/2010USPAP/USPAP/stmnts/smt_02.htm. The method is an additional tool available

to an appraiser, but it is best applied in developing value opinions in the context of one or more other approaches. See *id.* The record contains evidence of the base rent and a yield rate applied to the agreed-upon fair market value of an average lakefront property. However, as TERC stated:

> Whether that rate is a market rate and whether it would be an appropriate rate for use in a discounted cash flow analysis is unknown. There is no evidence of the amount or frequency of assessments by the [nonprofit c]orporation or the repayment of taxes or in lieu of tax payments made by [Central]. In this appeal, there is no evidence of an appropriate discount rate. Without a determination of gross rents and a discount rate, an estimate of market value is not possible using the discounted cash flow method.

We agree with TERC that there is simply insufficient evidence in the record to support use of the discounted cash-flow method.

[7,8] Third, the Board's estimate of value has support in generally accepted methodology. "Actual value may be determined using professionally accepted mass appraisal methods, including, but not limited to, the (1) sales comparison approach . . . , (2) income approach, and (3) cost approach." Neb. Rev. Stat. § 77-112 (Reissue 2009). The appraiser used a cost approach to value the properties, and the Board adopted these valuations. The record cards that were developed from the government appraisal show that a computer program was used to determine property valuations. These state that data for cost calculations was supplied by "Marshall & Swift." The appraiser testified that he determined the "replacement cost new" of the improvements, deducted depreciation, and then added the leasehold value to arrive at a total value. An analysis by the appraiser of the K-1 subdivision and of the K-3 subdivision examined all of the sold properties within these areas for assessment year 2007. The reports stated that the sales comparison approach "was not developed because there was an insufficient amount of sales in the area that were similar in age, size, location, and style. It is not typical to use this approach in mass appraisal unless there are an abundant

amount of sales and interior information is known." However, "[t]he Sales Comparison Approach and the Abstraction Method w[ere] used to determine the land value in all of the subdivisions around the lake." With regard to the income approach, the reports stated, "The unknown lease agreements make it difficult to determine a capitalization rate. In addition, if the total accurate income was well known and was market driven on a year to year basis, the value would be similar to the cost approach to value or the sales comparison approach." In tax valuation cases, actual value is largely a matter of opinion and without a precise yardstick for determination with complete accuracy. *Brenner v. Banner Cty. Bd. of Equal.*, 276 Neb. 275, 753 N.W.2d 802 (2008). The taxpayers had the burden of persuading TERC that the Board's valuations were arbitrary or unreasonable. See *id.* We conclude that the record does not show that the Board acted arbitrarily or unreasonably in determining its valuations of the subject properties.

CONCLUSION

Because we conclude that TERC's decisions conform to the law, are supported by competent evidence, and are not arbitrary, capricious, or unreasonable, we affirm its orders.

AFFIRMED.

VALLEY COUNTY SCHOOL DISTRICT 88-0005, ALSO KNOWN AS ORD PUBLIC SCHOOLS, APPELLEE, V. ERICSON STATE BANK, A NEBRASKA CORPORATION, APPELLANT.

790 N.W.2d 462

Filed October 26, 2010. No. A-09-1206.

1. **Statutes: Appeal and Error.** The determination of the applicability of a statute is a question of law, and when considering a question of law, the appellate court makes a determination independent of the trial court.
2. **Prejudgment Interest.** Generally, prejudgment interest accrues on the unpaid balance of liquidated claims arising from an instrument in writing from the date the cause of action arose until the entry of judgment, pursuant to Neb. Rev. Stat. §§ 45-103.02(2) and 45-104 (Reissue 2004).
3. **Appeal and Error.** Under the law-of-the-case doctrine, an appellate court's holdings on questions presented to it in reviewing the trial court's proceedings

become the law of the case; those holdings conclusively settle, for that litigation, all matters ruled upon, either expressly or by necessary implication.

4. **Waiver: Appeal and Error.** Under the mandate branch of the law-of-the-case doctrine, a decision made at a previous stage of litigation, which could have been challenged in the ensuing appeal but was not, becomes the law of the case; the parties are deemed to have waived the right to challenge that decision.
5. ____: ____. An issue is not considered waived if a party did not have both an opportunity and an incentive to raise it in a previous appeal.
6. **Judgments: Interest: Time.** Interest as provided in Neb. Rev. Stat. § 45-103 (Reissue 2004) shall accrue on decrees and judgments for the payment of money from the date of entry of judgment until satisfaction of judgment.
7. **Prejudgment Interest.** Neb. Rev. Stat. § 45-104 (Reissue 2004) provides the interest rate for prejudgment interest upon the happening of events outlined in the statute.
8. **Judgments: Interest: Time.** When a judgment is modified on appeal, whether increased or decreased, the interest accrues on the judgment from the date the original judgment was due.
9. **Prejudgment Interest.** Prejudgment interest is part of the judgment.
10. **Judgments: Interest: Time.** Although compound interest generally is not allowable on a judgment, it is established that a judgment bears interest on the whole amount from its date even though the amount is in part made up of interest.
11. ____: ____: ____. As a general rule, interest on a judgment or debt is computed up to the time of the first payment, and that payment is first applied to interest and the balance to principal.
12. **Judgments: Costs.** Costs are considered part of the judgment.

Appeal from the District Court for Wheeler County: KARIN L. NOAKES, Judge. Reversed and remanded for further proceedings.

Gregory G. Jensen, P.C., L.L.O., for appellant.

Joshua J. Schauer and Rex R. Schultze, of Perry, Guthery, Haase & Gessford, P.C., L.L.O., for appellee.

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

CASSEL, Judge.

INTRODUCTION

In a prior appeal between these same parties, we affirmed the district court's order which rendered judgment with interest accruing at the rate of 12 percent per annum from the day after a demand letter was sent. This appeal concerns the applicable interest rate following entry of the judgment. The district court determined that interest at 12 percent continued

to run. Because we conclude that after entry of judgment, the judgment rate applied rather than the 12-percent prejudgment interest rate, we reverse, and remand for further proceedings in conformity with this opinion.

BACKGROUND

These parties were previously before us in *Valley Cty. Sch. Dist. 88-0005 v. Ericson State Bank*, No. A-08-913, 2009 WL 1639739 (Neb. App. June 9, 2009) (selected for posting to court Web site) (*Valley Cty. I*). That case involved the refusal of Ericson State Bank (Bank) to deliver funds held in two escrow accounts to Ord Public Schools (OPS). The funds were put into escrow by two Class I school districts which were dissolved and merged with OPS. The Bank contended that because the legislative bill which mandated the dissolution and merger of Class I school districts had been repealed, the escrow funds belonged to the two Class I school districts that put the money into escrow. On December 12, 2007, OPS filed a complaint against the Bank, seeking to recover the $30,000 in escrow funds. On August 1, 2008, the district court granted summary judgment in favor of OPS and rendered judgment "in the amount of $30,000.00 with interest accruing since July 20, 2006[,] at the rate of 12 percent per annum." On appeal, the Bank assigned error to, among other things, the granting of prejudgment interest and the setting of the rate at 12 percent. We affirmed via a memorandum opinion, concluding, "We also find that OPS is entitled to prejudgment interest at a rate of 12 percent per annum beginning July 20, 2006." *Valley Cty. I* at *6. Our mandate was filed with the clerk of the district court on September 14, 2009, and spread on the record of the district court on September 24.

The transcript in the present case shows that on October 20, 2009, OPS moved for an order stating the amount owing on the judgment. On October 27, the district court entered an order which stated that OPS "is entitled to 12% interest on the judgment principal of $30,000.00 from July 20, 2006[,] to September 24, 2009, the date the mandate from the Court of Appeals was spread." The district court ordered that the Bank owed OPS "an additional $11,771.81 as of October 23, 2009,

with interest accruing at the rate of $3.86 per day from and after October 23, 2009." The Bank timely filed a motion to alter or amend, contending that the order was contrary to law, that it included an order for compound interest, and that after August 1, 2008, the interest rate on the judgment should be at the judgment rate of 4.188 percent. The district court overruled the motion without a hearing, stating that it "has considered the issues in the motion to alter or amend twice and the Court of Appeals has returned a mandate affirming the decision. No further hearings are necessary or required."

The Bank timely appeals.

ASSIGNMENT OF ERROR

The Bank's sole assignment of error is that the district court erred in determining that prejudgment interest of 12 percent, as provided in Neb. Rev. Stat. § 45-104 (Reissue 2004), should continue to accrue postjudgment, when Neb. Rev. Stat. § 45-103.01 (Reissue 2004) specifically states that interest as provided in Neb. Rev. Stat. § 45-103 (Reissue 2004) shall accrue on all decrees and judgments for the payment of money from the date of entry of judgment until satisfaction of judgment.

STANDARD OF REVIEW

[1] The determination of the applicability of a statute is a question of law, and when considering a question of law, the appellate court makes a determination independent of the trial court. *Eikmeier v. City of Omaha*, 280 Neb. 173, 783 N.W.2d 795 (2010).

ANALYSIS

There is no dispute that the Bank must pay the 12-percent prejudgment interest from July 20, 2006, to the date of entry of summary judgment on August 1, 2008. This appeal presents the narrow issue of the appropriate interest rate after August 1.

[2,3] Generally, prejudgment interest accrues on the unpaid balance of liquidated claims arising from an instrument in writing from the date the cause of action arose until the entry of judgment, pursuant to Neb. Rev. Stat. §§ 45-103.02(2) (Reissue 2004) and 45-104. *Eikmeier v. City of Omaha, supra*. In *Valley*

Cty. I at *5, we determined that the case involved a liquidated claim and that OPS was "entitled to prejudgment interest from the date the cause of action arose until the entry of judgment," and we cited to § 45-103.02(2). We further cited § 45-104 and stated that because no interest rate had otherwise been agreed upon, the statutory default rate of 12 percent per annum applied. Because we have already determined these issues, we need not again decide them. Under the law-of-the-case doctrine, an appellate court's holdings on questions presented to it in reviewing the trial court's proceedings become the law of the case; those holdings conclusively settle, for that litigation, all matters ruled upon, either expressly or by necessary implication. *Money v. Tyrrell Flowers*, 275 Neb. 602, 748 N.W.2d 49 (2008). The law-of-the-case doctrine reflects the principle that an issue that has been litigated and decided in one stage of a case should not be relitigated in a later stage. *Pennfield Oil Co. v. Winstrom*, 276 Neb. 123, 752 N.W.2d 588 (2008). The doctrine promotes judicial efficiency and protects parties' settled expectations by preventing parties from relitigating settled issues within a single action. *Id.*

[4,5] OPS argues that the Bank should have raised the issue now before us in *Valley Cty. I*. OPS contends that because the summary judgment stated that interest accrued since July 20, 2006, at 12 percent per annum, it implied that § 45-104 was being applied. OPS reasons that because the Bank did not challenge that part of the order in the original appeal, the issue is waived under the law-of-the-case doctrine. Under the mandate branch of the law-of-the-case doctrine, a decision made at a previous stage of litigation, which could have been challenged in the ensuing appeal but was not, becomes the law of the case; the parties are deemed to have waived the right to challenge that decision. *Pennfield Oil Co. v. Winstrom, supra*. An issue is not considered waived if a party did not have both an opportunity and an incentive to raise it in a previous appeal. *Id.* In *Valley Cty. I* at *5, we specifically stated that § 45-104 applied "[b]ecause there was no 'otherwise agreed' upon rate for prejudgment interest" and that OPS was entitled to the 12-percent prejudgment interest until the entry of judgment. Neither the district court's judgment nor our opinion stated that

the 12-percent interest rate would continue to be applied after entry of judgment; thus, the Bank did not have a reason to raise the issue of the appropriate postjudgment interest rate at that time. Had the district court's initial judgment expressly stated a postjudgment interest rate, OPS' argument would have had merit. But because the judgment was silent on the matter of postjudgment interest, we reject OPS' argument that the matter should have been raised in the prior appeal.

[6] The Bank argues that § 45-103.01 controls the amount of interest accruing on a money judgment after the entry of judgment until satisfaction of the judgment. We agree. Under § 45-103.01, "[i]nterest as provided in section 45-103 shall accrue on decrees and judgments for the payment of money from the date of entry of judgment until satisfaction of judgment." Section 45-103 provides in pertinent part:

> For decrees and judgments rendered on and after July 20, 2002, interest on decrees and judgments for the payment of money shall be fixed at a rate equal to two percentage points above the bond investment yield, as published by the Secretary of the Treasury of the United States . . . . This interest rate shall not apply to:
>
> (1) An action in which the interest rate is specifically provided by law; or
>
> (2) An action founded upon an oral or written contract in which the parties have agreed to a rate of interest other than that specified in this section.

[7] OPS, on the other hand, argues that § 45-103 does not apply due to the language of § 45-103(1), because interest at 12 percent is specified in § 45-104 and thus is "specifically provided by law." We disagree. Section 45-104 provides the interest rate for prejudgment interest upon the happening of events outlined in the statute. *BSB Constr. v. Pinnacle Bank*, 278 Neb. 1027, 776 N.W.2d 188 (2009). We conclude that the 12-percent prejudgment interest rate does not continue to run after the entry of judgment.

Alternatively, OPS argues that the Bank unlawfully held funds belonging to OPS, thereby subjecting it to the interest provisions of § 45-104 rather than § 45-103. In *Valley Cty. I* at *6, we stated, with reference to a paragraph of the escrow

agreement which purported to protect the Bank from any liability unless the Bank showed gross negligence or willful misconduct, "We believe that the Bank's continued failure to turn the escrow funds over to OPS, as rightful owner, without any lawful basis to do so constitutes willful misconduct." Section 45-104 allows interest at 12 percent per annum "on money received to the use of another and retained without the owner's consent, express or implied, from the receipt thereof, and on money loaned or due and withheld by unreasonable delay of payment."

In our view, the authority cited by OPS does not support its argument. In *Cheloha v. Cheloha*, 255 Neb. 32, 582 N.W.2d 291 (1998), the district court found that the agent converted $33,495.05 in either principal or interest from certificates of deposit to his own use, and it awarded the principal that amount plus postjudgment interest and costs. On appeal, the Nebraska Supreme Court stated that under § 45-104, the agent was chargeable with interest at the legal rate from the time the money was wrongfully withheld from the principal, and that the principal "was entitled to prejudgment interest as a matter of law on [$33,495.05] from the time [the agent] received the certificates of deposit." 255 Neb. at 44, 582 N.W.2d at 301. The Supreme Court clearly referred to the interest under § 45-104 as prejudgment interest. Thus, even if OPS is entitled to interest under § 45-104 due to any wrongful actions of the Bank, the 12-percent rate under § 45-104 is still applied as prejudgment interest and does not continue to run following entry of judgment.

Finally, OPS argues that at the very least, it was entitled to the 12-percent interest rate until September 24, 2009, the date it asserts the mandate was spread after *Valley Cty. I*. It argues that "it is reasonable to view the district court's [m]andate [o]rder of September 24 . . . as the date of 'judgment' per § 4[5]-103." Brief for appellee at 9.

[8] We believe that OPS' argument is contrary to analogous precedent. In *Ramaekers, McPherron & Skiles v. Ramaekers*, 4 Neb. App. 733, 549 N.W.2d 662 (1996), this court explained that when a judgment is modified upon appeal, interest runs on the full amount of the judgment as modified from the

date the original judgment was rendered by the trial court. In *Gallner v. Gallner*, 257 Neb. 158, 595 N.W.2d 904 (1999), the Nebraska Supreme Court adopted the *Ramaekers* rationale. Thus, when a judgment is modified on appeal, whether increased or decreased, the interest accrues on the judgment from the date the original judgment was due. See *Gallner v. Gallner, supra*. If the original date of judgment is controlling where the amount of the judgment is modified, it would make no sense to adopt a different date in cases where the judgment is not changed. We therefore find no merit to this argument and determine that the controlling date is the original date of the district court's judgment, i.e., August 1, 2008.

[9-12] Before turning to our own calculations regarding the amount of the judgment, we recall general principles regarding interest and judgments. Prejudgment interest is part of the judgment. See, *Knox v. Cook*, 233 Neb. 387, 446 N.W.2d 1 (1989); *D.K. Meyer Corp. v. Bevco, Inc.*, 206 Neb. 318, 292 N.W.2d 773 (1980). Although compound interest generally is not allowable on a judgment, it is established that a judgment bears interest on the whole amount from its date even though the amount is in part made up of interest. *Ramaekers, McPherron & Skiles v. Ramaekers, supra*. As a general rule, interest on a judgment or debt is computed up to the time of the first payment, and that payment is first applied to interest and the balance to principal. *Camp v. Camp*, 14 Neb. App. 473, 709 N.W.2d 696 (2006). Costs are considered part of the judgment. *Smeal Fire Apparatus Co. v. Kreikemeier*, 271 Neb. 616, 715 N.W.2d 134 (2006). With these principles in mind, we calculate the amount owing to the extent that the record permits.

Although the Bank has provided us with the district court's records regarding payments on the judgment, we do not have the court's records regarding taxable costs before us, and thus, we do not have all of the necessary information to calculate the amount owed on the judgment as of the date of the payment record. However, we do have sufficient records to determine the amount of the judgment, exclusive of costs, as of August 1, 2008. We also have sufficient information to guide the district court in calculating the amount, if any, remaining on the

judgment. As determined above, prejudgment interest accrued on the principal amount of $30,000, from July 20, 2006, to August 1, 2008. There are 743 days between July 20, 2006, up to and including August 1, 2008, so the total prejudgment interest amount is $7,328.22 ($30,000 × 12 percent × 743 days ÷ 365 days per year). Thus, on August 1, 2008, the court's summary judgment should have included judgment for $30,000, plus prejudgment interest of $7,328.22, for a judgment of $37,328.22, plus any taxable costs (which were taxed to the Bank in an unspecified amount in the court's original summary judgment). The total judgment in turn bears postjudgment interest of 4.188 percent until satisfied.

The total judgment will accrue interest after August 1, 2008, at the applicable judgment rate of 4.188 percent per annum. However, because we do not have the record of taxable costs, we cannot calculate the precise judgment. Nonetheless, we recognize that the district court's records show that the Bank has made three partial payments since entry of judgment. On October 14, 2009—439 days after entry of judgment—the Bank made two payments totaling $29,921: one in the amount of $14,921 and the other in the amount of $15,000. The other payment of $7,328.22 was made on November 18, 35 days later. As stated above, the partial payments must first be applied to the accrued postjudgment interest and then to the unpaid judgment, including the original principal, prejudgment interest, and costs. The district court would make an initial calculation as of October 14 and then make a further calculation as of November 18. The court would then make a further calculation recognizing accrual of interest on the judgment and any further payments made by the Bank after November 18 and prior to the spreading of this court's mandate.

CONCLUSION

We conclude that OPS is entitled to 12-percent prejudgment interest from July 20, 2006, to the date of entry of summary judgment on August 1, 2008. Thereafter, interest on the entire judgment—including the original principal, prejudgment interest, and taxable costs—accrued at the judgment rate of 4.188 percent. Because the district court's order

calculated the amount due as including interest at the 12-percent prejudgment interest rate after the date of judgment, we reverse, and remand for further proceedings in conformity with this opinion.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

STATE OF NEBRASKA, APPELLEE, V.
DAVID J. CRAVEN, APPELLANT.
790 N.W.2d 225

Filed November 2, 2010. No. A-09-1230.

1. **Rules of Evidence.** In proceedings where the Nebraska Evidence Rules apply, the admissibility of evidence is controlled by the Nebraska Evidence Rules; judicial discretion is involved only when the rules make discretion a factor in determining admissibility.
2. **Courts: Expert Witnesses.** Under Nebraska's *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993), and *Schafersman v. Agland Coop*, 262 Neb. 215, 631 N.W.2d 862 (2001), jurisprudence, the trial court acts as a gatekeeper to ensure the evidentiary relevance and reliability of an expert's opinion.
3. **Expert Witnesses: Appeal and Error.** The standard for reviewing the admissibility of expert testimony is abuse of discretion.
4. **Judgments: Words and Phrases.** An abuse of discretion occurs when a trial court's decision is based upon reasons that are untenable or unreasonable or if its action is clearly against justice or conscience, reason, and evidence.
5. **Courts: Expert Witnesses.** In determining the admissibility of an expert's testimony, a trial judge may consider several more specific factors that might bear on a judge's gatekeeping determination. These factors include whether a theory or technique can be (and has been) tested; whether it has been subjected to peer review and publication; whether, in respect to a particular technique, there is a high known or potential rate of error; whether there are standards controlling the technique's operation; and whether the theory or technique enjoys general acceptance within a relevant scientific community.
6. **Rules of Evidence: Expert Witnesses.** An expert's opinion is ordinarily admissible under Neb. Rev. Stat. § 27-702 (Reissue 2008) if the witness (1) qualifies as an expert, (2) has an opinion that will assist the trier of fact, (3) states his or her opinion, and (4) is prepared to disclose the basis of that opinion on cross-examination.
7. **Judgments: Juries: Witnesses.** The credibility of a witness is left to the jury's judgment, and no witness, expert or otherwise, should be permitted to give

an opinion that another mentally and physically competent witness is telling the truth.

8. **Appeal and Error.** One may not invite error and then complain of it.
9. **Criminal Law: Juries: Evidence: Appeal and Error.** In a jury trial of a criminal case, an erroneous evidentiary ruling results in prejudice to a defendant unless the State demonstrates that the error was harmless beyond a reasonable doubt.

Appeal from the District Court for Douglas County: JAMES T. GLEASON, Judge. Affirmed.

Thomas C. Riley, Douglas County Public Defender, Robert Marcuzzo, and Ashley Albertsen and Stephan Marsh, Senior Certified Law Students, for appellant.

Jon Bruning, Attorney General, and George R. Love for appellee.

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

INBODY, Chief Judge.

I. INTRODUCTION

The defendant, David J. Craven, was charged in 2007 with one count of first degree sexual assault of a child under Neb. Rev. Stat. § 28-319.01 (Reissue 2008). The charges specified that Craven had subjected his daughter, E.C., to sexual penetration in March 2007. After a jury trial in Douglas County District Court, Craven was convicted and sentenced to 20 to 20 years' imprisonment. Craven now appeals to this court, assigning various errors regarding expert testimony as governed by *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993), and *Schafersman v. Agland Coop*, 262 Neb. 215, 631 N.W.2d 862 (2001); the denial of an offer of proof; the admission of certain testimony; and the refusal of the district court to allow him to impeach E.C.'s testimony.

II. STATEMENT OF FACTS

1. BACKGROUND

Craven, born in 1979, had been married to D.U., and a child, E.C., was born of the marriage in September 2003. Within approximately 2 years, the parties divorced, and E.C. remained

in D.U.'s custody. Craven exercised parental visitations on Wednesday evenings and every other weekend. Craven had visitation with E.C. on the weekend of March 16, 2007. That weekend's visit, as did all the visits, took place at Craven's parents' house, because he had experienced some financial difficulties and had been living with his parents since 2006.

On the evening of March 18, 2007, Craven took E.C. home and D.U. attempted to give her a bath. E.C. refused to take a bath and instead began to scream and cry. E.C. screamed, "[D]addy peed in my mouth" and "He thought I was a toilet." D.U. took E.C. to a doctor and also contacted law enforcement. Craven was interviewed by a detective and admitted that while in the shower with E.C., he put his penis in E.C.'s mouth for about 2 seconds and she choked on the water from the shower. Craven was arrested and charged with first degree sexual assault of a child.

2. Procedural History

(a) Motion in Limine/*Daubert* Hearing

On August 4, 2009, the State filed an amended motion in limine seeking to exclude the expert witness testimony of Dr. Scott Bresler regarding the proffer of his opinion about Craven's confession. Prior to that filing, Craven had also filed a motion in limine to exclude the admission of the transcript of an interview of E.C. at "Project Harmony," a facility which provides services to suspected victims of child abuse. The record indicates that the district court treated the hearing on the various motions of both Craven and the State as a hearing on a "Daubert slash [sic] in limine motion." See, *Daubert, supra*; *Schafersman, supra*.

At the hearing, Bresler testified that he was a professor at the University of Cincinnati's department of psychiatry, the clinical director for the Institute for Psychiatry and Law at that university's medical school, and the inpatient director of psychological services for that university's hospital. Bresler testified that he had a bachelor's degree and a master's degree in psychology from Columbia University; a master's degree and a Ph.D. in clinical psychology from Georgia State University; and postdoctoral education in forensic psychology,

neuropsychology, geriatrics, and clinical psychology. Bresler testified that he had previously worked both for the Douglas County Attorney and for defendants in Douglas County and had been declared an expert in psychology. Bresler also explained that he had an advanced certification for interrogation techniques and had undergone the same training as police officers in sexual abuse interrogations and interviews. Bresler further testified that he had authored a few academic publications, but not in the area of forensic interviewing techniques.

Bresler testified that he had been retained by Craven to evaluate Craven and testify regarding the interview of Craven conducted by police. Bresler testified that generally, in his evaluation process, he gathers information about the accused individual and any previous interaction of the individual with law enforcement in order to determine whether the individual has a psychological weakness or symptom. Bresler then testified that he views the tape of the individual's interview with police, analyzing the interrogation techniques used by law enforcement officers and watching the individual's reactions. Bresler testified that he also does an assessment of the individual consisting of personality and intelligence testing. Bresler explained that he utilizes specialized tools designed to look at the "construct" of individuals in order to determine who may be "more agreeable or more persuadable" in stressful situations, such as an interrogation. Bresler testified that he also administers a compliance test to individuals suspected of giving unreliable confessions and uses a suggestibility scale in his evaluations. Bresler testified that all of the above-mentioned tests have been generally accepted within the relevant scientific communities.

Bresler testified that his methodology for evaluating the reliability of confessions has been vetted in the scientific community and that specifically, a "White Paper" by "leading experts" had recently been published nationally discussing similar methodologies for assessing false confessions and police interrogations. Bresler indicated that in court cases such as the present case, he limits his opinion; Bresler explained that he does not give an ultimate conclusion as to whether or not the confession is false and instead leaves that determination for the judge or

jury. However, Bresler continued on to testify that the "White Paper" he had previously testified to was only a work in progress and was being published for peer review. Bresler testified that most of the research regarding false confessions and the use of these methodologies had taken place only in England and Iceland. Bresler testified that there is no known rate of error because there was no known baseline error and that he did not know the percentage of cases in which there actually had been false confessions.

When asked if the theories and methodologies used in his evaluation of false confessions were generally accepted within the relevant scientific community, Bresler testified that the methodologies had acceptance in the forensic psychology community but had their limitations due to a lack of baselines and ability to predict outcomes with any accuracy. On cross-examination, Bresler admitted that he had not testified in Nebraska regarding the false confessions methodology.

Bresler testified that in Craven's interview, there were aspects of the interrogation which he believed to have elements similar to those of other cases in which there had been false confessions, but that it was not his opinion that Craven's confession was actually a false confession. Bresler testified that his opinion was in effect to "caution" that some of the interrogation techniques had moved from persuasive to coercive. Bresler testified that his opinion was that he had "concerns that this may be an unreliable confession."

At the same hearing, Dr. Drew Barzman was also called to testify on behalf of Craven regarding his motion in limine to exclude the Project Harmony interview of E.C. Barzman testified that he was a child and adolescent psychiatrist at the Cincinnati Children's Hospital. Barzman testified that he attended medical school at the State University of New York at Buffalo and completed his residency at Duke University. Barzman testified that he had completed fellowships in forensic psychiatry and child and adolescent psychiatry and was board certified in both types of psychiatry. Barzman testified that he had published 20 peer-reviewed articles about child forensic interviewing for sexual abuse cases and was involved in training psychiatry student residents to conduct proper

forensic interviews with both child and adolescent sexual assault victims.

Barzman testified that he has had significant experience in assessing sexual assault and abuse allegations and has had the opportunity to assess interviews in child cases in Nebraska four times, the present case included. Barzman testified that the forensic interview process starts by setting ground rules, such as telling the truth, not just what the child may think the adult wants to hear. Barzman testified that the next step is discussing the importance of the truth versus a lie and of "pretend versus fantasy, what's real versus pretend." Barzman further testified that it is important to get a sense of how suggestible a child is in order to make a determination as to the reliability of the information elicited from the child, in order to ascertain whether the interviewer can push the child into a false statement. Barzman submitted to the court, without objection for purposes of that hearing, a report which recorded his observations of the March 26, 2007, Project Harmony interview of E.C., who was 3 years old at the time of the alleged incident and the interview.

Barzman testified that he observed several problems with the interview of E.C., including that the interviewer failed to orient E.C. with what was taking place and the purpose of the interview, that there was no invitation for a free narrative by E.C., that there was a lack of ground rules set by the interviewer, and that there was a lack of testing by the interviewer in relation to E.C.'s ability to understand "real versus pretend." Barzman testified that throughout the interview, which lasted approximately 15 minutes, it was clear that E.C. was bright, able to communicate, and able to sequence her stories, but he opined that the interviewer would cut E.C. off before expansive information could be elicited from open-ended questions. Barzman also indicated that there were several suggestive questions asked of E.C. regarding her taking a shower at Craven's house. Barzman testified that the interviewer also erred in asking multiple questions rather than asking one question at a time, because that form of questioning could be confusing for a 3-year-old. Barzman testified that the interviewer also asked the same question about whether

E.C.'s clothes were on or off in the shower several times, just changing the question a little bit, which may have given E.C. the impression that the interviewer wanted a different answer than she gave. Barzman further testified that the interviewer was eliciting positive and negative signs with each answer through body language which children respond to. Barzman then stated that based upon his experience and training, and to a reasonable degree of psychiatric certainty, it was his opinion that the reliability of the Project Harmony interview of E.C. was uncertain and there were significant flaws in the interview. Barzman testified:

> I'm saying that because of all the suggestive techniques and the other concerns that we talked about: ground rules and such, I — my role is not to say whether the abuse occurred or not. I can't say whether it's true or if the allegation is true or not. All I can do is evaluate the quality of the interview. And I felt that the quality of the interview was such that it's — it makes — it makes — it makes it such that the reliability of the information that was elicited is uncertain. We just don't know. I can't say whether it happened or it didn't happen.

Thereafter, the district court entered an order granting the State's motion in limine, specifically finding, "There is no peer reviewed accepted methodology to support the testimony of . . . Bresler. The court further finds that . . . Bresler's testimony would not provide the jury with any opinion, but would rather invade the province of the jury relating through the credibility of any witness." The court also overruled Craven's motion in limine.

(b) Jury Trial

On September 1, 2009, the matter came before the district court for a jury trial which lasted through September 3. E.C., who was 5 years old at that time, testified in open court that Craven was her father and that she did not see him anymore because he was "bad." E.C. explained that Craven was bad to her because he "yogurt peed in [her] mouth" while she was in the shower with him. E.C. testified that Craven had put his "pee-er" inside of her mouth. E.C. testified that she had not

told anyone but D.U., her mother, what had happened and that she was only 3 years old at that time.

On cross-examination, E.C. was questioned whether she remembered the interview that she had with Project Harmony, and the State objected based upon hearsay and improper impeachment. The district court sustained the objection, and the jury was removed so that Craven's counsel could make an offer of proof as to the interview for purposes of impeaching E.C.'s testimony based upon prior inconsistent statements; he argued that the conversation between E.C. and the interviewer was an out-of-court statement that was inconsistent with testimony given at trial. After the offer of proof was made, the objection was again sustained by the district court.

D.U. also testified at trial. D.U. testified that Craven was her ex-husband and E.C.'s father and that after the divorce, he had visitation with E.C. every other weekend and Wednesday nights. D.U. testified that she or Craven would bring E.C. from her home to Craven's parents' house on Friday nights and then back home on Sunday nights. D.U. testified that on the weekend in question, E.C. came home around 8 p.m. and D.U. proceeded with the normal bedtime schedule of giving E.C. a bath. D.U. testified that on this occasion, however, E.C. started screaming that she had already taken a shower with Craven and did not want another bath. D.U. explained that E.C. was crying and refused to take a bath, which was abnormal behavior for her. D.U. testified that E.C. did not want to be touched and screamed that Craven "thinks she's a toilet." D.U. went on to testify that E.C. told her, "Daddy peed in my mouth. He thinks I'm a toilet."

D.U. testified she put E.C. to bed that night and called Craven the next day, who told D.U. that he had taken a shower with E.C. and that he had been naked. D.U. took E.C. to the doctor and was also contacted by Project Harmony for an interview. D.U. testified that E.C.'s behaviors had changed entirely after her visitation with Craven on the weekend in question, with E.C. reverting completely back to diapers and not allowing anyone to touch her in the bath or to give her a bath. On cross-examination, D.U. admitted that she did not immediately contact the police on that Sunday night because she was in

shock and she was already going to the doctor the next morning for her younger daughter and figured that E.C. could talk to the doctor at that time. D.U. testified that after the doctor's appointment, she called Child Protective Services and then spoke with the police.

Sarah Spizzirri, a child victim sexual assault detective with the Omaha Police Department, testified that she had been with the police department for approximately 12 years and had had training at the police academy in addition to field training and various other types of training. Spizzirri testified that she had specifically been investigating child sexual assaults for 6 years and had received training specific to child abuse and interviewing the children and the suspects involved. Spizzirri testified that she had done approximately 500 interviews with suspects, 80 percent of which involved sexual assault allegations, and that approximately 70 percent of those involved children.

Spizzirri testified that in March 2007, she was assigned to sit in on E.C.'s interview. Spizzirri testified that she supervised a telephone call made by D.U. to Craven about the shower incident and also that she personally interviewed Craven at the police station. At trial, the State offered a recording of the telephone call and a video of the full interview of Craven at the police station, and both were received without objection. During Spizzirri's testimony, Craven also submitted a video of the full interview of E.C. at Project Harmony, which was received without objection and which Craven had previously filed a motion in limine to exclude. Both videos were played for the jury shortly after they were received.

On cross-examination of Spizzirri, several passages of the interview between her and Craven were read into the record by Craven's counsel, one of which included Spizzirri's statement, "'So that really concerns me. It concerns me about visitation. [Craven], I'm just being honest with you. [E.C. is] saying things that three-year-olds don't say.'" This passage was read out loud in the presence of the jury twice by Craven's counsel. On redirect, Spizzirri was asked what she meant by that statement, that what E.C. said could not "be made up by a three-year-old." Craven objected on grounds of foundation and speculation, but the objection was overruled by the district

court. Spizzirri explained by testifying, "What I meant by a three-year-old cannot make that up is — is just what I mean by it. It — it's not something that a three-year-old knows about. It's not something they can talk about and describe and demonstrate unless they've experienced it in their life."

The State rested its case, and Craven made an oral motion to dismiss, which was overruled. Craven called Barzman to the stand, and the district court announced that, as had been previously discussed with counsel, the expert testimony of Barzman would not be accepted, but Craven would have an opportunity to make an offer of proof. Craven indicated that there would be new material offered in addition to the testimony that was taken at the previous hearing. Barzman testified again about the information previously presented, including his critique of the interview of E.C. by Project Harmony. Barzman also testified about Spizzirri's statement about what a "three-year-old knows" and explained that there was no study showing that a child's demeanor indicates whether or not a statement given by the child was accurate. The district court ruled that Barzman would not be allowed to testify and found that the "scientific or specialized knowledge that . . . Barzman possesses and in which he is qualified really is not necessary to assist the jury in understanding the evidence or determining factual issues."

Craven then requested that he be allowed to call Bresler to the stand for an offer of proof regarding his expert testimony which had been excluded:

> [Craven's counsel]: I would like to also do an offer of proof on . . . Bresler and the interrogation, Judge.
>
> THE COURT: And as far as . . . Bresler — as far as . . . Bresler's offer of proof is concerned, do you intend to adduce anything in addition to what was adduced at the motion in limine hearing?
>
> [Craven's counsel]: Just slightly. About like we did with . . . Barzman. We've refined it a little bit.
>
> THE COURT: But is it based on the same expertise that was offered at that hearing?
>
> [Craven's counsel]: Yes, sir. I won't go into —

> THE COURT: Then I'm not even going to allow the offer of proof on . . . Bresler. The Court has previously ruled that the expertise he offered is not sufficient under the Daubert standards. And for the purpose of this offer of proof, the Court reiterates its ruling that, under the Daubert standards, he didn't meet those standards to be able to testify and, therefore, the offer of proof is for the Court's purposes not necessary.

Craven then called his mother and father to the stand, and they both testified generally as to the activities that Craven and E.C. participated in on the weekend of the incident and testified that after the shower on that Sunday night, E.C. continued to act the same as she had and played nicely until she had to leave. Both testified that E.C. ate dinner and played or watched television and did not exhibit any unusual behavior.

Craven also testified in his own behalf. Craven testified that at the time in question, he lived with his parents because he had lost his job and struggled with his finances. Craven testified that when E.C. would stay at his parents' house for his visitations, she would sleep in his room and he would sleep on a couch in another room. Craven testified that his visitation with E.C. had been irregular due to D.U.'s withholding visitation. Craven testified that on the particular Sunday in question, he and E.C. went to church in the morning and then spent the day playing outside. Craven testified that D.U. complained about how E.C. smelled after visitations because his parents smoked in the home and that as a result, he wanted to make sure E.C. was bathed before she was picked up. Craven indicated that it had been getting late in the day, so he decided to have E.C. shower in order to be ready in case D.U. arrived early and because he had not yet taken a shower. Craven testified that the shower was "unremarkable" in that he washed E.C.'s hair and body as he would any other time. Craven testified that he did not put his penis in E.C.'s mouth during the shower but had taken a shower with E.C. as a sort of revenge to show D.U. that she could not control him. Craven testified that when D.U. arrived to pick up E.C., E.C. did not want to leave with her.

Craven testified that he had no contact with D.U. for several days, until he was asked to come to the police department to "figure out what was going on" with E.C. Craven's counsel played the entire interview of Craven and Spizzirri to the jury again, stopping at various points to discuss with Craven the circumstances of statements he made and how he was feeling as he made those statements. Craven testified that he became angry during the interview because Spizzirri did not believe his denial of the allegation that he had put his penis in E.C.'s mouth and ejaculated.

During the interview of Craven, Craven admitted to the allegations several times, by stating that he had stuck his penis in E.C.'s mouth for about 2 seconds but not ejaculated and also by stating, "I put my penis in [E.C.'s] mouth and she choked on the water." Craven told Spizzirri that he put his penis in E.C.'s mouth for 2 seconds and that maybe it was his penis that choked her. Craven then said that E.C. looked confused and that he apologized to her. However, Craven testified that he did not think that any statement he made during that interview was an admission, because he thought he had to sign a piece of paper for it to be a confession. Craven testified that he had lied and had falsely confessed to Spizzirri. Craven testified that during the interview with Spizzirri, he blamed the incident on his father, his brother, or maybe a multiple personality disorder.

On September 3, 2009, at 12:35 p.m., the case was submitted to the jury, and after approximately 3 hours 30 minutes, the jury reached a unanimous verdict that Craven was guilty of first degree sexual assault of a child. Craven filed a motion for a new trial, which was denied, and the district court sentenced him to 20 to 20 years' imprisonment with 62 days' credit for time served. Craven has timely appealed to this court.

III. ASSIGNMENTS OF ERROR

Craven assigns that the district court erred in denying the admission of certain expert testimony in accordance with *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993), and *Schafersman v. Agland Coop*, 262 Neb. 215, 631 N.W.2d 862 (2001); in

denying an offer of proof; in allowing certain testimony to be given by Spizzirri; and in failing to allow him to impeach E.C.'s testimony through prior inconsistent statements.

IV. STANDARD OF REVIEW

[1] In proceedings where the Nebraska Evidence Rules apply, the admissibility of evidence is controlled by the Nebraska Evidence Rules; judicial discretion is involved only when the rules make discretion a factor in determining admissibility. *State v. Casillas*, 279 Neb. 820, 782 N.W.2d 882 (2010).

V. ANALYSIS

1. Admission of Expert Testimony

Craven's first two assignments of error are that the district court erred by failing to admit the expert testimony of Bresler and Barzman. Craven argues that the testimony of both individuals was sufficient to qualify them as experts in accordance with the *Daubert*/*Schafersman* standard and should have been admitted.

[2-4] Under Nebraska's *Daubert*/*Schafersman* jurisprudence, the trial court acts as a gatekeeper to ensure the evidentiary relevance and reliability of an expert's opinion. This gatekeeping function entails a preliminary assessment whether the reasoning or methodology underlying the testimony is valid and whether that reasoning or methodology properly can be applied to the facts in issue. *State v. Daly*, 278 Neb. 903, 775 N.W.2d 47 (2009); *State v. Robinson*, 272 Neb. 582, 724 N.W.2d 35 (2006), *abrogated on other grounds, State v. Thorpe*, 280 Neb. 11, 783 N.W.2d 749 (2010). The standard for reviewing the admissibility of expert testimony is abuse of discretion. *State v. Edwards*, 278 Neb. 55, 767 N.W.2d 784 (2009). An abuse of discretion occurs when a trial court's decision is based upon reasons that are untenable or unreasonable or if its action is clearly against justice or conscience, reason, and evidence. *State v. Daly, supra*.

[5] In determining the admissibility of an expert's testimony, a trial judge may consider several more specific factors that might bear on a judge's gatekeeping determination.

These factors include whether a theory or technique can be (and has been) tested; whether it has been subjected to peer review and publication; whether, in respect to a particular technique, there is a high known or potential rate of error; whether there are standards controlling the technique's operation; and whether the theory or technique enjoys general acceptance within a relevant scientific community. These factors are, however, neither exclusive nor binding; different factors may prove more significant in different cases, and additional factors may prove relevant under particular circumstances. *State v. Daly, supra*; *State v. Fernando-Granados*, 268 Neb. 290, 682 N.W.2d 266 (2004).

(a) Bresler

In his brief, Craven argues that he "has a right, according to *Buechler*, to have an expert testify as to his mental state during the interrogation and eventual confession." Brief for appellant at 27.

A close review of *State v. Buechler*, 253 Neb. 727, 572 N.W.2d 65 (1998), indicates that the defendant therein was convicted of murder in the first degree and use of a firearm to commit a felony. On appeal, one of the defendant's assignments of error addressed the admission of certain expert testimony, and he argued that the district court should not have excluded the expert testimony of a clinical psychologist about the circumstances under which the defendant confessed—specifically, testimony about his mental state and the effect thereof on his statements to law enforcement officers. *Id*. The Nebraska Supreme Court discussed the U.S. Supreme Court's decision regarding lay testimony in *Crane v. Kentucky*, 476 U.S. 683, 689, 106 S. Ct. 2142, 90 L. Ed. 2d 636 (1986), and the observation (which Craven specifically cites to in his brief) that if a jury cannot hear evidence of the circumstances under which a confession is obtained, "the defendant is effectively disabled from answering the one question every rational juror needs answered: If the defendant is innocent, why did he previously admit his guilt?"

In *Buechler*, a psychologist was prepared to render expert testimony that due to the defendant's incarceration prior to the

confession, he had been in the throes of a methamphetamine withdrawal, and that there were severe effects of withdrawal. The psychologist would have testified that as a result of the withdrawal, combined with other disorders, the defendant would have been very "suggestible, would waiver in his attitudes and beliefs, would process information haphazardly, and would often reach faulty conclusions." *Id.* at 736, 572 N.W.2d at 71. The facts in *Buechler* are remarkably distinguishable from the case at hand.

In the present case, the approximately 1-hour video of Craven's interview and confession was admitted into evidence and published to the jury without objection. Craven had not been previously incarcerated and was not suffering from any apparent condition. Craven had been called to the police station to discuss the situation regarding E.C. and came of his own accord. Furthermore, Bresler testified that the expert testimony he would have given to the jury, the methodology of reviewing false confessions, had been vetted, but a "White Paper" describing similar methodologies was a work in progress and was currently being published for peer review. Bresler testified that most of the research on these methodologies had taken place only in England and Iceland and that there was no known rate of error, no baseline error, and no known percentage of cases in which there had actually been false confessions. Bresler testified that the methodologies had acceptance in the forensic psychology community but had their limitations due to a lack of baselines and ability to predict outcomes with any accuracy.

Bresler testified that in this case, there were aspects of the interrogation which he believed to have elements similar to those of other cases in which there were false confessions, but that it was not his opinion that Craven's confession was actually a false confession. Bresler testified that his opinion was in effect to "caution" the jury that some of the interrogation techniques had gone from persuasive to coercive. Bresler testified that it was his expert opinion that he had "concerns that this may be an unreliable confession."

Upon our review of the testimony of Bresler, which Craven wished to present to the jury, it is clear that the theory

regarding false confessions was still being tested and subjected to peer review and publication, had no known rate of error, and had no specific standards to control its operation. Furthermore, the ultimate conclusion to be given to the jury by Bresler was not that of an "expert opinion" but merely a tool to assist the jury in its determination of the facts. See, also, *State v. Reynolds*, 235 Neb. 662, 457 N.W.2d 405 (1990) (court may exclude expert's opinion which is nothing more than expression of how trier of fact should decide case or what result should be reached on any issue to be resolved by trier of fact), *disapproved on other grounds, State v. Messersmith*, 238 Neb. 924, 473 N.W.2d 83 (1991). The jury had an opportunity to view the interview twice during the trial and to draw its own conclusions regarding the interview. Therefore, we find that the district court did not abuse its discretion by excluding the testimony of Bresler.

Craven has also assigned as error that the district court erred by not allowing him to make an offer of proof at the close of the State's case in chief as to the exclusion of Bresler's testimony. Craven contends that by not being allowed to make an offer of proof, he was hampered by the district court in preserving his argument to this court.

As discussed in the facts above, the district court denied Craven's request to call Bresler to the stand, after which denial Craven made an offer of proof:

> [Craven's counsel]: I would like to also do an offer of proof on . . . Bresler and the interrogation, Judge.
>
> THE COURT: And as far as . . . Bresler — as far as . . . Bresler's offer of proof is concerned, do you intend to adduce anything in addition to what was adduced at the motion in limine hearing?
>
> [Craven's counsel]: Just slightly. About like we did with . . . Barzman. We've refined it a little bit.
>
> THE COURT: But is it based on the same expertise that was offered at that hearing?
>
> [Craven's counsel]: Yes, sir. I won't go into —
>
> THE COURT: Then I'm not even going to allow the offer of proof on . . . Bresler. The Court has previously ruled that the expertise he offered is not sufficient under

> the Daubert standards. And for the purpose of this offer of proof, the Court reiterates its ruling that, under the Daubert standards, he didn't meet those standards to be able to testify and, therefore, the offer of proof is for the Court's purposes not necessary.

This court has had the opportunity to carefully review the full record in this case, and having made the determination above that the district court did not abuse its discretion by excluding Bresler's testimony after a full hearing on the matter under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993), and *Schafersman v. Agland Coop*, 262 Neb. 215, 631 N.W.2d 862 (2001), we need not address this assignment of error any further. See *Papillion Rural Fire Prot. Dist. v. City of Bellevue*, 274 Neb. 214, 739 N.W.2d 162 (2007) (appellate court is not obligated to engage in analysis which is not needed to adjudicate controversy before it).

(b) Barzman

Craven also asserts that the testimony of Barzman should have been admitted in order for Barzman to testify as to the reliability of E.C.'s interview at Project Harmony. Specifically, Barzman testified both at the motion in limine/*Daubert* hearing and during an offer of proof at trial that if allowed to testify at trial, he would opine to a reasonable degree of psychiatric certainty that the reliability of the interview of E.C. at Project Harmony was uncertain. The district court ruled that Barzman would not be allowed to testify and found that the "scientific or specialized knowledge that . . . Barzman possesses and in which he is qualified really is not necessary to assist the jury in understanding the evidence or determining factual issues." Craven contends that this testimony was vital to assist the jury in understanding certain flaws in the interview and why E.C. interviewed as she did.

[6] An expert's opinion is ordinarily admissible under Neb. Rev. Stat. § 27-702 (Reissue 2008) if the witness (1) qualifies as an expert, (2) has an opinion that will assist the trier of fact, (3) states his or her opinion, and (4) is prepared to disclose the basis of that opinion on cross-examination. *Smith*

v. Colorado Organ Recovery Sys., 269 Neb. 578, 694 N.W.2d 610 (2005).

[7] However, the Nebraska Supreme Court has made clear that the credibility of a witness is left to the jury's judgment and that no witness, expert or otherwise, should be permitted to give an opinion that another mentally and physically competent witness is telling the truth. *State v. Beermann*, 231 Neb. 380, 436 N.W.2d 499 (1989). See, also, *In re Interest of Kyle O.*, 14 Neb. App. 61, 703 N.W.2d 909 (2005) (trial court did not abuse its discretion by excluding letter from defendant's counselor opining that defendant was telling truth in denying allegations of sexual contact, because opinion of counselor regarding defendant's credibility was irrelevant); *State v. Doan*, 1 Neb. App. 484, 498 N.W.2d 804 (1993) (in prosecution for sexual assault of child, expert witness may not give testimony which directly or indirectly expresses opinion that child is credible or that witness' account has been validated).

In this case, Craven asserts that the testimony of Barzman would assist the jury in understanding the good and bad portions of the interview with E.C., which is essentially an attempt to assist the jury in determining the weight of that evidence and the credibility of E.C. Therefore, the district court did not abuse its discretion by excluding the expert testimony of Barzman, because his opinion regarding E.C.'s credibility was irrelevant.

2. Admission of Spizzirri's Statement

Craven contends that the district court erred by allowing Spizzirri to testify about E.C.'s Project Harmony interview, specifically by allowing Spizzirri's statement that E.C.'s statements were "not something that a three-year-old knows about."

On cross-examination of Spizzirri, several passages of the interview between her and Craven were read into the record by Craven's counsel, one of which included Spizzirri's statement, "'So that really concerns me. It concerns me about visitation. [Craven], I'm just being honest with you. [E.C. is] saying things that three-year-olds don't say.'" This passage was read out loud in the presence of the jury twice by Craven's counsel. On redirect, Spizzirri was asked by the prosecution what she

meant by that statement, that what E.C. said could not "be made up by a three-year-old." Craven objected on grounds of foundation and speculation, but the objection was overruled by the district court. Spizzirri explained by testifying, "What I meant by a three-year-old cannot make that up is — is just what I mean by it. It — it's not something that a three-year-old knows about. It's not something they can talk about and describe and demonstrate unless they've experienced it in their life."

[8] The problem with this assignment of error by Craven is twofold because even though generally, in Nebraska, it is improper for one witness to testify as to the credibility of another witness, Craven presented the statement and testimony to the jury on several occasions and did not object to them until the State questioned Spizzirri on redirect. The first mention of the statement was made by Spizzirri during her interview of Craven, the video of which was submitted into evidence by Craven and published to the jury. The second presentation of the statement at trial occurred when the statement was read into the record twice during Craven's cross-examination of Spizzirri. Then, as discussed above, it was only on redirect, when the State asked Spizzirri to explain the statement, that Craven then objected. One may not invite error and then complain of it. See *Davis v. State*, 51 Neb. 301, 70 N.W. 984 (1897), *disapproved on other grounds, Barber v. State*, 75 Neb. 543, 106 N.W. 423 (1906). This is what Craven has done by reading the exact statement to which he now objects into the record multiple times. This assignment of error is without merit.

3. Impeaching E.C.'s Testimony

Craven contends that the district court erred by not allowing him to impeach E.C.'s testimony at trial based upon her prior inconsistent statements made during the Project Harmony interview.

On cross-examination, Craven asked if E.C. knew anyone by the name of Chase, and she indicated that she did not. Craven made an offer of proof regarding the Project Harmony interview and E.C.'s statements contained therein, but was denied the opportunity to impeach E.C.'s testimony based upon

those statements. However, during the testimony of Spizzirri, Craven offered the video of the full interview of E.C. at Project Harmony into evidence (even after the previous motion in limine wherein Craven sought to exclude the interview entirely) and it was received without objection and published to the jury.

[9] Therefore, upon our review, even though Craven was not allowed to impeach E.C.'s testimony regarding statements she made during the Project Harmony interview, Craven submitted the interview and the jury had an opportunity to view both E.C.'s in-court testimony and statements made during the interview. Thus, we find that even if the trial court erred by excluding the impeachment at the time during which it sustained the State's objection during cross-examination of E.C., the error was harmless. In a jury trial of a criminal case, an erroneous evidentiary ruling results in prejudice to a defendant unless the State demonstrates that the error was harmless beyond a reasonable doubt. *State v. Ford*, 279 Neb. 453, 788 N.W.2d 473 (2010); *State v. Epp*, 278 Neb. 683, 773 N.W.2d 356 (2009). Harmless error exists when there is some incorrect conduct by the trial court which, on review of the entire record, did not materially influence the jury in reaching a verdict adverse to a substantial right of the defendant. *Id.* Craven's assignment of error is without merit.

VI. CONCLUSION

After a careful review of the lengthy testimony and record in this case, we find that the district court did not abuse its discretion in any of the assigned errors by Craven regarding the admission or exclusion of evidence, and we therefore affirm the judgment of the district court.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. RICHARD FREY, ALSO KNOWN AS RICHARD KOUMA, APPELLANT.

790 N.W.2d 722

Filed November 9, 2010. No. A-09-818.

1. **Convicted Sex Offender: Police Officers and Sheriffs.** Neb. Rev. Stat. § 29-4004(2) (Reissue 2008) provides that any person required to register under Nebraska's Sex Offender Registration Act shall inform the sheriff of the county in which he or she resides, in writing, if he or she has a new address within such county within 5 working days after the address change.

Appeal from the District Court for Seward County: ALAN G. GLESS, Judge. Reversed and remanded.

David L. Kimble, Seward County Public Defender, for appellant.

Jon Bruning, Attorney General, and Kimberly A. Klein for appellee.

IRWIN, SIEVERS, and CARLSON, Judges.

IRWIN, Judge.

I. INTRODUCTION

Richard Frey, also known as Richard Kouma, appeals his conviction on a charge of failure of a sex offender to register a new address. On appeal, Frey alleges that the evidence was insufficient to support a conviction. The State concedes that the evidence was insufficient. We concur that the evidence was insufficient, and we reverse, and remand.

II. BACKGROUND

There is no dispute that Frey is subject to the registration requirements of Nebraska's Sex Offender Registration Act. There is also no dispute that Frey was properly registered prior to February 2008 while he was residing in Seward, Nebraska. The events giving rise to the current action concern Frey's moving to a new address, in Utica, Nebraska, in February 2008.

On April 18, 2008, the State charged Frey by information with one count of failure of a sexual offender to register, a

Class IV felony offense pursuant to Neb. Rev. Stat. § 29-4011 (Reissue 2008). The State alleged that in February 2008, Frey had failed to notify the sheriff of Seward County, in writing, of his new address within 5 working days after the address change. Frey pled not guilty to the charge. On February 18, 2009, a trial was held during which the State elicited testimony from one of Frey's new neighbors in Utica, the city utility clerk from Seward, the city utility clerk from Utica, and the investigating deputy from the sheriff's department.

One of Frey's new neighbors testified that she notified law enforcement on February 21, 2008, that Frey was residing in Utica. She testified that she had noticed people moving belongings into the residence in Utica "[t]wo Saturdays before" February 21 and had noticed "new vehicles out in front parked there all the time." She also testified that she observed lights on in the residence at night "most of the time" during the 2 weeks prior to February 21. She acknowledged that she was not able to say that she actually saw Frey moving belongings into the residence. She also acknowledged that she could not say who was paying rent, who was living in the residence, who was receiving mail at the residence, when the utilities were turned on, who was paying the utilities, who was sleeping at the residence, or who was driving any of the vehicles she observed at the residence.

The city utility clerk for Seward testified that she had an order in her records for utilities at Frey's residence in Seward to be placed in the landlord's name, instead of Frey's, on February 11, 2008. The city utility clerk for Utica testified that Frey's wife contacted her on February 8 to have utilities for the Utica residence placed in her name and that Frey's wife paid a deposit for the utilities on February 12.

The investigating deputy from the sheriff's office testified that he received a call on February 21, 2008, about Frey's residing in Utica. The deputy testified that he was told that Frey had been residing at the Utica residence for 2 weeks. The deputy testified that as of February 21, Frey's registered address was still the address in Seward. The deputy made contact with Frey and arrested him for failing to register his

change of address within 5 days of moving. The deputy testified that he received information from the city utility clerk for Utica about the utilities being placed in Frey's wife's name and a deposit being paid on February 12 and that 5 working days from February 12 would have been February 19; because Frey had not registered his new address by February 19, the deputy placed him under arrest. The deputy also testified that Frey completed the paperwork for registering his new address on February 22. The deputy testified that Frey denied having lived at the Utica residence for 5 days. The deputy also testified that Frey's wife had indicated that they took possession of the Utica residence on February 8 or 18; the deputy was "not 100 percent positive that it was the 18th or the 8th, but an 8 was involved."

Frey called his wife to testify. She testified that she and Frey moved from Seward to Utica in February 2008. She testified that she paid rent to the landlord in Utica on February 10 or 11 and paid for utilities on February 12. She testified that they began moving belongings into the residence on February 16 and completed moving belongings on February 18. She testified that February 18 was the first night that they stayed at the Utica residence overnight. She testified that the utilities in Seward were placed in the landlord's name on February 12, but that they had his permission to remain in the Seward residence past that date. She testified that they received the keys to the Utica residence on February 12 and returned the keys to the Seward residence on February 18.

Frey's wife also testified that Frey was aware of the registration requirement. She testified that they attempted to register the change of address on February 16, 2008, which was a Saturday. She testified that they went to the sheriff's department and had a conversation with a woman working behind a glass window. The woman informed them that Frey did not need to register again because he had already registered.

After considering all of the evidence, the district court found Frey guilty of failing to register his change of address within 5 days of obtaining the new address. The court sentenced Frey to 2 years' probation. This appeal followed.

III. ASSIGNMENT OF ERROR

Frey's sole assignment of error is that there was insufficient evidence to support the conviction.

IV. ANALYSIS

The issue presented in this case is whether the State established beyond a reasonable doubt that Frey had a new address more than 5 working days before February 22, 2008, when he notified the sheriff's department in writing of his address change. Frey submits that the State failed to adduce sufficient evidence, the State agrees on appeal that it failed to adduce sufficient evidence, and we concur that there was not sufficient evidence.

[1] Neb. Rev. Stat. § 29-4004(2) (Reissue 2008) provides that any person required to register under Nebraska's Sex Offender Registration Act shall inform the sheriff of the county in which he or she resides, in writing, if he or she has a new address within such county within 5 working days after the address change. There are no prior cases in Nebraska concerning what constitutes an "address change" to trigger the start of the 5-working-day period for registering the new address.

In this case, the evidence indicates that Frey notified the sheriff's department of his new address on February 22, 2008. Thus, the question is whether the State adduced sufficient evidence to prove beyond a reasonable doubt that Frey had an address change more than 5 working days prior to February 22. Evidence in the record establishes that February 22 was a Friday, so 5 working days prior to February 22 would have been the previous Friday, February 15. Thus, we must review the evidence presented by the State to determine if there was sufficient evidence to prove beyond a reasonable doubt that Frey changed his address to the Utica residence on or before February 15.

The State's first witness, one of Frey's new neighbors in Utica, testified that she had observed belongings being moved into the Utica residence as early as February 9, 2008, but acknowledged that she could not identify Frey as somebody she had even seen at the Utica residence. She was not able to

present any testimony about who was at the residence at any point in time. Her testimony clearly was not sufficient to establish that Frey had changed his address to the Utica residence at any particular time, let alone on or before February 15.

The State's evidence from the city utility clerks of Seward and Utica established the dates on which the utilities were placed in particular names. The clerks were not able to present any testimony, however, concerning who was actually living at any particular place on any particular date. Their testimony clearly was not sufficient to establish that Frey had changed his address to the Utica residence at any particular time, let alone on or before February 15, 2008.

Finally, the State's final witness, the investigating deputy from the sheriff's department, testified that he calculated the running of the 5-working-day period from February 12, 2008, based on information from the city utility clerk about Frey's wife's making a utility payment on that date. He presented no testimony indicating any evidence that Frey had actually changed his address to the Utica residence at any particular time, let alone on or before February 15.

Frey's wife presented uncontroverted testimony that Frey did not spend the night at the Utica residence prior to February 18, 2008. She also presented uncontroverted testimony that she and Frey had gone to the sheriff's department on February 16, the date on which she testified they first began moving belongings into the Utica residence, to attempt to register the address change, but were turned away by the employee they spoke with.

Even considering the evidence adduced in a light most favorable to the State, the State failed to adduce evidence proving beyond a reasonable doubt that Frey had an address change prior to February 15, 2008. We need not determine exactly what constitutes an "address change" pursuant to § 29-4004(2) because the evidence adduced in the present case was clearly insufficient to establish that Frey had changed his address sufficient to trigger § 29-4004(2). Although we conclude, and all parties agree, that the evidence was insufficient in this case regardless of the proper definition of what constitutes a "new address" pursuant to § 29-4004(2), the State, the defense,

and this court also all agree that some guidance from the Legislature concerning this important undefined term would be beneficial for future cases.

V. CONCLUSION

The evidence adduced was clearly insufficient to support the conviction. We reverse the conviction and remand the matter with directions to dismiss.

REVERSED AND REMANDED.

STATE OF NEBRASKA, APPELLEE, V.
JAY J. SCHUETZ, APPELLANT.
790 N.W.2d 726

Filed November 9, 2010. No. A-10-276.

1. **Judgments: Appeal and Error.** When reviewing a question of law, an appellate court reaches a conclusion independent of the lower court's ruling.
2. **Sentences: Appeal and Error.** The sentencing court rather than the appellate court is entrusted with the power to impose sentences for the commissions of crimes against the State, and the judgment of the sentencing court cannot be interfered with in the absence of an abuse of discretion.
3. **Criminal Law: Probation and Parole.** A motion to revoke probation is not a criminal proceeding.
4. ____: ____. A probation revocation hearing is considered a continuation of the original prosecution for which probation was imposed—in which the purpose is to determine whether a defendant or a juvenile has breached a condition of his existing probation, not to convict or adjudicate that individual of a new offense.
5. ____: ____. A probation revocation hearing is not part of a criminal prosecution or adjudication and therefore does not give rise to the full panoply of rights that are due a defendant at a trial or a juvenile in an adjudication proceeding.
6. **Criminal Law: Probation and Parole: Sentences.** Violation of probation is not itself a crime or offense, and the court may impose a new sentence for the offense for which the offender was originally convicted or adjudicated.
7. **Double Jeopardy: Probation and Parole.** Double jeopardy is not implicated by probation revocation proceedings.
8. **Sentences.** The considerations for sentencing an offender are well known and include the defendant's (1) age, (2) mentality, (3) education and experience, (4) social and cultural background, (5) past criminal record or record of law-abiding conduct, and (6) motivation for the offense, as well as (7) the nature of the offense, and (8) the violence involved in the commission of the crime.

9. ____. In imposing a sentence, the sentencing court is not limited to any mathematically applied set of factors.
10. ____. The appropriateness of a sentence is necessarily a subjective judgment and includes the sentencing judge's observation of the defendant's demeanor and attitude and all the facts and circumstances surrounding the defendant's life.
11. **Drunk Driving: Licenses and Permits: Revocation.** Under Neb. Rev. Stat. § 60-6,197.03(3) (Supp. 2009), driving under the influence, second offense, is a Class W misdemeanor, and the court shall order the offender not to drive any motor vehicle for any purpose for a period of 1 year.

Appeal from the District Court for Gage County, PAUL W. KORSLUND, Judge, on appeal thereto from the County Court for Gage County, STEVEN B. TIMM, Judge. Judgment of District Court affirmed.

Gerald M. Stilmock, of Brandt, Horan, Hallstrom & Stilmock, for appellant.

Jon Bruning, Attorney General, and George R. Love for appellee.

IRWIN, SIEVERS, and CARLSON, Judges.

SIEVERS, Judge.

INTRODUCTION

This case involves the interplay between a probationary sentence, a subsequent revocation of probation, the imposition of a new sentence, and the Double Jeopardy Clauses of the U.S. and Nebraska Constitutions. Jay J. Schuetz contends that the new sentence imposed after his probation was revoked is a double jeopardy violation, but we disagree and therefore affirm his sentence.

FACTUAL AND PROCEDURAL BACKGROUND

On August 25, 2008, Schuetz entered a plea of guilty to driving under the influence, second offense, in exchange for the Gage County Attorney's agreement not to charge Schuetz with operating a vehicle with a blood alcohol content in excess of .15 of 1 gram of alcohol per 100 milliliters of his blood. The Gage County Court accepted the plea, convicted Schuetz, sentenced him to 16 months' probation, and ordered him to pay a $500 fine, plus the usual fees associated with probation.

Schuetz' driver's license was revoked for 1 year as a condition of probation by the court's order, which stated:

> [Schuetz] is ordered not to drive a motor vehicle for a period of ONE (1) YEAR, except a vehicle equipped with an ignition interlock device. Pursuant to [§] 60-6,211.05, [Schuetz] shall install an ignition interlock device on his automobile and the Department of Motor Vehicles shall issue a restricted Class O license for the period of time he is ordered not to drive under his order of probation. He shall not drive until the following conditions have been met . . . .

The conditions referenced were payment of fees and costs, enrollment and attendance in treatment programs, installation of the ignition interlock device, and acquisition of a Class O license. Schuetz was also ordered to spend 10 days in the Gage County jail, beginning on October 24, 2008.

While our record does not contain a motion to revoke probation or a supporting affidavit, the bill of exceptions shows that Schuetz appeared pro se before the Gage County Court on October 19, 2009, for a hearing on the revocation of his probation. The record reveals that Schuetz was accused of consuming alcohol on or about September 6, 2009, in Otoe County, Nebraska, while he was on probation. After being advised of his rights and indicating that he wished to proceed without counsel, Schuetz admitted that the allegation was true and that he did consume alcohol while on probation. The factual basis provided to the court was that on September 6, 2009, a deputy sheriff for Otoe County responded to a complaint about the operation of all-terrain vehicles in Unadilla, Nebraska. The deputy determined that Schuetz was one of the drivers and gave him a preliminary breath test, which registered .254 of 1 gram of alcohol per 210 liters of Schuetz' breath. The court found there was a factual basis for the plea that Schuetz had violated the terms and conditions of his probation. The trial court judge indicated he was going to revoke Schuetz' probation and sentence him according to the applicable statute. The sentence pronounced was a $500 fine plus court costs and 45 days in jail with credit for 11 days previously served. Schuetz was ordered "not to operate a motor vehicle for any purpose

for a period of one year from this date, and [his] operator's license [was] revoked for that period of time." This sentence is in accordance with that provided for driving under the influence, second offense, under Neb. Rev. Stat. § 60-6,197.03(3) (Supp. 2009). Schuetz then appealed to the district court for Gage County.

DISTRICT COURT DECISION

In the district court, Schuetz argued that the revocation of his license on October 19, 2009, imposed after the revocation of his probation, violated his constitutional right against double jeopardy because he was not given credit for the time he was ordered not to drive under the probation order. He also argued that such failure was inconsistent with the trial court's grant of credit on his fine and jail sentence.

The district court found that § 60-6,197.03(3) provides for two separate instances in which an offender's license must be revoked. The first is following a conviction under the statute. The second is as a required condition of probation—unless otherwise authorized by an order for an ignition interlock permit and installation of an interlock device as provided for in Neb. Rev. Stat. § 60-6,211.05 (Supp. 2009). It is noteworthy that the statute in effect at all times material herein provides in part: "Such revocation shall be administered upon sentencing, upon final judgment of any appeal or review, or upon the date that any probation is revoked." § 60-6,197.03(3). The court then reasoned that the first instance of revocation was a condition of probation. And Schuetz' second revocation resulted from a finding that he violated his probation. The court then cited to Neb. Rev. Stat. § 29-2268 (Reissue 2008), which provides in part: "If the court finds that the probationer did violate a condition of his probation, it may revoke the probation and impose on the offender such new sentence as might have been imposed originally for the crime of which he was convicted." The court concluded there were no double jeopardy implications as a result of the new sentencing, nor was the sentence an abuse of discretion. Thus, the district court affirmed the sentence imposed by the county court. Schuetz now appeals to this court.

ASSIGNMENTS OF ERROR

Schuetz asserts that the district court committed error in failing to find that a second 1-year driver's license revocation did not constitute double jeopardy, and second, he claims that the imposition of driver's license revocation totaling 2 years is an excessive sentence.

STANDARD OF REVIEW

[1,2] When reviewing a question of law, an appellate court reaches a conclusion independent of the lower court's ruling. *State v. Haas*, 279 Neb. 812, 782 N.W.2d 584 (2010). The sentencing court rather than the appellate court is entrusted with the power to impose sentences for the commissions of crimes against the State, and the judgment of the sentencing court cannot be interfered with in the absence of an abuse of discretion. See *State v. Hall*, 242 Neb. 92, 492 N.W.2d 884 (1992).

ANALYSIS

Does Driver's License Suspension Imposed Upon Violation of Probation Violate Double Jeopardy Clause?

Schuetz argues that he already completed his 1-year order of driver's license revocation at the time he was sentenced again after his probation was revoked. He contends that the legislative history concerning § 60-6,197.03(3) did not contemplate a factual situation such as presented here, in that Schuetz will end up with 2 years of license revocation. His claim is based on the aspect of the Double Jeopardy Clause that prohibits multiple punishments for the same offense, see *State v. Dragoo*, 277 Neb. 858, 765 N.W.2d 666 (2009), and based on § 60-6,197.03(3), which is applicable to driving under the influence, second offense, and provides for only a 1-year revocation "from the date ordered by the court." However, Schuetz appears to ignore the portion of the statute that provides such order "shall be administered upon sentencing, upon final judgment of any appeal or review, *or upon the date that any probation is revoked.*" § 60-6,197.03(3) (emphasis supplied). Schuetz then argues that this statute was

not intended to allow a second 1-year revocation following an order revoking probation.

The State's response is that Schuetz' first license revocation was a condition of probation and that his second revocation was the consequence of violating probation. And, under § 29-2268(1), such is a permissible sentence. Section 29-2268(1) provides that upon revocation of probation, the court may "impose on the offender such new sentence as might have been imposed originally for the crime of which he was convicted."

Thus, the State concludes that Schuetz has not been subjected to double jeopardy by the imposition of the second 1-year license revocation. Additionally, the State directs our attention to *In re Interest of Rebecca B.*, 280 Neb. 137, 144, 783 N.W.2d 783, 789 (2010), wherein the court said: "[D]ouble jeopardy is not implicated in probation revocation proceedings because the proceedings are a continuation of the original underlying conviction or adjudication. The jeopardy that is attached is the jeopardy that attached in the underlying prosecution or adjudication."

In re Interest of Rebecca B., supra, analyzed whether jeopardy had attached when the State moved to revoke the juvenile's probation—which required her to complete a court-supervised drug treatment program—because she failed two chemical tests. She had already been ordered to serve two periods of detention for the failed drug tests. She contended that basing the motion to revoke on those same failed tests was a violation of the Double Jeopardy Clause. When the juvenile court dismissed the motion to revoke, the State appealed to this court rather than the district court. The Supreme Court, in *In re Interest of Rebecca B., supra*, found that the issue of whether the district court or the Court of Appeals had jurisdiction over the State's appeal was determined by whether the revocation motion placed the juvenile "in jeopardy." *Id.* at 139, 783 N.W.2d at 786. Because the Supreme Court concluded that probation revocation did not place her in jeopardy, the appeal was properly to the district court under Neb. Rev. Stat.

§ 43-2,106.01(2)(d) (Reissue 2008). Thus, the Supreme Court dismissed the appeal.

[3-7] The question for us is whether the court's holding in *In re Interest of Rebecca B., supra*, that the Double Jeopardy Clause does not apply to probation revocation proceedings, is the definitive answer to Schuetz' claim of a double jeopardy violation. Because of the lack of jurisdiction, the Supreme Court did not directly decide whether the juvenile in *In re Interest of Rebecca B.* could be punished further after a probation revocation, even though she had been punished by serving detention at a juvenile facility for each violation. Nonetheless, we believe that the holding of *In re Interest of Rebecca B., supra*, disposes of Schuetz' claim of a double jeopardy violation. The Supreme Court said:

> [A] motion to revoke probation is not a criminal proceeding. A probation revocation hearing is considered a continuation of the original prosecution for which probation was imposed—in which the purpose is to determine whether a defendant or a juvenile has breached a condition of his existing probation, not to convict or adjudicate that individual of a new offense.
>
> . . . It is well established that a probation revocation hearing is not part of a criminal prosecution or adjudication and therefore does not give rise to the full panoply of rights that are due a defendant at a trial or a juvenile in an adjudication proceeding. Furthermore, violation of probation is not itself a crime or offense . . . and the court may impose a new sentence for the offense for which the offender was originally convicted or adjudicated.

In re Interest of Rebecca B., 280 Neb. 137, 142-43, 783 N.W.2d 783, 788 (2010). Moreover, the *In re Interest of Rebecca B.* court said, "Simply stated, it is black letter law that double jeopardy is not implicated by probation revocation proceedings." 280 Neb. at 144, 783 N.W.2d at 789.

Given such holdings and the reasoning behind them, we conclude that *In re Interest of Rebecca B., supra*, conclusively answers Schuetz' claim that the new term of license revocation upon the admitted violation of his probation is a double

jeopardy violation—it is not. Schuetz' first assignment of error is thus without merit.

Was Revocation of Schuetz' Driver's License After Revocation of His Probation Excessive Sentence?

[8-10] Schuetz argues that his resentencing after the revocation of his probation, which prohibited him from operating a motor vehicle for "a second full year," is an abuse of discretion. Brief for appellant at 12. The considerations for sentencing an offender are well known, as set forth in *State v. Rung*, 278 Neb. 855, 774 N.W.2d 621 (2009). Such include consideration of the defendant's (1) age, (2) mentality, (3) education and experience, (4) social and cultural background, (5) past criminal record or record of law-abiding conduct, and (6) motivation for the offense, as well as (7) the nature of the offense, and (8) the violence involved in the commission of the crime. *Id.* In imposing a sentence, the sentencing court is not limited to any mathematically applied set of factors. *Id.* The appropriateness of a sentence is necessarily a subjective judgment and includes the sentencing judge's observation of the defendant's demeanor and attitude and all the facts and circumstances surrounding the defendant's life. *Id.*

[11] Driving under the influence, second offense, is a Class W misdemeanor, and the court shall order the offender not to drive any motor vehicle for any purpose for a period of 1 year. See § 60-6,197.03(3). Therefore, the sentence is within statutory limits. In the factual basis at the revocation hearing, it was indicated that in addition to the arrest for driving the all-terrain vehicle with a preliminary breath test result indicating a breath alcohol content of .254—which we note is nearly identical to the test result of .259 on the underlying second-offense driving under the influence conviction—the ignition interlock device recorded failures on September 20 and October 1 and 4, 2009. Thus, it appears that not only has Schuetz continued to drink during his probation, he may well have done so with some frequency, given his attempts to drive his vehicle when the ignition interlock device indicated he had been drinking.

Thus, Schuetz can hardly be heard to say that he fulfilled the probationary conditions that he not drink, let alone not drink and drive.

CONCLUSION

Because the sentence does not violate the Double Jeopardy Clause and we cannot say the sentence at issue was an abuse of discretion, we affirm.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V.
LANCE P. FICK, APPELLANT.
790 N.W.2d 890

Filed November 16, 2010. No. A-09-1222.

1. **Rules of Evidence.** In proceedings where the Nebraska Evidence Rules apply, the admissibility of evidence is controlled by the Nebraska Evidence Rules; judicial discretion is involved only when the rules make discretion a factor in determining admissibility.
2. **Rules of Evidence: Appeal and Error.** When the Nebraska Evidence Rules commit the evidentiary question at issue to the discretion of the trial court, an appellate court reviews the admissibility of evidence for an abuse of discretion.
3. **Trial: Evidence: Appeal and Error.** A trial court's determination of the relevancy and admissibility of evidence must be upheld in the absence of abuse of discretion.
4. **Evidence: Judges.** The exercise of judicial discretion is implicit in determining the relevance of evidence.
5. **Evidence: Words and Phrases.** Evidence is relevant if it has any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.
6. **Constitutional Law: Hearsay.** If statements at issue are nontestimonial, then no further Confrontation Clause analysis is required.
7. **Hearsay.** The Nebraska Supreme Court has noted that in *Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004), the U.S. Supreme Court provided three formulations of the core class of testimonial statements.
8. **Rules of Evidence.** Neb. Rev. Stat. § 27-403 (Reissue 2008) provides that evidence, although relevant, may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice.
9. **Evidence: Jury Instructions.** The giving of a limiting instruction is mandatory when requested.
10. **Convictions: Evidence: Appeal and Error.** Regardless of whether the evidence is direct, circumstantial, or a combination thereof, and regardless of whether

> the issue is labeled as a failure to direct a verdict, insufficiency of the evidence, or failure to prove a prima facie case, the standard is the same: 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 evidence admitted at trial, viewed and construed most favorably to the State, is sufficient to support the conviction.

Appeal from the District Court for Wayne County: ROBERT B. ENSZ, Judge. Affirmed.

Chad J. Wythers, of Berry Law Firm, for appellant.

Jon Bruning, Attorney General, and James D. Smith for appellee.

IRWIN, SIEVERS, and CARLSON, Judges.

IRWIN, Judge.

I. INTRODUCTION

Lance P. Fick appeals an order of the district court for Wayne County, Nebraska, sentencing Fick to a term of 4 to 6 years' incarceration on a conviction for first degree sexual assault. On appeal, Fick challenges the court's admission into evidence of an audio recording, the court's failure to give a limiting instruction to the jury concerning the audio recording, and the court's failure to grant a directed verdict in his favor. We find no merit to the assertions on appeal, and we affirm.

II. BACKGROUND

On or about December 17, 2008, Fick was charged by information with three counts of first degree sexual assault. The information alleged that Fick had subjected the victim, C.S., to sexual penetration without her consent or while he knew or should have known that she was mentally or physically incapable of resisting or appraising the nature of her conduct. Fick was ultimately convicted on one of the three counts. Testimony at trial revealed that the relevant conduct occurred during a postictal period following C.S.' experiencing an epileptic seizure. Fick did not deny that sexual penetration occurred, and the factual issue for the jury to resolve at trial was whether

Fick knew or should have known that C.S. was mentally or physically incapable of resisting or appraising the nature of the conduct because she was in a postictal state.

C.S. was a 23-year-old college student in Wayne, Nebraska, at the time of the incidents involved in this case. C.S. has been diagnosed with intractable epilepsy. According to C.S., "intractable" means that her epilepsy "is hard to control and it sometimes is impossible to control" with medication or surgery. C.S. has experienced epileptic seizures since she was 12 years old.

C.S. testified that she sometimes is aware when she is about to experience a seizure. She testified that she sometimes experiences "an aura" where she has a copper or other metallic taste in her mouth or believes she smells something burning prior to the onset of a seizure. She testified that she does not always remember these auras after the seizure is over. She testified that she sometimes is able to find somebody and seek assistance prior to the onset of the seizure. C.S. testified that in the fall of 2008, she was averaging approximately six seizures per month, although the number of seizures could vary greatly from week to week and month to month.

C.S. testified that the period after a seizure is called a postictal period. She testified that after experiencing a seizure, she never remembers having it. She testified that it usually takes her at least 8 hours after a seizure to start remembering things. She testified that although each seizure is different and the length of time needed for her to recover and end the postictal period varies, if she experienced a seizure at night, she "may be 50 percent" recovered the next morning, and that it usually takes approximately 3 days to "be back to a hundred percent."

C.S. testified that she sometimes engages in activities the day after a seizure and has no memory of them. For example, she might get up, take a shower, get dressed, sit through a class, and engage in other normal daily activities and yet have no memory of any of it because she was in a postictal state. C.S. acknowledged that it was "possible" that a person who did not know her well would be unaware that she was in a postictal state, but she did not believe it likely.

C.S. attended college in Wayne because the school agreed to admit her as a student to live on campus without a personal assistant; 133 other colleges she contacted refused her request to do so. According to C.S., the dormitory resident assistants at her dormitory all knew about her condition, as did her friends, and her condition was generally well known on campus. C.S., along with her treating physicians, created a four-page written protocol explaining her seizure characteristics, how to perform interventions when she has a seizure, her treatment and medications, and her postictal characteristics and behaviors. The written protocol included a description indicating that in C.S.' postictal state, she has no memory of what has happened, is cognitively impaired, displays regressed behavior and an inability to speak, is amnesic for at least 8 hours, and experiences headaches and sensitivity to light, noise, and stimulation. A copy of the protocol was posted on C.S.' dormitory room door. C.S. testified that she met with all of the resident assistants, including Fick, in early September 2008 to discuss her condition and the protocol.

Fick testified that he had assisted during two or three of C.S.' seizures prior to the early September 2008 meeting. He also testified that he was at the early September 2008 meeting. Fick testified that he was involved in helping C.S. with approximately 8 to 12 seizures in the fall of 2008.

On or about October 9, 2008, C.S. found a letter in her dormitory room the morning after experiencing a seizure. The letter appears as if written by a child and reads, "Deer lanse, i stil want to be your speshl frind but i dont lik it wen you get hapy mad and hapy i sory i cant get slepign somtim[s] i hav brane goign crazy love [C.S.]" Two times in the letter, the letter "s" is written backward. C.S. testified that the writing in the letter looked the same as other writing she had completed while in previous postictal states. C.S. was concerned that Fick was uncomfortable caring for her, and she shared the letter with a friend who was also a resident assistant.

C.S. testified that after discussing the letter with her friend and thinking back over the previous weeks, she recalled two prior occasions when she had experienced soreness in her vaginal area the day after having a seizure while Fick had been on

duty at the dormitory and another time when she had discovered "a spot" on her sheets several days after a seizure. C.S. then asked her friend to make an audio recording of her during her next postictal state. After C.S. and her friend reviewed the recording of her next postictal state, C.S.' concerns about Fick were reported to the Wayne Police Department. A portion of the recording was ultimately played for the jury, over Fick's objections.

Fick was interviewed by a police officer on October 22, 2008. At the conclusion of the interview, Fick prepared a written statement in which he acknowledged having sexual contact with C.S. on October 6 and 8. He indicated that on October 6, C.S. asked him to "touch her where 'she went pee' and [he] did," and that C.S. "asked to play with [his] 'special finger' as she had called [it]" and he "let this happen for a short-time but quickly stopped when [C.S.] looked up at [him] again and [he] could tell she was not her normal self, but still in a wake-up stage." He indicated that on October 8, C.S. "asked [him] to . . . finger her again, because it felt good, so [he] did[, and s]he then asked [him] to hold and play with [his] penis, and [he] did let her for a short time."

At trial, Fick testified that after C.S.' seizure late on October 5, 2008, he stopped in to check on her after 2 a.m. on October 6. He testified that C.S. talked with him about homework and classes and that she asked him to stay. He testified that he watched television for some time and that he and C.S. had "a fairly lengthy discussion about the scientific aspects of [the] television show [C.S.I.], how much was real, how much was made up for TV, what part of that technology is true and what's not."

Fick testified that C.S. then asked him to "just lay beside her and cuddle for a while." He testified that C.S. asked him to "rub her shoulders and her arms" and that he proceeded to tickle her. He testified that C.S. "[e]ventually . . . started to make sexual gestures towards [him, then] asked [him] to tickle her some more, asked [him] to tickle her lower, [and] specifically [asked him to] tickle [her] where she went pee" and that she then moved his "hand down into her pants." He testified that C.S. asked him to pull down his shorts, that he did so,

and that C.S. "performed oral sex on [him] for a short period of time."

In further testimony, Fick stated that C.S. "performed [oral sex] for a short period of time[,] . . . took a break, came up, . . . asked how she was doing," and then commented that "'[her] dad used to do these things with [her].'" He testified that she refused to answer his questions about her comment and became very upset before he left. Fick testified that C.S. was coherent, was capable of adult conversation, and was able to use her iPod herself during this incident.

Fick acknowledged that during his interview with the police officer, within a couple of weeks of the incidents, he had been unable to recall what he watched on television, had indicated to the police officer that C.S. was "pretty silent" during the entire incident, and had never told the police officer about the conversations he had with C.S. concerning the television show C.S.I. He also acknowledged that he had told the police officer that he put the earphones of C.S.' iPod in her ears for her. He also acknowledged that he had never mentioned to the police officer anything about C.S.' indicating that events involving her father had taken place which were similar to those at issue involving Fick. He acknowledged that he had told the police officer,

> "[The oral sex ended] when [C.S.] started sucking her thumb and started to talk like a baby again, or, you know, just, she has a look in her eye when she's still waking up or when she's normal. She looked up and she had that look like she was still asleep."

He acknowledged that he had not provided many details about C.S.' actions to the police officer and indicated that he had a better recollection of the details at trial in September 2009 than he did during the police interview in October 2008.

The second incident between C.S. and Fick involving sexual contact occurred 2 days after the first incident. Fick testified that C.S. had a seizure at approximately 7:55 p.m. on October 8, 2008. He testified that he went to C.S.' room to check on her at approximately 10 p.m. He testified that C.S. was initially speaking in phrases, not complete sentences, and that C.S. was quiet and "extremely frightened" and said, "[B]ad people are going to come, protect me." He testified that he and C.S. were

alone at approximately 10:30 p.m. and that C.S. calmed down and fell asleep. He testified that he watched television again and that C.S. continued to sleep until "shortly after midnight." He testified that he and C.S. had a conversation about their favorite movies featuring Will Smith and made smalltalk about classes and that eventually, C.S. "again asked [him] to tickle her." He testified that he tickled her arms and shoulders and that "[s]he asked [him] to tickle her again lower." He testified that he "proceeded to finger [C.S.] again." He testified that he stopped because of a relationship he had been in with another female, that C.S. became "extremely upset . . . that [he] would no longer continue whatever type of relationship [he and C.S.] had," and that he eventually left. He testified that C.S. was speaking normally, that her attitude was normal, that she had no difficulty with balance or functioning on her own, and that he thought she was normal.

Fick again acknowledged that he had not provided details to the police officer during the interview in October 2008 and that he remembered more details at the time of trial. He acknowledged that his trial testimony was that on each occasion, it was C.S. who had been in charge of the sexual activity and she solicited him for sexual activity and he merely complied.

The jury ultimately convicted Fick on the charge of first degree sexual assault for the incident that occurred on or about October 8, 2008. The district court sentenced Fick to 4 to 6 years' imprisonment. This appeal followed.

III. ASSIGNMENTS OF ERROR

Fick has assigned three errors on appeal. First, Fick asserts that the district court erred in admitting the audio recording of C.S. made while she was in a postictal state. Second, Fick asserts that the court erred in failing to give the jury a limiting instruction about the audio recording. Finally, Fick asserts that the court erred in denying his motion for a directed verdict.

IV. ANALYSIS

1. Admission of Audio Recording

Fick first asserts that the district court erred in admitting into evidence the audio recording of C.S. made while she was in a

postictal state. Fick argues that the recording was not relevant, that it was hearsay, that there was insufficient foundation, that its admission violated Fick's right to confrontation, and that the recording was unfairly prejudicial. We find no merit to Fick's assertions.

The court received into evidence six audio segments recorded during C.S.' postictal state following an October 12, 2008, seizure. The total length of the admitted recordings is less than 20 minutes, and they reflect attempts by one of the resident assistants to communicate with C.S. during the initial hours of her postictal period. The resident assistant testified that he had cared for C.S. approximately 20 times after she had seizures and that the audio recording captured events typical of what C.S. was like in her initial postictal state.

During the audio recording, C.S. can be heard speaking and responding to various questions. Her voice sounds like that of a very young child, and it is difficult, if not impossible, to decipher the actual words she is speaking. Similarly, Fick testified that during C.S.' postictal recovery, she cannot communicate clearly. The district court overruled Fick's objections and allowed the jury to hear the six audio segments received; the court advised the jury that it would not be provided a transcript of the audio recording, that the audio recording would not be allowed into the jury room, and that the jury would have only one opportunity to listen to the segments received.

[1-3] In proceedings where the Nebraska Evidence Rules apply, the admissibility of evidence is controlled by the Nebraska Evidence Rules; judicial discretion is involved only when the rules make discretion a factor in determining admissibility. *State v. Daly*, 278 Neb. 903, 775 N.W.2d 47 (2009). When the Nebraska Evidence Rules commit the evidentiary question at issue to the discretion of the trial court, an appellate court reviews the admissibility of evidence for an abuse of discretion. *Erickson v. U-Haul Internat.*, 278 Neb. 18, 767 N.W.2d 765 (2009). A trial court's determination of the relevancy and admissibility of evidence must be upheld in the absence of abuse of discretion. *Id.*

(a) Relevancy

[4,5] We find no merit to Fick's assertion that the audio recording was not relevant. The exercise of judicial discretion is implicit in determining the relevance of evidence. *State v. Draganescu*, 276 Neb. 448, 755 N.W.2d 57 (2008). Evidence must be relevant to be admissible. See *State v. Merrill*, 252 Neb. 736, 566 N.W.2d 742 (1997). Evidence is relevant if it has any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. See *id.* Relevancy of evidence has two components: materiality and probative value. *Id.* Materiality looks to the relation between the propositions for which the evidence is offered and the issues in the case. *Id.* Probative value is a relative concept; the probative value of a piece of evidence involves a measurement of the degree to which the evidence persuades the trier of fact that the particular fact exists and the distance of the particular fact from the ultimate issues of the case. *Id.*

In the present case, Fick did not deny that sexual contact had occurred on the two occasions in question. Rather, he asserted that he did not know and should not have known that C.S. was incapable of consenting to sexual contact because she was in a postictal state. There was testimony presented concerning C.S.' demeanor and capacity during postictal states and testimony presented to demonstrate that the sexual contact on both occasions occurred during the first few hours after C.S. had suffered a seizure, and Fick acknowledged knowing about the seizures and their timing. The jury instructions informed the jury that C.S.' incapacity and Fick's knowledge of her incapacity were material elements of the crimes. We find that the audio recording and the testimony that it was an accurate representation of C.S.' demeanor and ability to communicate during a postictal state were relevant evidence on the issue of whether Fick knew or should have known that C.S. was incapable of resisting or appraising the nature of her conduct.

(b) Hearsay

We find no merit to Fick's assertion that the audio recording was hearsay. Neb. Rev. Stat. § 27-801(3) (Reissue 2008)

defines hearsay as a statement offered in evidence to prove the truth of the matter asserted. The audio recording in this case was not offered for the truth of any assertions made during the audio recording; indeed, there are no assertions made by C.S. during the audio recording concerning whether she had consented or had been capable of consenting to sexual contact by Fick. Rather, the audio recording was offered as evidence relevant to the question of whether Fick knew or should have known that C.S., while in a postictal state, was incapable of consenting.

(c) Foundation

We find no merit to Fick's assertion that there was insufficient foundation for admission of the audio recording. The resident assistant who recorded his conversation with C.S. during the postictal state testified about the circumstances of the recording and testified that it was a true and accurate representation of the conversation he had with C.S. on that occasion. To the extent the audio recording was not offered for the truth or veracity of any actual statements, but, rather, was offered as evidence relevant to the question of whether Fick knew or should have known that C.S., while in a postictal state, was incapable of consenting, sufficient foundation was laid.

(d) Confrontation

We find no merit to Fick's assertion that admission of the audio recording violated his right to confrontation. Both the resident assistant who made the recording and conversed with C.S. on the recording and C.S. herself were available and testified at trial and were subject to cross-examination by Fick. In addition, despite a passing statement by the district court that the audio recording was "testimonial in nature," the contents of the audio recording in this case do not fit within the definition of testimonial statements.

[6,7] If statements at issue are nontestimonial, then no further Confrontation Clause analysis is required. *State v. Fischer*, 272 Neb. 963, 726 N.W.2d 176 (2007). The Nebraska Supreme Court has noted that in *Crawford v. Washington*, 541 U.S. 36,

124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004), the U.S. Supreme Court provided three formulations of the core class of testimonial statements:

> "'In the first, testimonial statements consist of "ex parte in-court testimony or its functional equivalent—that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine or similar pretrial statements that declarants would reasonably expect to be used prosecutorially." . . . The second formulation described testimonial statements as consisting of "extrajudicial statements . . . contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions." . . . Finally, the third explained that testimonial statements are those "made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial." . . . While the Court declined to settle on a single formulation, it noted that, "[w]hatever else the term [testimonial] covers, it applies . . . to prior testimony at a preliminary hearing, before a grand jury, or at a former trial, and to police interrogations. These are the modern abuses at which the Confrontation Clause was directed."'"

State v. Fischer, 272 Neb. at 970, 726 N.W.2d at 181-82, quoting *State v. Vaught*, 268 Neb. 316, 682 N.W.2d 284 (2004). In this case, the audio recording does not contain any statements that even resemble testimonial statements.

(e) Unfair Prejudice

[8] Finally, we find no merit to Fick's assertion that admission of the audio recording was unfairly prejudicial. Neb. Rev. Stat. § 27-403 (Reissue 2008) provides that evidence, although relevant, may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. The fact that evidence is prejudicial is not enough to require exclusion under § 27-403, because most, if not all, of the evidence a party offers is calculated to be prejudicial to the opposing party; it is only evidence which has a tendency to suggest a decision on an improper basis that is unfairly prejudicial under § 27-403. *State*

v. Daly, 278 Neb. 903, 775 N.W.2d 47 (2009). While the audio recording was undoubtedly prejudicial, we conclude that it was relevant on the issue of C.S.' capacity during a postictal state and that it suggested a decision on a proper basis.

There was testimony that the audio recording was an accurate depiction of C.S.' demeanor during postictal states, and her demeanor as depicted therein was consistent with Fick's own testimony that C.S. was unable to communicate effectively during the first few hours after a seizure. There was also evidence presented that Fick had told a police officer that he stopped the first sexual contact when realizing that C.S. was still in a postictal state and that the second occasion of sexual contact, for which he was convicted and from which this appeal stems, occurred only a couple of days later. Fick had the opportunity to testify that C.S.' demeanor on that occasion was somehow different from what was represented on the audio recording. We do not find an abuse of discretion by the district court in concluding that the evidence's probative value was not substantially outweighed by the danger of unfair prejudice.

2. Limiting Instruction

Fick next asserts that the district court erred in failing to give the jury a limiting instruction about the audio recording. Fick argues that he requested a limiting instruction and that the court refused to issue it. We disagree with Fick's characterization of the record and find no reversible error.

First, Fick asserts in his brief on appeal that "Fick requested a limiting instruction . . . ." Brief for appellant at 41. This is not an accurate representation of the record. Instead, the record reflects that Fick's counsel asked the court if it was concluding that the contents of the audio recording were not hearsay, and the court responded, "Yes, I'm making that determination." Fick's counsel responded, "Okay. Okay." The court then indicated, "So I don't intend to give [the jury] a limiting instruction." Fick's counsel responded, "Okay. That's what I wanted to find out." Fick's counsel then moved on to question the court about his objection to not being able to effectively cross-examine C.S. about the contents of the audio recording. Fick did not request a limiting instruction or propose a limiting

instruction, and Fick did not request a limiting instruction during the later jury instruction conference.

[9] Although Fick accurately indicates that the Nebraska Supreme Court, in *State v. Ryan*, 233 Neb. 74, 444 N.W.2d 610 (1989), indicated that the giving of a limiting instruction is mandatory when requested, we conclude that that proposition of law is not applicable to the present situation. As noted, no limiting instruction was requested by Fick in this case. We already concluded above that the court did not err in allowing the audio recording, and in the absence of any request for a limiting instruction, we find no reversible error in the court's failure to give a limiting instruction. See *State v. Gutierrez*, 272 Neb. 995, 726 N.W.2d 542 (2007), *abrogated on other grounds, State v. Thorpe*, 280 Neb. 11, 783 N.W.2d 749 (2010).

3. Directed Verdict

Finally, Fick asserts that the district court erred in denying his motion for a directed verdict. Fick argues that the State failed to adduce sufficient evidence to demonstrate that there was nonconsensual sexual contact. We disagree.

[10] Regardless of whether the evidence is direct, circumstantial, or a combination thereof, and regardless of whether the issue is labeled as a failure to direct a verdict, insufficiency of the evidence, or failure to prove a prima facie case, the standard is the same: 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 evidence admitted at trial, viewed and construed most favorably to the State, is sufficient to support the conviction. *State v. Banks*, 278 Neb. 342, 771 N.W.2d 75 (2009).

In this case, the State adduced substantial evidence concerning C.S.' medical condition, her seizures, and her postictal state after seizures. The State adduced evidence concerning C.S.' making the resident assistants aware of her condition and the proper protocol for caring for her. The State adduced evidence concerning Fick's knowledge of C.S.' condition and previous involvement in caring for her after seizures. The State adduced

evidence that Fick engaged in sexual contact with C.S. after her seizure on or about October 6, 2008, and that during the course of that sexual contact, Fick determined that, in his own words, C.S. "was not her normal self, but still in a wake-up stage." The State adduced evidence that nonetheless, 2 days later, when Fick was checking on C.S. within approximately 2 hours after she had a seizure, Fick again had sexual contact with C.S. The State presented sufficient evidence from which the jury could make a determination about whether C.S. was capable of consenting to sexual contact and about whether Fick knew or should have known whether C.S. was capable of consenting. This assertion of error is meritless.

V. CONCLUSION

We find no merit to Fick's assertions of error on appeal. We affirm.

AFFIRMED.

IN RE INTEREST OF JAMYIA M., A CHILD UNDER 18 YEARS OF AGE. STATE OF NEBRASKA, APPELLEE AND CROSS-APPELLEE, V. JAMISON M., APPELLEE AND CROSS-APPELLANT, AND SHINAI S., APPELLANT.

791 N.W.2d 343

Filed November 30, 2010. No. A-10-208.

1. **Juvenile Courts: Appeal and Error.** An appellate court reviews juvenile cases de novo on the record and reaches its conclusions independently of the juvenile court's findings.
2. **Judgments: Appeal and Error.** In reviewing questions of law, an appellate court reaches conclusions independent of the lower court's ruling.
3. **Statutes: Appeal and Error.** Statutory interpretation presents a question of law, for which an appellate court has an obligation to reach an independent conclusion irrespective of the determination made by the court below.
4. **Indian Child Welfare Act: Parental Rights: Proof.** The Indian Child Welfare Act requirement of "active efforts" requires more than the "reasonable efforts" standard applicable in non-Indian Child Welfare Act cases, and at least some of the efforts should be culturally relevant.
5. ____: ____: ____. There is no precise formula for what constitutes "active efforts" under Neb. Rev. Stat. § 43-1505(4) (Reissue 2008); instead, a

determination as to what constitutes "active efforts" must be made on a case-by-case basis.

6. **Statutes.** Statutory language is to be given its plain and ordinary meaning.
7. ____. It is not within the province of the courts to read a meaning into a statute that is not there or to read anything direct and plain out of a statute.
8. **Indian Child Welfare Act: Parental Rights: Proof.** The exceptions found in Neb. Rev. Stat. § 43-283.01 (Reissue 2008) which relieve the State from its obligation to provide reasonable efforts when aggravating circumstances are present do not extend to the State's obligation to provide "active efforts" pursuant to Neb. Rev. Stat. § 43-1505 (Reissue 2008).

Appeal from the Separate Juvenile Court of Douglas County: ELIZABETH CRNKOVICH, Judge. Reversed and remanded for further proceedings.

Kim D. Erwin-Loncke, of Loncke Law Office, and Jeremy Muckey-Shirk for appellant.

Donald W. Kleine, Douglas County Attorney, and Amy Schuchman for appellee State of Nebraska.

Thomas C. Riley, Douglas County Public Defender, and Christine D. Kellogg for appellee Jamison M.

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

INBODY, Chief Judge.

INTRODUCTION

This case involves the termination of the parental rights of the parents of an Indian child, Jamyia M., following the child's removal from the home at 2 months of age after what doctors described as a nonaccidental injury resulting in serious physical and developmental delays to the child. Shinai S., the natural mother, has appealed and Jamison M., the natural father, has cross-appealed the termination of their parental rights. Because we find that there is no exemption to the "active efforts" requirement of the Nebraska Indian Child Welfare Act (NICWA), which is based on the federal Indian Child Welfare Act (ICWA), and that the juvenile court erred in finding "active efforts" were made in this case, we reverse the court's order terminating the parental rights of Shinai and Jamison to their daughter, Jamyia, and remand the cause for further proceedings.

STATEMENT OF FACTS

On September 30, 2008, 2-month-old Jamyia was admitted to a hospital with a posterior occipital subdural hemorrhage and either a subarachnoid hemorrhage or cerebral contusion, which injuries doctors concluded were intentionally inflicted and were consistent with shaken baby syndrome. Although Jamyia had been in the care of one or both of her parents, neither parent could provide a reasonable explanation consistent with Jamyia's injuries. As a result, on October 3, the State filed an adjudication petition alleging that Jamyia was a child within the meaning of Neb. Rev. Stat. § 43-247(3)(a) (Reissue 2008) due to the natural parents' placing Jamyia in a situation which was dangerous to her life or limb or injurious to her health or morals.

Later in October 2008, the State filed a second amended petition adding allegations that Jamyia, who was enrolled or was eligible for tribal enrollment in the Navajo Nation, came within the meaning of Neb. Rev. Stat. § 43-292(2), (8), (9), and (10)(d) (Reissue 2008); that reasonable efforts were not required and, in the alternative, that "active efforts" were provided and proved unsuccessful; and that termination of parental rights was in Jamyia's best interests. On January 23, 2009, the juvenile court ordered that NICWA requirements applied to this case.

Adjudication and dispositional hearings were held over the course of several days spanning from February 2009 to January 2010. A protection and safety worker from the Department of Health and Human Services (DHHS) testified that the parents were offered a comprehensive family assessment and that DHHS performed an early developmental network referral and provided a clothing voucher for Jamyia.

The State also adduced testimony from Evelyn Labode, who has worked in the ICWA field since 1993. Labode has trained DHHS employees and social workers with the Ponca and Omaha Tribes on ICWA regulations, and she has been affiliated with the "Through the Eyes of the Child Initiative" and the "Douglas County 1184 Treatment Team." Labode testified that in determining whether the State had provided "active efforts" to the family, she reviewed, among other things, information

from the hospital, a visitation plan, and information regarding services that had been offered to the parents. Labode testified that the services offered to the parents included transportation and grocery vouchers for Shinai, proposed visitation services, and classes in CPR, first aid, and parenting. Labode testified that the State had provided "active efforts."

The evidence established that Jamyia receives occupational, physical, and speech therapy. She has significant cognitive motor delays, language delays in all areas, visual impairment due to severe retinal hemorrhages to both eyes, seizures, and neurological problems—including problems with swallowing which require a "G-tube" to supplement her daily oral feedings consisting of "'pureed table food' or 'baby food' with some texture." Jamyia's hands and feet are curled when not in splints; she currently wears splints several hours per day to teach her to straighten her hands and feet and is placed in a "'stander'" twice a day to strengthen her leg muscles. Jamyia was still unable to walk or talk at 17 months old.

On December 2, 2009, the juvenile court found that Jamyia was a child within the meaning of §§ 43-247(3)(a) and 43-292(2), (8), and (9) regarding both parents. The court also found that "active efforts" had been made to provide remedial services designed to prevent the breakup of the family and that such efforts proved unsuccessful. The juvenile court took under advisement the allegations of whether termination was in Jamyia's best interests and whether reasonable efforts to preserve and reunify the family were required under Neb. Rev. Stat. § 43-283.01 (Reissue 2008). A dispositional hearing was set for January 11, 2010, so that the juvenile court could be updated on information or recommendations in support of, or in opposition to, the State's request for termination.

An updated DHHS court report received into evidence during the January 11, 2010, hearing noted that although Jamyia's parents had not been allowed any visits with Jamyia since she was placed in foster care as ordered by the court, the parents have been able to stay somewhat connected to their daughter through video recordings that the team from Early Development Network (EDN) prepared for them to watch and from written updates provided by Jamyia's foster parent.

The caseworker's report noted that since Jamyia's removal, Jamyia's parents

> have remained very interested and committed to doing everything that they can to have the opportunity to regain custody of their daughter. They both have: received CPR and first aid certification and plan on updating that as it is about to expire (financed by [D]HHS); successfully completed parenting classes through Heartland Family Services (financed by [D]HHS); attended every court hearing without fail; attended all of the educational meetings for Jamyia and work with her EDN service coordinator to keep up on her progress and her needs; provided gifts for her on every holiday and birthday; cooperated with every request that was made by the court and/or [D]HHS; take the initiative to research all of their daughter's diagnos[e]s and what she may need in the future as the result of them.

The caseworker also noted that it was her understanding that both parents were paying child support as ordered by the court and were up to date on their obligation. The caseworker recommended that the parents be allowed supervised visitation to occur in the foster parent's home and noted that the foster parent was willing to supervise those visits or was willing to have the visits supervised by someone else in her home. The foster parent reported to Jamyia's guardian ad litem that the parents continually and consistently provide Jamyia with "'toys, clothes and baby stuff.'"

In February 2010, the juvenile court filed an order terminating the parental rights of both natural parents after finding that termination was in Jamyia's best interests. The court also found that reasonable efforts were not required pursuant to § 43-283.01 as to both parents because Jamyia was subjected to aggravating circumstances, including, but not limited to, abandonment, chronic abuse, torture, or sexual abuse.

ASSIGNMENTS OF ERROR

Both Shinai and Jamison contend the juvenile court erred in finding that the State made "active efforts" to provide remedial services and rehabilitative programs designed to prevent

the breakup of their Indian family and that those efforts were unsuccessful, as required by Neb. Rev. Stat. § 43-1505(4) (Reissue 2008), and in finding, beyond a reasonable doubt, that returning custody of Jamyia to them would result in serious emotional or physical damage to her. Shinai also contends that the juvenile court erred in deferring the Navajo Nation from intervening until the dispositional portion of the juvenile proceedings. Jamison also claims that the juvenile court erred in finding there was sufficient evidence to terminate his parental rights pursuant to § 43-292(2), (8), and (9) and that the juvenile court violated his due process rights by failing to conduct the juvenile proceedings in a fair and impartial manner.

STANDARD OF REVIEW

[1,2] An appellate court reviews juvenile cases de novo on the record and reaches its conclusions independently of the juvenile court's findings. *In re Interest of Jorge O.*, 280 Neb. 411, 786 N.W.2d 343 (2010); *In re Interest of Dakota M.*, 279 Neb. 802, 781 N.W.2d 612 (2010). In reviewing questions of law, an appellate court reaches conclusions independent of the lower court's ruling. *In re Interest of Louis S. et al.*, 17 Neb. App. 867, 774 N.W.2d 416 (2009).

[3] Statutory interpretation presents a question of law, for which an appellate court has an obligation to reach an independent conclusion irrespective of the determination made by the court below. *State v. Vela*, 279 Neb. 94, 777 N.W.2d 266 (2010).

ANALYSIS

We first address the parents' claim the juvenile court erred in finding that the State made "active efforts," as required by § 43-1505(4), to provide remedial services and rehabilitative programs designed to prevent the breakup of their Indian family and that those efforts were unsuccessful.

[4,5] Pursuant to NICWA,

> Any party seeking to effect a foster care placement of, or termination of parental rights to, an Indian child under state law shall satisfy the court that active efforts have been made to provide remedial services and rehabilitative

> programs designed to prevent the breakup of the Indian family and that these efforts have proved unsuccessful.

§ 43-1505(4). It is well established that the "active efforts" standard requires more than the "reasonable efforts" standard applicable in non-ICWA cases, and at least some of the efforts should be "culturally relevant." See *In re Interest of Walter W.*, 274 Neb. 859, 744 N.W.2d 55 (2008). However, there is no precise formula for what constitutes "active efforts"; instead, a determination as to what constitutes "active efforts" must be made on a case-by-case basis. See *id*. Further, there has been no real guidance on what "culturally relevant" efforts are sufficient, but the Nebraska Supreme Court has found that a cultural plan discussed by a case manager with a foster parent, without further elaboration regarding the details of such, constituted a sufficient "active effort" to support termination. See *id*.

"Active efforts" have been shown where the Indian family was provided with utility and housing assistance; psychological evaluations, assessments, and followup; therapy; chemical dependency evaluations and drug screenings; access to the Specialized Treatment and Recovery Court; bus tickets; and supervised visitation. "Active efforts" have also been shown where the children were provided with foster care placement, tutoring, and medical services; early education services; and speech therapy. See *In re Interest of Louis S. et al., supra*. "Active efforts" have also been shown where the Indian family was provided information regarding inpatient and outpatient chemical dependency treatment programs and was encouraged to apply to and attend said programs; provided information regarding community resources to assist with job skill development on multiple occasions; provided information on community resources to obtain a psychiatric evaluation and received a referral to a psychologist for a psychological evaluation; provided vouchers for rent, clothing, an electric bill, drug testing, and bus tickets; provided visitation; provided transportation of the child for visitation and foster care; provided medical care for the child; had a discussion of a cultural plan with the foster parent; and received assistance with obtaining housing. See *In re Interest of Walter W., supra.*

In the instant case, during the 17 months that this case was pending, the services offered to the parents included a comprehensive family assessment, an early developmental network referral, a clothing voucher for Jamyia, transportation and grocery vouchers for Shinai, and classes in CPR, first aid, and parenting, which classes both parents completed. Pursuant to the court's order, the parents were not allowed any contact with Jamyia following her removal in September 2008, despite DHHS' recommendation that they be allowed supervised visitation. Further, there were no "culturally relevant" efforts made in this case.

Throughout the 17 months the parents were not allowed contact with Jamyia, they have attempted to stay connected to Jamyia by watching video recordings and through written updates, and they have paid child support and remained current on that obligation. The caseworker's report noted that Jamyia's parents

> have remained very interested and committed to doing everything that they can to have the opportunity to regain custody of their daughter. They both have: received CPR and first aid certification and plan on updating that as it is about to expire (financed by [D]HHS); successfully completed parenting classes through Heartland Family Services (financed by [D]HHS); attended every court hearing without fail; attended all of the educational meetings for Jamyia and work with her EDN service coordinator to keep up on her progress and her needs; provided gifts for her on every holiday and birthday; cooperated with every request that was made by the court and/or [D]HHS; take the initiative to research all of their daughter's diagnos[e]s and what she may need in the future as the result of them.

It appears from DHHS' own evidence that not only were the few services provided by DHHS successful, but that it was the parents themselves who took the initiative to attempt to remain involved in their daughter's life. Therefore, we find the State did not provide by clear and convincing evidence that it made "active efforts," as required by § 43-1505(4), to provide remedial services and rehabilitative programs designed to

prevent the breakup of the Indian family and that those efforts were unsuccessful.

Although we have found that the State did not provide "active efforts" to prevent the breakup of the Indian family, the State argues that the exception relieving the State from its obligation to provide reasonable efforts when aggravating circumstances are present should be extended to the "active efforts" requirement, thereby relieving the State from its obligation in this case.

Nebraska's statute excusing the State from providing reasonable efforts when aggravating or other specific circumstances are present provides, in pertinent part:

> Reasonable efforts to preserve and reunify the family are not required if a court of competent jurisdiction has determined that:
>
> (a) The parent of the juvenile has subjected the juvenile to aggravated circumstances, including, but not limited to, abandonment, torture, chronic abuse, or sexual abuse;
>
> (b) The parent of the juvenile has (i) committed first or second degree murder to another child of the parent, (ii) committed voluntary manslaughter to another child of the parent, (iii) aided or abetted, attempted, conspired, or solicited to commit murder, or aided or abetted voluntary manslaughter of the juvenile or another child of the parent, or (iv) committed a felony assault which results in serious bodily injury to the juvenile or another minor child of the parent; or
>
> (c) The parental rights of the parent to a sibling of the juvenile have been terminated involuntarily.

§ 43-283.01(4). See, also, 42 U.S.C. § 671(a)(15) (2006).

These exceptions were not included in the NICWA statute mandating "active efforts" which provides:

> Any party seeking to effect a foster care placement of, or termination of parental rights to, an Indian child under state law shall satisfy the court that active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that these efforts have proved unsuccessful.

§ 43-1505(4). See, also, 25 U.S.C. § 1912(d) (2006). The question of whether the aggravating circumstances exception found in the reasonable efforts statute should be extended to excuse the State from having to fulfill NICWA's requirement to provide "active efforts" to prevent the breakup of Indian families is an issue of first impression in Nebraska, and our research has uncovered only three cases considering this issue nationwide.

The two polestar cases regarding whether an exception exists to ICWA's "active efforts" requirement were decided by the Alaska Supreme Court and the South Dakota Supreme Court, 3 years apart, with the courts reaching opposite conclusions.

In the earlier case, *J.S. v. State*, 50 P.3d 388 (Alaska 2002), the Alaska Supreme Court upheld the termination of a father's parental rights to his three Indian children, after he was convicted of sexually abusing them, by finding that "active efforts" were not required under ICWA in cases of sexual abuse by a parent. The court acknowledged that the case was not governed by the federal Adoption and Safe Families Act of 1997 (ASFA). However, the court relied on a provision contained in ASFA which releases the State from the reasonable efforts requirement when aggravating circumstances are present in making its determination that "active efforts" were not required under ICWA in its case. The Alaska Supreme Court clearly relied on policy grounds placing the greater importance on "a child's fundamental right to safety" rather than relying on strict statutory construction. 50 P.3d at 392.

The South Dakota Supreme Court, in *People ex rel. J.S.B., Jr.*, 691 N.W.2d 611 (S.D. 2005), rejected the Alaska Supreme Court's public policy reasoning, finding that ASFA did not supersede ICWA. The South Dakota Supreme Court specifically stated, "[W]e do not think Congress intended that ASFA's 'aggravated circumstances' should undo the State's burden of providing 'active efforts' under ICWA." 691 N.W.2d at 619. The South Dakota Supreme Court then identified three rules of statutory construction supporting this determination: (1) ICWA does not offer any exception to its "active efforts" requirement, ASFA does not mention ICWA, and ASFA does not purport to modify ICWA, much less explicitly state that ASFA's

exceptions to "reasonable efforts" should apply to ICWA's "active efforts"; (2) ICWA is a more specific set of statutes than ASFA, and the rules of statutory construction require that the more specific statute controls; and (3) when interpreting a statute pertaining to Indians,

> "statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit. . . ." . . . As Congress found when it enacted ICWA, it is to the benefit of Indian children to remain within their families and only after "active efforts" to reunite those families have proven unsuccessful should the children be removed.

691 N.W.2d at 619 (quoting *Montana v. Blackfeet Tribe*, 471 U.S. 759, 105 S. Ct. 2399, 85 L. Ed. 2d 753 (1985)).

In a third case addressing this issue, Michigan's Supreme Court, similarly to South Dakota's, held that neither ASFA nor its corresponding state laws relieve the state from ICWA's "active efforts" requirement. See *In re JL*, 483 Mich. 300, 770 N.W.2d 853 (2009).

[6,7] In considering the language of our Nebraska statutes, statutory language is to be given its plain and ordinary meaning. *State v. Alford*, 278 Neb. 818, 774 N.W.2d 394 (2009). It is not within the province of the courts to read a meaning into a statute that is not there or to read anything direct and plain out of a statute. *Id.*

Our "active efforts" statute, § 43-1505(4), like its federal counterpart, does not contain any exceptions to the State's obligation to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family. There is no conflict between the lack of any exceptions in the "active efforts" statute and the presence of exceptions in the "reasonable efforts" statutes, because statutes are separate and distinct. *In re Interest of Shayla H. et al.*, 17 Neb. App. 436, 764 N.W.2d 119 (2009) (ICWA's "active efforts" provision is separate and distinct from "reasonable efforts" provision requiring State to plead active efforts by State to prevent breakup of Indian family). However, even if conflict could be read between the two statutes, the more specific NICWA statutory provisions would be controlling. See *R & D Properties v. Altech Constr. Co.*, 279

Neb. 74, 776 N.W.2d 493 (2009) (to extent there is conflict between two statutes on same subject, specific statute controls over general statute).

[8] In sum, we hold that the exceptions found in § 43-283.01 which relieve the State from its obligation to provide reasonable efforts when aggravating circumstances are present do not extend to the State's obligation to provide "active efforts" pursuant to § 43-1505. Since there were no exceptions relieving the State of its obligation to provide "active efforts" in this case and we have found that it did not provide those "active efforts," the order of termination is reversed, and this cause is remanded for further proceedings.

CONCLUSION

Having found that "active efforts" were required in this case and were not provided, we need not address the remaining assignments of error raised by the parents. The juvenile court's order of termination is reversed, and this cause is remanded for further proceedings.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

STATE OF NEBRASKA, APPELLEE, V.
SONNY D. BALVIN, APPELLANT.
791 N.W.2d 352

Filed December 7, 2010. No. A-09-1089.

1. **Convictions: Evidence: Appeal and Error.** Regardless of whether the evidence is direct, circumstantial, or a combination thereof, and regardless of whether the issue is labeled as a failure to direct a verdict, insufficiency of the evidence, or failure to prove a prima facie case, the standard is the same: 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 evidence admitted at trial, viewed and construed most favorably to the State, is sufficient to support the conviction.
2. **Rules of Evidence.** In proceedings where the Nebraska Evidence Rules apply, the admissibility of evidence is controlled by the Nebraska Evidence Rules; judicial discretion is involved only when the rules make discretion a factor in determining admissibility.

3. **Rules of Evidence: Appeal and Error.** When judicial discretion is not a factor in assessing admissibility, whether the underlying facts satisfy the legal rules governing the admissibility of such evidence is a question of law, subject to de novo review.
4. ____: ____. Where the Nebraska Evidence Rules commit the evidentiary question at issue to the discretion of the trial court, an appellate court reviews the admissibility of evidence for an abuse of discretion.
5. **Trial: Witnesses: Testimony: Appeal and Error.** When the object of cross-examination is to collaterally ascertain the accuracy or credibility of the witness, some latitude should be permitted, and the scope of such latitude is ordinarily subject to the discretion of the trial judge, and, unless abused, its exercise is not reversible error.
6. **Rules of Evidence: Witnesses.** Determinations regarding cross-examination of a witness on specific instances of conduct, pursuant to Neb. Evid. R. 608(2), are specifically entrusted to the discretion of the trial court.
7. **Criminal Law: Constitutional Law: Trial: Witnesses.** The right of a person accused of a crime to confront the witnesses against him or her is a fundamental right guaranteed by the 6th amendment to the U.S. Constitution, as incorporated in the 14th amendment, as well as by article I, § 11, of the Nebraska Constitution.
8. **Constitutional Law: Trial: Juries: Witnesses.** An accused's constitutional right of confrontation is violated when either (1) he or she is absolutely prohibited from engaging in otherwise appropriate cross-examination designed to show a prototypical form of bias on the part of the witness, or (2) a reasonable jury would have received a significantly different impression of the witness' credibility had counsel been permitted to pursue his or her proposed line of cross-examination.
9. **Trial: Testimony: Appeal and Error.** The scope of cross-examination of a witness rests largely in the discretion of the trial court, and its ruling will be upheld on appeal unless there is an abuse of discretion.
10. **Trial: Evidence: Appeal and Error.** On appeal, a defendant may not assert a different ground for his or her objection to the admission of evidence than was offered to the trier of fact.
11. **Appeal and Error.** An objection, based on a specific ground and properly overruled, does not preserve a question for appellate review on any other ground.
12. **Motions for Mistrial: Appeal and Error.** The decision whether to grant a motion for mistrial is within the discretion of the trial court, and an appellate court will not disturb the ruling on appeal in the absence of an abuse of discretion.
13. **Motions for Mistrial.** A motion for mistrial must be premised upon actual prejudice, not the mere possibility of prejudice.
14. **Trial: Motions to Strike: Appeal and Error.** The failure to make a timely and proper objection or motion to strike will ordinarily bar a party from later claiming error in the admission of testimony.
15. **Trial: Motions for Mistrial.** When a party has knowledge during trial of irregularity or misconduct, the party must timely assert his or her right to a mistrial.

16. **Motions to Strike: Motions for Mistrial: Appeal and Error.** If an objection or motion to strike is made and the jury is admonished to disregard the objectionable or stricken testimony, ordinarily, error cannot be predicated on the allegedly tainted evidence and a mistrial should not be granted.
17. **Motions for Mistrial: Prosecuting Attorneys: Waiver: Appeal and Error.** A party who fails to make a timely motion for mistrial based on prosecutorial misconduct waives the right to assert on appeal that the court erred in not declaring a mistrial due to such prosecutorial misconduct.
18. **Motions for Mistrial.** A mistrial is appropriate when an event occurs during the course of a trial which is of such a nature that its damaging effects would prevent a fair trial.
19. **Sentences: Juries: Appeal and Error.** Where a court errs in failing to require the jury to decide a factual question pertaining only to the enhancement of the sentence, not to the determination of guilt, the appropriate harmless error standard of review is whether the record demonstrates beyond a reasonable doubt that a rational jury would have found the existence of the sentencing enhancement factor.
20. **Convicted Sex Offender: Sentences: Juries.** Because lifetime community supervision under Neb. Rev. Stat. § 83-174.03 (Reissue 2008) is an additional form of punishment, a jury, rather than a trial court, must make a specific finding concerning the facts necessary to establish an aggravated offense where such facts are not specifically included in the elements of the offense of which the defendant is convicted.
21. **Sentences: Appeal and Error.** A sentence imposed within statutory limits will not be disturbed on appeal absent an abuse of discretion by the trial court.
22. **Judgments: Words and Phrases.** An abuse of discretion occurs when a trial court's decision is based upon reasons that are untenable or unreasonable or if its action is clearly against justice or conscience, reason, and evidence.
23. **Sentences.** In imposing a sentence, the sentencing court is not limited to any mathematically applied set of factors.
24. **Effectiveness of Counsel: Proof.** To prevail on a claim of ineffective assistance of counsel under *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), the defendant must show that counsel's performance was deficient and that this deficient performance actually prejudiced his or her defense.
25. **Effectiveness of Counsel: Records: Trial: Evidence: Appeal and Error.** A claim of ineffective assistance of counsel need not be dismissed merely because it is made on direct appeal. The determining factor is whether the record is sufficient to adequately review the question.

Appeal from the District Court for Lancaster County: JEFFRE CHEUVRONT, Judge. Affirmed in part, and in part reversed and remanded with directions.

Dennis R. Keefe, Lancaster County Public Defender, and Christopher Eickholt for appellant.

Jon Bruning, Attorney General, and George R. Love for appellee.

IRWIN, SIEVERS, and CARLSON, Judges.

IRWIN, Judge.

I. INTRODUCTION

Sonny D. Balvin was convicted by a jury of first degree sexual assault. The district court subsequently sentenced Balvin to 24 to 36 years' imprisonment. Balvin appeals from his conviction and sentence here. On appeal, Balvin assigns numerous errors, including that there was insufficient evidence to support his conviction, that the district court erred in making certain evidentiary rulings, and that the district court erred in finding that he was subject to lifetime community supervision and erred in imposing an excessive sentence. Balvin also alleges that he received ineffective assistance of trial counsel.

Upon our review, we find that the district court erred in determining that Balvin committed an aggravated offense and was, as a result, subject to lifetime community supervision. We find that the jury should have determined whether Balvin committed an aggravated offense. We reverse, and remand with directions to conduct an evidentiary hearing so that a jury may make a finding regarding whether Balvin's offense was aggravated and, thus, whether he was subject to lifetime community supervision. We affirm the conviction and sentence, and find no merit to all other assigned errors.

II. BACKGROUND

The State filed a criminal complaint charging Balvin with first degree sexual assault pursuant to Neb. Rev. Stat. § 28-319 (Reissue 2008). The charge against Balvin stems from an incident which occurred in March 2009. Evidence adduced at trial revealed that on the night of March 9, 2009, Balvin offered a ride to A.R., who had been walking from a friend's house to the home of her cousin. Although A.R. did not know Balvin, she accepted a ride. She and Balvin proceeded to drive to a liquor store where Balvin bought bottles of beer. They continued to drive around the city of Lincoln, Nebraska, drinking beer and talking. Eventually, Balvin drove

to a secluded, rural area, where he parked his car on the side of a dirt road.

The events that transpired after Balvin parked the car on the side of the road were disputed at trial. A.R. testified that Balvin asked her to have sex with him. When she told him that she did not want to, he told her that she was either "going to give it to him or he was going to take it." He then lunged toward her. She testified that she was scared and was unable to run away because there was nowhere to go. She testified that she had no choice but to do what he asked of her. A.R. testified that Balvin forced her to engage in numerous sexual acts. She testified that after approximately 45 minutes, Balvin drove her to her cousin's house. When she arrived, she told her cousin what happened and called the police.

Balvin did not testify at trial, nor did he offer any evidence in his defense. However, throughout the cross-examination of the State's witnesses and during closing arguments, Balvin's counsel indicated that Balvin did not dispute that he and A.R. engaged in sexual intercourse on the night in question. Balvin contended that he had picked up A.R. on March 9, 2009, because she was a prostitute. He argued that A.R. consented to having sexual intercourse with him and reported a sexual assault to the police only because Balvin refused to pay her after the incident.

After hearing all of the evidence, the jury convicted Balvin of first degree sexual assault. The district court subsequently sentenced Balvin to 24 to 36 years' imprisonment. In addition, the district court found that Balvin committed an aggravated offense and sentenced him to lifetime community supervision.

Balvin appeals his conviction and sentence here.

III. ASSIGNMENTS OF ERROR

On appeal, Balvin assigns eight errors, which we consolidate to six errors for our review. Balvin first argues that the evidence was insufficient to support his conviction. He also argues that the district court erred in making certain evidentiary rulings, failing to grant his motions for a mistrial due to the State's violations of a motion in limine and failing to grant a mistrial

due to prosecutorial misconduct during closing arguments, finding that he is subject to lifetime community supervision, and imposing an excessive sentence. Finally, Balvin argues that he received ineffective assistance of trial counsel.

IV. ANALYSIS

1. Sufficiency of Evidence

Balvin alleges that the State presented insufficient evidence to prove his guilt beyond a reasonable doubt. Upon our review, we conclude that the evidence was sufficient to support the conviction.

(a) Standard of Review

[1] Regardless of whether the evidence is direct, circumstantial, or a combination thereof, and regardless of whether the issue is labeled as a failure to direct a verdict, insufficiency of the evidence, or failure to prove a prima facie case, the standard is the same: 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 evidence admitted at trial, viewed and construed most favorably to the State, is sufficient to support the conviction. *State v. France*, 279 Neb. 49, 776 N.W.2d 510 (2009).

(b) Analysis

Balvin was charged with and convicted of first degree sexual assault pursuant to § 28-319. Section 28-319(1) provides in pertinent part, "Any person who subjects another person to sexual penetration . . . without the consent of the victim . . . is guilty of sexual assault in the first degree." In Neb. Rev. Stat. § 28-318(8)(a) (Reissue 2008), "[w]ithout consent" is defined to mean, inter alia, that "[t]he victim was compelled to submit due to the use of force or threat of force or coercion, or . . . the victim expressed a lack of consent through words . . . ."

Balvin does not dispute that he engaged in sexual intercourse with A.R. on the night in question. As such, the primary issue is whether A.R. consented. In his brief, Balvin argues that

A.R.'s testimony was inconsistent and not believable and that, in contrast, his version of the events was "conceivable." Brief for appellant at 19. Essentially, Balvin's arguments focus on witness credibility.

The testimony of A.R., if believed by the jury, could establish that the sexual penetration was "without consent" as defined in § 28-318(8)(a). A.R. testified that Balvin drove her to a deserted, dark road outside the city and asked her to have sex with him. When she told him that she did not want to, he told her that she was either "going to give it to him or he was going to take it." He then lunged toward her. She testified that she was scared and was unable to run away because there was nowhere to go. She testified that she had no choice but to do what he asked of her. At one point during the encounter, Balvin asked A.R. whether she was scared. When she responded that she was scared, Balvin told her that "you better do everything I tell you to." Balvin then slapped A.R. across her face. A.R. testified that she repeatedly told him "no" and that "we don't have to do this."

A.R.'s testimony indicates that Balvin used force, the threat of force, or coercion to compel her to submit to sexual penetration and, additionally, that she expressed her lack of consent through words by telling him she did not want to have sex. Balvin's sole argument is that A.R.'s testimony was not credible; however, the jury, as a fact finder, found her testimony to be credible. When reviewing a criminal conviction for sufficiency of the evidence, we, as an appellate court, do not pass on the credibility of witnesses. See *State v. France, supra*.

Because the jury as the trier of fact could have found the essential elements of first degree sexual assault beyond a reasonable doubt based on A.R.'s testimony, the evidence was sufficient to support Balvin's conviction. Balvin's assertions to the contrary have no merit.

2. Evidentiary Rulings

Balvin alleges that the district court erred in making certain evidentiary rulings. Specifically, he alleges the court erred in (1) prohibiting him from questioning A.R. regarding a prior false accusation of sexual assault and (2) admitting into

evidence testimony regarding a telephone conversation between Balvin, his fiance, and his mother.

(a) Standard of Review

[2-4] In proceedings where the Nebraska Evidence Rules apply, the admissibility of evidence is controlled by the Nebraska Evidence Rules; judicial discretion is involved only when the rules make discretion a factor in determining admissibility. *State v. Draganescu*, 276 Neb. 448, 755 N.W.2d 57 (2008). When judicial discretion is not a factor in assessing admissibility, whether the underlying facts satisfy the legal rules governing the admissibility of such evidence is a question of law, subject to de novo review. See *id*. But where the Nebraska Evidence Rules commit the evidentiary question at issue to the discretion of the trial court, we review the admissibility of evidence for an abuse of discretion. See *id.*

(b) Evidence of Prior False Report of Sexual Assault

Prior to trial, the State filed a motion in limine seeking to preclude Balvin from offering evidence that A.R. allegedly had previously made a false report that she had been sexually assaulted. This previous false report occurred approximately 11 years prior to trial, when A.R. was 10 years old. The district court granted the State's motion, but indicated that it would revisit the issue prior to A.R.'s testimony at trial.

Prior to A.R.'s testimony, the court indicated, "I'm inclined to allow [Balvin] to inquire into whether [A.R.] had made such an allegation and that it turned out it was not true . . . ." The court later clarified its ruling by informing Balvin's counsel, "[I]f you ask [A.R.] if she has made a prior allegation of attempted sexual contact when she was ten years old and she says, no, . . . that ends it."

During Balvin's cross-examination of A.R., counsel asked her, "[A]s we sit here today, do you recall that you reported that you had been sexually assaulted during that incident?" A.R. responded that she did not remember such a report. Counsel was not permitted to ask further questions regarding the prior false report in the presence of the jury.

Outside the presence of the jury, counsel made an offer of proof. Counsel questioned A.R. further about the prior false report. A.R. continually indicated that she did not remember making such a report. When counsel referred to a police report concerning the incident, A.R. testified that because she did not remember reporting that she had been sexually assaulted, she could not agree or disagree with anything written in the police report. Counsel then called A.R.'s mother to testify regarding the prior false report. A.R.'s mother testified she did not remember that A.R. had reported being sexually assaulted or that such report was false.

On appeal, Balvin alleges that the district court erred in prohibiting him from submitting evidence concerning the prior false report during his cross-examination of A.R. Balvin argues that excluding such evidence "is a denial of [his] right to confrontation." Brief for appellant at 23. Upon our review of the record, we conclude that the district court did not abuse its discretion in excluding evidence of the prior false report.

[5,6] In his brief to this court, Balvin concedes that evidence regarding A.R.'s prior false report of a sexual assault is relevant only to demonstrate her credibility as a witness. When the object of cross-examination is to collaterally ascertain the accuracy or credibility of the witness, some latitude should be permitted, and the scope of such latitude is ordinarily subject to the discretion of the trial judge, and, unless abused, its exercise is not reversible error. *State v. Schreiner*, 276 Neb. 393, 754 N.W.2d 742 (2008). And determinations regarding cross-examination of a witness on specific instances of conduct, pursuant to Neb. Evid. R. 608(2), are specifically entrusted to the discretion of the trial court. *State v. Schreiner, supra.*

Rule 608(2) provides:

> Specific instances of the conduct of a witness, for the purpose of attacking or supporting his credibility, other than conviction of crime as provided in section 27-609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness be inquired into on cross-examination of the witness (a) concerning his character

> for truthfulness or untruthfulness, or (b) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified.

From the foregoing rule, it is apparent that specific instances of conduct, relating only to the credibility of a witness, may not be established by extrinsic evidence.

During the cross-examination of A.R., Balvin's counsel was permitted to ask A.R. whether she remembered making a prior report that she was sexually assaulted when she was 10 years old. A.R. responded that she did not remember such a report. Counsel wanted to use the police reports from the prior incident to assist A.R. in remembering and to prove that such report was, in fact, false. However, rule 608(2) explicitly prohibits such an attack on the credibility of a witness through extrinsic evidence of specific instances of the witness' conduct. As such, the district court did not err in prohibiting counsel from further questioning A.R. about the prior false report after she indicated she did not remember or in failing to admit into evidence copies of the police report regarding the prior false report.

[7] Balvin argues that his right to confrontation was violated because he was not allowed to demonstrate to the jury that A.R. had previously falsely reported that she was sexually assaulted. The right of a person accused of a crime to confront the witnesses against him or her is a fundamental right guaranteed by the 6th amendment to the U.S. Constitution, as incorporated in the 14th amendment, as well as by article I, § 11, of the Nebraska Constitution. *State v. Stark*, 272 Neb. 89, 718 N.W.2d 509 (2006). The functional purpose of the Confrontation Clause is to ensure the integrity of the factfinding process through the provision of an opportunity for effective cross-examination. *State v. Stark, supra.*

[8,9] An accused's constitutional right of confrontation is violated when either (1) he or she is absolutely prohibited from engaging in otherwise appropriate cross-examination designed to show a prototypical form of bias on the part of the witness, or (2) a reasonable jury would have received a significantly different impression of the witness' credibility

had counsel been permitted to pursue his or her proposed line of cross-examination. *Id*. The right of cross-examination is not unlimited. *Id.* The scope of cross-examination of a witness rests largely in the discretion of the trial court, and its ruling will be upheld on appeal unless there is an abuse of discretion. *Id.*

Balvin alleges that the jury would have received a significantly different impression of A.R.'s credibility had he been allowed to question her about the prior false report. We disagree. The alleged false report involved an event that happened 11 years prior to the trial, when A.R. was only 10 years old. The circumstances of the prior report were significantly different from the incident between Balvin and A.R. We do not find that the district court abused its discretion in excluding evidence of the prior false report.

(c) Evidence of Telephone Conversation Between Balvin, Balvin's Fiance, and Balvin's Mother

At trial, the State called Tiffany Blaker (Tiffany) to testify. Tiffany was Balvin's fiance at the time of the incident. Sometime after Balvin was arrested, Tiffany ended her relationship with Balvin. However, prior to the end of their relationship, Balvin telephoned Tiffany from jail on numerous occasions. These telephone conversations were recorded by jail personnel. During Tiffany's testimony, the State offered into evidence a recording of six of the telephone conversations between Balvin and Tiffany. Before any of the recordings were played for the jury, Balvin's counsel objected generally to the admission of the recordings, arguing, "I believe the CD in question does contain hearsay and does contain statements other than that of . . . Balvin." The district court overruled the objection.

During the second telephone conversation played for the jury, Tiffany telephoned Balvin's mother on another telephone line so that Tiffany was able to talk to both Balvin and his mother. Tiffany then relayed to Balvin his mother's questions and comments. As a part of this dialog, Tiffany told Balvin that his mother wanted to know whether the girl he picked up

on the night in question was a prostitute who was angry that she did not get paid. Balvin responded, "That is really close." Balvin did not make any objections at the time this recording was played for the jury.

After the second telephone conversation was played for the jury, the State questioned Tiffany about the content of the recording as follows:

> Q. And you are trying to relay what [Balvin's mother] says to . . . Balvin, her son?
>
> A. Yes.
>
> Q. And it was [his mother] that brought up the possibility that he had picked up a prostitute.
>
> A. Yes.

After this line of questioning, Balvin's counsel objected to the form of the question, because counsel did not "think that's what was said" on the recording and because "the tape speaks for itself." The court overruled the objection.

On appeal, Balvin argues that Tiffany's testimony about the substance of the conversation between herself, Balvin's mother, and Balvin included inadmissible hearsay statements. Such hearsay statements include Tiffany's testimony that Balvin's mother was the one who initially suggested to Balvin that A.R. was a prostitute. We do not read Balvin's argument to suggest that the admission of the recording, itself, was in any way erroneous.

[10,11] At trial, Balvin did not object to Tiffany's testimony on the basis of hearsay. Rather, he objected only to the form of the State's question. On appeal, a defendant may not assert a different ground for his or her objection to the admission of evidence than was offered to the trier of fact. *State v. Shipps*, 265 Neb. 342, 656 N.W.2d 622 (2003). An objection, based on a specific ground and properly overruled, does not preserve a question for appellate review on any other ground. *State v. Molina*, 271 Neb. 488, 713 N.W.2d 412 (2006).

Because Balvin has raised a different ground for his objection to Tiffany's testimony than was presented to the trial court, he has not preserved this issue for appellate review and we decline to address his assertions further.

3. Motions for Mistrial

Balvin alleges that the district court erred by failing to declare a mistrial because of the State's use of prohibited terms during the trial. Balvin also alleges that certain comments made during the State's closing argument amounted to prosecutorial misconduct and that the court erred in failing to grant a mistrial as a result of such comments.

(a) Standard of Review

[12] The decision whether to grant a motion for mistrial is within the discretion of the trial court, and an appellate court will not disturb the ruling on appeal in the absence of an abuse of discretion. *State v. Goynes*, 278 Neb. 230, 768 N.W.2d 458 (2009).

(b) Use of Prohibited Terms

Prior to trial, Balvin filed a motion in limine seeking to preclude the State from using the terms "victim," "sexual assault kit," "rape," "assailant," or "attack" during its opening statement or its presentation of evidence. The district court sustained the motion in limine except as to the use of the term "sexual assault kit." On multiple occasions during the trial, Balvin moved for a mistrial based upon the motion in limine. Specifically, Balvin argued that the State and its witnesses had repeatedly used certain terms in violation of the motion in limine. The district court denied each of Balvin's motions for a mistrial.

On appeal, Balvin asserts that the district court erred in denying his motions for a mistrial. Balvin alleges that the use of the prohibited terms "tainted the testimony and the evidence presented" and that "[t]his is a denial of [his] fundamental right to a fair trial free from . . . prejudice." Brief for appellant at 26.

[13] A motion for mistrial must be premised upon actual prejudice, not the mere possibility of prejudice. See *Sturzenegger v. Father Flanagan's Boys' Home*, 276 Neb. 327, 754 N.W.2d 406 (2008). "Actual prejudice" means a real probability, or a probability existing in fact, sufficient to undermine confidence in the outcome or uphold a conclusion

that the result of the proceeding would have been different. See *State v. Robinson*, 271 Neb. 698, 715 N.W.2d 531 (2006). When determining whether an alleged error is so prejudicial as to justify reversal, courts generally consider whether the error, in light of the totality of the record, influenced the outcome of the case. *Id*.

[14,15] Balvin alleges that the State violated the motion in limine 12 times during the trial. We have reviewed each instance cited by Balvin. Initially, we note that Balvin failed to make any objection or move for a mistrial after six of the alleged violations of the motion in limine. The failure to make a timely and proper objection or motion to strike will ordinarily bar a party from later claiming error in the admission of testimony. *State v. Harris*, 263 Neb. 331, 640 N.W.2d 24 (2002). In order to be timely, an objection must ordinarily be made at the earliest opportunity after the ground for the objection becomes apparent. *State v. Archbold*, 217 Neb. 345, 350 N.W.2d 500 (1984). Moreover, when a party has knowledge during trial of irregularity or misconduct, the party must timely assert his or her right to a mistrial. See *State v. Sellers*, 279 Neb. 220, 777 N.W.2d 779 (2010). One may not waive an error, gamble on a favorable result, and, upon obtaining an unfavorable result, assert the previously waived error. *Id.*

Balvin did not properly object or make a timely motion for a mistrial after six of the alleged violations. As such, we find that these instances are not preserved for appellate review. We now review the remaining six alleged violations.

During the State's direct examination of a deputy with the Lancaster County sheriff's office, the deputy testified that A.R. reported to him that she had been "raped." Balvin objected to this testimony as hearsay. The district court sustained the objection and instructed the jury to "disregard the comment."

[16] On appeal, Balvin alleges that the deputy violated the motion in limine by using the term "rape." While it is clear that the deputy did utilize a term prohibited by Balvin's motion in limine, it is also clear that the entire statement was stricken from the record because it was hearsay. If an objection or

motion to strike is made and the jury is admonished to disregard the objectionable or stricken testimony, ordinarily, error cannot be predicated on the allegedly tainted evidence and a mistrial should not be granted. *State v. Archbold, supra*.

The remaining five alleged violations of the motion in limine involve the testimony of Melissa Kreikemeier, a forensic scientist for the Nebraska State Patrol crime laboratory. Kreikemeier testified about testing she had done on various pieces of evidence involved in the case. Specifically, Kreikemeier testified about a report she had completed during the criminal investigation.

During the State's direct examination, it asked Kreikemeier to describe the various sections of the report to the jury. As a part of this discussion, Kreikemeier indicated that on the first page of the report, she had listed the offense as sexual assault and then listed the names of the victim and suspect. In response to Kreikemeier's testimony, the State asked her about her use of the terms "sexual assault" and "victim" as follows:

> Q. On the right-hand side you mentioned that you list the offense and then you have the name of it. Is that just the allegation of the case that you are working on?
>
> A. Yes. It's the alleged offense.
>
> Q. You are not making any conclusions with respect to the guilt or innocence of the party, is that correct?
>
> A. No.
>
> Q. Okay. And is that just how you commonly list it, what type of case?
>
> A. Yes.
>
> Q. All right. And the same with your victim and the suspect. Those are simple — your lab's way of making those notations. They are not in any way determinative as to whether or not those parties are in fact the victim or the suspect, is that right?
>
> A. That's correct.

The State then continued its examination of Kreikemeier by questioning her about specific tests she had completed on evidence obtained during A.R.'s medical examination after the

incident. Kreikemeier testified that she tested cells from A.R.'s vaginal area for the presence of sperm. She indicated that such test is conducted with a "vaginal smear slide." Kreikemeier explained to the jury what a vaginal smear slide is and where it comes from as follows:

> When the alleged victim goes to the hospital for the exam, the nurse will take swabs of the vaginal area. She will . . . take that swab and smear it on a slide and then she will also save that same swab and put it into a swab container and what we do with the smear slide is we do our staining techniques on that and we look at it under the microscope.

Shortly after Kreikemeier provided this testimony, the court took a brief recess. During this recess, Balvin's counsel made an oral motion for a mistrial "based on the Court's previous order and motion in limine instructing no one to use" terms such as "victim." The court overruled the motion.

When trial resumed, the State continued questioning Kreikemeier. Kreikemeier testified about specific evidence contained within A.R.'s sexual assault kit. Kreikemeier opened the kit in front of the jury and read from the label of each envelope contained in the kit. Two such envelopes were labeled "panties from victim."

After the court recessed for the day, Balvin's counsel again motioned for a mistrial based on Kreikemeier's repeated use of the word "victim." Counsel argued, "There is a cumulative effect and obviously I filed this motion in limine and the Court grants it for a reason." The court overruled the motion for a mistrial.

As discussed above, Balvin must prove that the alleged violations of the motion in limine actually prejudiced him, rather than creating only the possibility of prejudice. See *Sturzenegger v. Father Flanagan's Boys' Home*, 276 Neb. 327, 754 N.W.2d 406 (2008). He has failed to do so. While Kreikemeier did use some of the prohibited terms during her testimony, her use of such terms was, for the most part, generic in nature and not specific to the parties in this case. Moreover, during the State's direct examination of Kreikemeier, it questioned her about her

use of the prohibited terms and she indicated that the terms in her report and on her evidentiary labels were merely the laboratory's way of generically referring to the parties involved and in no way reflected on the guilt or innocence of the accused party. Because there is no indication that Kreikemeier's use of the prohibited terms resulted in any prejudice, we cannot say that the court abused its discretion in denying Balvin's motions for a mistrial.

(c) Closing Argument

The State began its closing argument to the jury with the following description of the events on the night in question:

> Casting himself in the role of a chivalrous gentleman, . . . Balvin, offered a young woman a ride on a dark, cold and damp evening, a ride to a nearby destination. But Balvin had ulterior motives as almost immediately would be seen and he, as [A.R.] would found [sic] out later, was most certainly no gentleman. Contrary to the actions of an individual simply providing a ride to the destination just blocks away, Balvin within minutes if not seconds offers [A.R.] alcohol and the possibility of some marijuana if he'll go driving around with her. Who does this? Who makes such an offer to a stranger, particularly a female at night unless he has an ulterior motive?
>
> It was certainly no coincidence that his actions mirrored the age-old attempts of men providing alcohol or attempting to provide alcohol to the women — to a woman in the hopes of loosening her inhibitions. And driving around in the country pretending to be looking for a friend's house, as . . . Balvin did, while feeding [A.R.] more alcohol was just another part of that age-old plan. The only thing missing from . . . Balvin's plan that night was his Mustang mysteriously running out of gas in the middle of nowhere.

In his brief to this court, Balvin argues that the State's comments were "only remotely based on evidence adduced and seemed to be based on some urban myth." Brief for appellant at 28. In addition, Balvin asserts that the comments were "nothing more than a play on stereotypical images of sinister, predatory

men and weak, wafish [sic], maidens." *Id*. Balvin argues that such remarks had a prejudicial effect on the members of the jury and constituted prosecutorial misconduct. Balvin assigns as error the district court's failure to grant a mistrial as a result of these comments.

[17] We first note that Balvin did not request a mistrial or move to have the court admonish the jury when the prosecutor made these remarks. A party who fails to make a timely motion for mistrial based on prosecutorial misconduct waives the right to assert on appeal that the court erred in not declaring a mistrial due to such prosecutorial misconduct. *State v. Lotter*, 255 Neb. 456, 586 N.W.2d 591 (1998).

[18] Even so, we conclude that the prosecutor's remarks in closing argument did not constitute prosecutorial misconduct. Generally, in assessing allegations of prosecutorial misconduct in closing arguments, a court first determines whether the prosecutor's remarks were improper. *State v. Barfield*, 272 Neb. 502, 723 N.W.2d 303 (2006), *disapproved on other grounds, State v. McCulloch*, 274 Neb. 636, 742 N.W.2d 727 (2007). It is then necessary to determine the extent to which the improper remarks had a prejudicial effect on the defendant's right to a fair trial. *Id.* A mistrial is appropriate when an event occurs during the course of a trial which is of such a nature that its damaging effects would prevent a fair trial. *Sturzenegger v. Father Flanagan's Boys' Home*, 276 Neb. 327, 754 N.W.2d 406 (2008).

In light of the evidence presented at trial, we cannot say that the prosecutor's comments during closing argument were based only "remotely" on the evidence or that such comments were so prejudicial as to prevent a fair trial. Balvin's assignment of error has no merit.

4. Lifetime Community Supervision

Balvin argues that the district court erred in finding that he committed an aggravated offense, making him subject to lifetime community supervision pursuant to Neb. Rev. Stat. § 83-174.03 (Reissue 2008). Balvin contends that the factual finding of an aggravated offense must be made by a jury, rather than by the court.

(a) Standard of Review

[19] Where a court errs in failing to require the jury to decide a factual question pertaining only to the enhancement of the sentence, not to the determination of guilt, the appropriate harmless error standard of review is whether the record demonstrates beyond a reasonable doubt that a rational jury would have found the existence of the sentencing enhancement factor. See *State v. Payan*, 277 Neb. 663, 765 N.W.2d 192 (2009).

(b) Analysis

At the sentencing hearing, the district court found that "this is an aggravated offense" and that therefore Balvin "is subject to lifetime community supervision by the Office of Parole Administration upon release from incarceration or a civil commitment as provided by law." Balvin argues that the court erred in making this determination. He asserts that such a finding should have been made by the jury. We agree.

Section 83-174.03 details which sex offenders are subject to lifetime community supervision. This section was revised by the legislature, operative January 1, 2010. However, at the time of Balvin's offense and trial, § 83-174.03 read:

> Any individual who, on or after July 14, 2006, . . . is convicted of or completes a term of incarceration for an aggravated offense as defined in section 29-4005, shall, upon completion of his or her term of incarceration or release from civil commitment, be supervised in the community by the Office of Parole Administration for the remainder of his or her life.

At the time of Balvin's offense and trial, Neb. Rev. Stat. § 29-4005(4)(a) (Reissue 2008) defined "aggravated offense" as "any registrable offense under section 29-4003 which involves the penetration of (i) a victim age twelve years or more through the use of force or the threat of serious violence or (ii) a victim under the age of twelve years."

[20] In *State v. Payan, supra*, the Nebraska Supreme Court addressed the imposition of lifetime community supervision pursuant to § 83-174.03. In *Payan*, the court held that lifetime community supervision is akin to "parole," and is, as a result,

an additional form of punishment for certain sex offenders. The court also held that because lifetime community supervision is an additional form of punishment, a jury, rather than a trial court, must make a specific finding concerning the facts necessary to establish an "aggravated offense" where such facts are not specifically included in the elements of the offense of which the defendant is convicted. See *State v. Payan, supra.*

In this case, there is no question that A.R. was over the age of 12. As such, a finding that Balvin committed an aggravated offense as defined in § 29-4005(4)(a) had to be based on whether the offense included penetration through the use of force or the threat of serious violence. Balvin was convicted of first degree sexual assault pursuant to § 28-319. Section 28-319(1) provides in pertinent part, "Any person who subjects another person to sexual penetration . . . without the consent of the victim . . . is guilty of sexual assault in the first degree."

While penetration is a fact specifically included as an element of first degree sexual assault, "the use of force or the threat of serious violence" is not a fact specifically included as an element of the offense. Pursuant to the Supreme Court's holding in *State v. Payan*, 277 Neb. 663, 765 N.W.2d 192 (2009), Balvin was entitled to a jury determination regarding whether the offense included the use of force or the threat of serious violence. Because the jury did not make such a determination, the district court erred in finding that Balvin committed an aggravated offense.

Although the district court erred in finding that Balvin committed an aggravated offense, such error may be harmless. See *id*. The appropriate harmless error standard in this circumstance is whether the record demonstrates beyond a reasonable doubt that a rational jury would have found the existence of the sentencing enhancement factor. See *id.*

In *Payan*, the Supreme Court concluded that the trial court committed harmless error in finding that the defendant committed an aggravated offense. There, the jury heard two different material versions of the events. In the State's evidence, the victim and a witness testified that the victim was sexually

assaulted and that the defendant threatened the victim with a knife. In the defendant's defense, he and his supporting witness claimed that no assault took place whatsoever. The *Payan* court found there was no evidence that if the assault occurred, it was done without violence or the threat thereof. Accordingly, the *Payan* court concluded:

> On this record, any rational jury which convicted [the defendant] of the sexual assault would have also concluded that it was committed through the use of force or the threat of serious violence. Accordingly, we conclude that the making of this finding by the trial judge instead of the jury was harmless error.

277 Neb. at 677, 765 N.W.2d at 204-05.

Here, A.R. testified that Balvin drove her to a deserted, dark road outside the city and asked her to have sex with him. When she told him that she did not want to, he told her that she was either "going to give it to him or he was going to take it." He then lunged toward her. She testified that she was scared and was unable to run away because there was nowhere to go. She testified that she had no choice but to do what he asked of her. At one point during the encounter, Balvin asked A.R. whether she was scared. When she responded that she was scared, Balvin told her that "you better do everything I tell you to." Balvin then slapped A.R. across her face. A.R. testified that she repeatedly told him "no" and that "we don't have to do this."

Based on this evidence, we cannot say beyond a reasonable doubt that the jury would have found that Balvin used force or the threat of serious violence in compelling A.R. to engage in sexual intercourse with him. First degree sexual assault involves sexual penetration without the consent of the victim. The jury was instructed "without consent" means that A.R. was compelled to submit due to the use of force or the threat of force or coercion, that A.R. expressed a lack of consent through words, or that A.R. expressed a lack of consent through conduct. It is not clear whether the jury found that Balvin committed first degree sexual assault because he compelled A.R. to submit through force or the threat of force or whether the jury found that Balvin committed first

degree sexual assault because A.R. expressed a lack of consent through her words or actions.

Because we cannot say beyond a reasonable doubt that the jury would have found that Balvin used force or the threat of serious violence in compelling A.R. to engage in sexual intercourse with him, we cannot say that the district court's error in making the determination that Balvin committed an aggravated offense was harmless. We reverse, and remand with directions to conduct an evidentiary hearing for a jury to determine whether Balvin used force or the threat of serious violence in sexually assaulting A.R. and, thus, whether Balvin committed an aggravated offense and is subject to lifetime community supervision.

5. Excessive Sentence

(a) Standard of Review

[21,22] A sentence imposed within statutory limits will not be disturbed on appeal absent an abuse of discretion by the trial court. *State v. Moore*, 277 Neb. 111, 759 N.W.2d 698 (2009). An abuse of discretion occurs when a trial court's decision is based upon reasons that are untenable or unreasonable or if its action is clearly against justice or conscience, reason, and evidence. *Id.*

(b) Analysis

The district court sentenced Balvin to 24 to 36 years' imprisonment. On appeal, Balvin argues that this sentence is excessive because the court placed too much weight on Balvin's criminal history and did not consider the numerous positive character letters submitted by his family and friends. We find that the district court did not abuse its discretion in imposing a sentence of 24 to 36 years' imprisonment.

[23] In imposing a sentence, the sentencing court is not limited to any mathematically applied set of factors. *State v. Nelson*, 276 Neb. 997, 759 N.W.2d 260 (2009). The appropriateness of a sentence is necessarily a subjective judgment and includes the sentencing judge's observation of the defendant's demeanor and attitude and all the facts and circumstances surrounding the defendant's life. *Id.* In imposing a sentence, a

judge should consider the defendant's age, mentality, education, experience, and social and cultural background, as well as his or her past criminal record or law-abiding conduct, motivation for the offense, nature of the offense, and the amount of violence involved in the commission of the crime. *State v. Davis*, 277 Neb. 161, 762 N.W.2d 287 (2009).

Balvin was convicted of first degree sexual assault, a Class II felony. See § 28-319. A Class II felony is punishable by a minimum of 1 year's imprisonment and a maximum of 50 years' imprisonment. See Neb. Rev. Stat. § 28-105 (Reissue 2008). Balvin's sentence of 24 to 36 years' imprisonment is well within the statutory limits.

At the sentencing hearing, the district court indicated that it had reviewed the presentence report, including all of the letters submitted by Balvin's family and friends. The court also noted that Balvin has a "somewhat extensive prior criminal record," which includes convictions for attempted burglary, terroristic threats, fleeing to avoid arrest, hindering an arrest, and driving under the influence. The court went on to find that "[t]he offense here is extremely serious."

Contrary to Balvin's assertions in his brief to this court, there is no evidence that the district court did not properly consider all of the relevant factors in imposing a sentence. Rather, it appears that the court considered all of the information in the presentence report as well as the nature and circumstances of the current offense. Given the serious nature of this offense and Balvin's criminal history, the district court did not abuse its discretion in sentencing Balvin to 24 to 36 years' imprisonment.

6. Ineffective Assistance of Trial Counsel

[24] Balvin asserts that his trial counsel was ineffective in a number of respects. To prevail on a claim of ineffective assistance of counsel under *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), the defendant must show that counsel's performance was deficient and that this deficient performance actually prejudiced his or her defense. *State v. Young*, 279 Neb. 602, 780 N.W.2d 28 (2010). The two-prong ineffective assistance of counsel test need not be

addressed in order. *State v. Nesbitt*, 279 Neb. 355, 777 N.W.2d 821 (2010).

When considering whether trial counsel's performance was deficient, there is a strong presumption that counsel acted reasonably. *Id.* Furthermore, trial counsel is afforded due deference to formulate trial strategy and tactics. When reviewing a claim of ineffective assistance of counsel, an appellate court will not second-guess reasonable strategic decisions by counsel. *Id.*

[25] A claim of ineffective assistance of counsel need not be dismissed merely because it is made on direct appeal. *State v. Young, supra*. The determining factor is whether the record is sufficient to adequately review the question. *Id.*

Because Balvin has different counsel in this appeal from trial counsel, Balvin can make a claim for ineffective assistance of trial counsel on direct appeal. See *State v. York*, 273 Neb. 660, 664, 731 N.W.2d 597, 602 (2007) ("where appellate counsel is different from trial counsel, a defendant must raise on direct appeal any issue of ineffective assistance of trial counsel which is known to the defendant or is apparent from the record, or the issue will be procedurally barred on postconviction review").

We now turn to Balvin's specific claims.

Balvin alleges that trial counsel was ineffective in preparing for trial in that counsel did not depose witnesses and did not complete a "proper investigation." Brief for appellant at 41. The record is not sufficient to address this claim, because it does not indicate whether counsel deposed any witnesses or whether there were any further witnesses to depose, nor does the record disclose trial counsel's strategy in trial preparation.

Balvin alleges that trial counsel was ineffective in keeping him informed of the progress of the case prior to trial. Specifically, Balvin alleges that trial counsel did not provide him with any paperwork, including statements made against him or copies of depositions of witnesses; did not answer his telephone calls; did not inform him of the evidence the State planned to use against him; and informed him that "the [S]tate had evidence that would prove him not guilty and

that he should sit back and relax and that he did not need to have copies of statements or paperwork and it would only waste money." *Id.* The record is not sufficient to address these claims, because it does not contain any indication of the communication that transpired between Balvin and his counsel prior to trial.

Balvin alleges that trial counsel was ineffective because he failed to appear at a pretrial hearing and had another attorney from his office appear on his behalf. Balvin indicates that during this hearing, the State endorsed additional witnesses; Balvin waived his right to a speedy trial; and the court granted, only in part, Balvin's motion to preclude the use of certain terms at trial. It is not clear from Balvin's assertions how he was prejudiced by the presence of substitute counsel during this hearing. Balvin does not allege that the outcome of the hearing would have been different had his counsel attended, nor does he argue that the substitute counsel's representation was in any way deficient. As such, we find that Balvin did not allege sufficient facts to demonstrate any prejudice and we determine this allegation to be without merit.

Balvin alleges that trial counsel was ineffective in failing to call certain witnesses or to present evidence of certain facts. Balvin alleges that trial counsel was ineffective for failing to "call witnesses on his behalf at trial, including character witnesses." *Id.* at 42. Balvin also alleges that counsel was ineffective in failing "to adequately cross-examine the [S]tate's witnesses and/or ask question[s] that . . . Balvin wanted him to ask." *Id.* at 43. As a part of this argument, Balvin alleges that counsel failed to adequately cross-examine the State's DNA expert. The record is not sufficient to address these claims, because it does not disclose whether any additional witnesses were available to testify, what their testimony would have been, what other questions counsel could have asked the State's witnesses, or counsel's reasoning for not having other witnesses testify or not conducting further cross-examination.

Balvin also alleges that trial counsel was ineffective in failing to call him to testify in his own defense. The record does not disclose why counsel did not call Balvin to testify in his

own defense. However, the record does reflect that Balvin freely and voluntarily waived his right to testify. After the State rested, the following dialog occurred between the court and Balvin:

> THE COURT: Okay. And is it your decision to not testify?
>
> [Balvin]: Yes.
>
> THE COURT: And is that being done by you freely and voluntarily?
>
> [Balvin]: Yes.
>
> THE COURT: Has anyone made any promises to you or threats against you or any inducements to get you to make this decision?
>
> [Balvin]: No.

Balvin does not allege any facts to suggest that counsel improperly advised him to waive such right or to suggest that Balvin's waiver was not freely and voluntarily given. Nonetheless, upon our review, we conclude that the record is not sufficient to address this claim, because it does not contain any indication of the communication between Balvin and counsel concerning whether Balvin should testify in his own defense or any indication of counsel's reason for not calling Balvin to testify.

Balvin alleges trial counsel was ineffective in failing to offer evidence to demonstrate that A.R. was a prostitute and that A.R. used drugs. Included in Balvin's argument are specific assertions that trial counsel failed to oppose certain motions in limine filed by the State which requested that evidence of A.R.'s past sexual behavior and drug use be prohibited at trial. The record is not sufficient to address these claims, because it does not disclose what evidence counsel failed to present at trial, nor does it disclose counsel's reasons for failing to object to the State's motions in limine.

Balvin alleges that trial counsel was ineffective in failing "to refresh, or attempt to refresh, [A.R.'s] recollection as to her inability to remember whether she had falsely reported a sexual assault earlier in her life." Brief for appellant at 43. We addressed this topic in detail above. As a part of our discussion, we examined counsel's extensive efforts to admit into

evidence proof that A.R. had previously falsely reported that she was sexually assaulted. We then concluded that pursuant to rule 608(2), counsel could not utilize extrinsic evidence, including copies of police reports, to prove that A.R. had previously made a false report. Based on our analysis, we find that counsel's performance in cross-examining A.R. about whether she had previously falsely reported she was sexually assaulted was not deficient.

Balvin also alleges that trial counsel was ineffective in failing to file motions to suppress or to object to the admissibility of certain evidence. Specifically, Balvin alleges that trial counsel did not file a motion to suppress evidence of letters Balvin wrote and telephone calls he made while incarcerated. Balvin argues that counsel "aided" the State by stipulating to the foundational admissibility of the telephone calls. Brief for appellant at 43. Balvin further alleges that counsel failed to object to the admission of a particular telephone call during which Balvin asked Tiffany to take his computer to his mother's house. The record is not sufficient to address these claims, because it does not disclose counsel's reasons for not filing motions to suppress or not objecting to the admission of certain evidence.

Balvin alleges that counsel was ineffective in failing to "adequately argue against" the State's motion in limine requesting that the district court prohibit Balvin from offering evidence to demonstrate that the State's witness, Tiffany, had a motive to cooperate with the State and to testify against Balvin. *Id.* at 42. The record is not sufficient to address this claim, because it does not disclose what further arguments counsel could have made in opposing the State's motion.

Balvin alleges that counsel was ineffective in failing to make a motion for dismissal of the case against him after the State completed its case in chief and in failing to make a motion for a directed verdict of not guilty when the evidence was completed. Contrary to Balvin's allegations, counsel did make a motion to dismiss the case after the State rested. The court denied the motion. Balvin did not offer any witness testimony or evidence in his defense. As such, counsel's motion to dismiss was made at the close of all of the evidence. Counsel did not make a

specific motion for a directed verdict, but such a motion would have been futile. The standard for granting a motion to dismiss and a motion for directed verdict is essentially the same. The relevant question is whether, after viewing all the evidence in the light most favorable to the State, any rational trier of fact could find the essential elements of the crime beyond a reasonable doubt. See *State v. Redmond*, 262 Neb. 411, 631 N.W.2d 501 (2001). Because the district court denied counsel's motion to dismiss, it would have also denied a motion for a directed verdict. Balvin's claim has no merit.

Balvin alleges that trial counsel was ineffective in failing to object during the State's "improper closing argument." Brief for appellant at 45. We discussed this topic thoroughly above. We concluded that although counsel failed to object to certain remarks during the State's closing argument, the prosecutor's remarks did not constitute prosecutorial misconduct. We also concluded that the prosecutor's comments during closing argument were based on the evidence and were not so prejudicial as to prevent a fair trial. Based on our conclusions above, we find that Balvin was not prejudiced by counsel's failure to object to the State's closing argument.

Balvin alleges that trial counsel was ineffective in failing to argue effectively during closing arguments, in failing to file a motion for new trial, and in failing to argue and convince the district court that he deserved a lesser sentence than the one he received. The record is not sufficient to address these claims, because it does not disclose what further arguments counsel could have made and what grounds existed as bases for a motion for new trial.

Balvin alleges that trial counsel was ineffective in failing to request that the jury make a specific finding concerning whether he was subject to lifetime community supervision. We discussed this topic thoroughly above and concluded that the district court erred in not permitting the jury to make the factual findings necessary to impose lifetime community supervision. We reversed, and remanded with directions to conduct an evidentiary hearing so that a jury could make such factual findings. In light of our decision, we decline to address Balvin's assertion in the context of postconviction relief.

V. CONCLUSION

Upon our review, we find that the district court erred in determining that Balvin committed an aggravated offense and was, as a result, subject to lifetime community supervision. We find that the jury should have determined whether Balvin committed an aggravated offense. We reverse, and remand with directions to conduct an evidentiary hearing so that a jury may make a finding regarding whether Balvin's offense was aggravated and, thus, whether he was subject to lifetime community supervision. We affirm the conviction and sentence in all other respects.

As to Balvin's claims of ineffective assistance of counsel, we find that he was not denied effective assistance of counsel when substitute counsel appeared on Balvin's behalf during a pretrial hearing, when counsel failed to refresh A.R.'s memory about a prior false report that she had been sexually assaulted, when counsel made a motion to dismiss at the close of the evidence, or when counsel failed to object to the State's closing argument. We find that the record is insufficient to review the remaining grounds for Balvin's ineffective assistance of counsel claim.

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

IN RE INTEREST OF JUSTIN H. ET AL., CHILDREN UNDER 18 YEARS OF AGE. STATE OF NEBRASKA, APPELLEE AND CROSS-APPELLEE, V. TONYA S., APPELLANT, AND JEFFREY H. AND MICHAEL F., APPELLEES AND CROSS-APPELLANTS.

791 N.W.2d 765

Filed December 7, 2010. No. A-10-094.

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. **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: Parental Rights: Proof.** For a juvenile court to terminate parental rights under Neb. Rev. Stat. § 43-292 (Reissue 2008), it must find that one or more of the statutory grounds listed in this section have been satisfied and that termination is in the child's best interests.
4. **Parental Rights: Evidence: Appeal and Error.** If an appellate court determines that the lower court correctly found that termination of parental rights is appropriate under one of the statutory grounds set forth in Neb. Rev. Stat. § 43-292 (Reissue 2008), the appellate court need not further address the sufficiency of the evidence to support termination under any other statutory ground.
5. **Parental Rights: Proof.** Neb. Rev. Stat. § 43-292(7) (Reissue 2008) operates mechanically and, unlike the other subsections of the statute, does not require the State to adduce evidence of any specific fault on the part of a parent.
6. **Parental Rights: Words and Phrases.** A termination of parental rights is a final and complete severance of the child from the parent and removes the entire bundle of parental rights; therefore, with such severe and final consequences, parental rights should be terminated only in the absence of any reasonable alternative and as the last resort.
7. **Parent and Child.** The law does not require perfection of a parent. Instead, courts should look for the parent's continued improvement in parenting skills and a beneficial relationship between parent and child.
8. **Juvenile Courts: Jurisdiction.** To obtain jurisdiction over a juvenile, the court's only concern is whether the conditions in which the juvenile presently finds himself or herself fit within the asserted subsection of Neb. Rev. Stat. § 43-247 (Reissue 2008).
9. **Juvenile Courts: Jurisdiction: Proof.** At the adjudication stage, in order for a juvenile court to assume jurisdiction of minor children under Neb. Rev. Stat. § 43-247(3)(a) (Reissue 2008), the State must prove the allegations of the petition by a preponderance of the evidence.

Appeal from the Separate Juvenile Court of Douglas County: WADIE THOMAS, Judge. Affirmed in part, and in part reversed and remanded.

Anne E. Troia, of Kruger & Troia, P.C., L.L.O., for appellant.

Donald W. Kleine, Douglas County Attorney, Jennifer Chrystal-Clark, and Daniel Gubler, Senior Certified Law Student, for appellee State of Nebraska.

Sally J. Hytrek for appellee Jeffrey H.

Michael Matthews for appellee Michael F.

IRWIN, SIEVERS, and CARLSON, Judges.

IRWIN, Judge.

I. INTRODUCTION

Tonya S. appeals and Jeffrey H. and Michael F. cross-appeal from three separate juvenile court orders. Collectively, the three juvenile court orders concern eight children: Stephanie H., Justin H., Nicholas H., Zachary K., Ashley H., Austin H., Kiarra F., and Cian F. In the first order, the juvenile court terminated Tonya's parental rights to her six children. In the second order, the juvenile court terminated Jeffrey's parental rights to his four children. In the third order, the juvenile court adjudicated Michael's two children as being within the meaning of Neb. Rev. Stat. § 43-247(3)(a) (Reissue 2008) as to Michael.

The appeals from these three juvenile court orders are related in that each parent shares at least one child with another parent involved in the case. However, the appeals are distinct in that each parent appeals from a separate order and, in the proceedings below, different evidence was presented as to each parent. Accordingly, we will address each appeal separately. Our discussion of each appeal will include a recitation of the factual background relevant to the parent's appeal, the parent's assigned errors, and an analysis of those assigned errors.

Before we discuss each appeal, we provide a brief description of the parties' relationships with each other and with the children involved.

II. PARTIES

This case is complex not only because of the number of parents and children involved, but also because of the somewhat complicated relationships between the parents and between the parents and the children. In an effort to explain the connection between all of the families involved in this case, we provide the following general background information:

Tonya is the mother of Stephanie, born in March 1995; Justin, born in March 1997; Nicholas, born in February 1999; Zachary, born in February 2002; Kiarra, born in June 2006; and Cian, born in August 2007.

Tonya was previously married to Jeffrey. Jeffrey is the father of Tonya's two oldest children, Stephanie and Justin. Tonya and Jeffrey divorced, and at the time of the termination hearing, Jeffrey was married to Carrie H. Jeffrey and Carrie have two children together, Ashley, born in June 2001, and Austin, born in October 2002. Carrie is not a party to this appeal, but she was a party to the proceedings below. There, the juvenile court determined that there was insufficient evidence to prove that termination of Carrie's parental rights was in the best interests of Ashley and Austin. No one appeals from this decision.

Tonya is currently in a relationship with Michael. At the time of the proceedings, Tonya and Michael lived together. Michael is the father of Tonya's two youngest children, Kiarra and Cian.

In an effort to clarify for the reader the connection between the families in this case, we provide the following table concerning the relationships between the parents and the children:

Child	**Age at Removal**	**Parents**
Stephanie	12	Tonya and Jeffrey
Justin	10	Tonya and Jeffrey
Nicholas	8	Tonya*
Zachary	5	Tonya*
Ashley	5	Jeffrey and Carrie
Austin	4	Jeffrey and Carrie
Kiarra	1	Tonya and Michael
Cian	(removed at birth)	Tonya and Michael

* The fathers of Nicholas and Zachary are not parties to this appeal, and they will not be discussed further.

We will separately discuss each party's appeal below. We begin by addressing the standard of review that applies to all three appeals.

III. STANDARD OF REVIEW

[1,2] 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 Jagger L.*,

270 Neb. 828, 708 N.W.2d 802 (2006). 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. *Id.*

[3] For a juvenile court to terminate parental rights under Neb. Rev. Stat. § 43-292 (Reissue 2008), it must find that one or more of the statutory grounds listed in this section have been satisfied and that termination is in the child's best interests. See *In re Interest of Jagger L., supra*. The State must prove these facts by clear and convincing evidence. *Id.* Clear and convincing evidence is 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. *Id.*

IV. TONYA'S APPEAL

The juvenile court terminated Tonya's parental rights to her six children: Stephanie, Justin, Nicholas, Zachary, Kiarra, and Cian. Tonya appeals from this order. On appeal, she challenges both the statutory basis for termination of her parental rights and the juvenile court's finding that termination of her parental rights is in the children's best interests.

Upon our de novo review of the record, we conclude that there is clear and convincing evidence to demonstrate that all of the children have been in an out-of-home placement for 15 or more months of the most recent 22 months pursuant to § 43-292(7).

However, we also conclude that there is insufficient evidence to demonstrate that termination of Tonya's parental rights is in the best interests of Stephanie, Zachary, Kiarra, and Cian. As such, we reverse that portion of the juvenile court's order which terminated Tonya's parental rights to Stephanie, Zachary, Kiarra, and Cian.

We conclude that there is sufficient evidence to demonstrate that termination of Tonya's parental rights is in the best interests of Justin and Nicholas. We affirm that portion of the juvenile court's order which terminated Tonya's parental rights to Justin and Nicholas.

Below, we provide a table to make clear the children involved in Tonya's appeal and our resolution as to each child.

Child	Parents	Court of Appeals' Decision
Stephanie	Tonya and Jeffrey	Reversed and remanded
Justin	Tonya and Jeffrey	Affirmed
Nicholas	Tonya	Affirmed
Zachary	Tonya	Reversed and remanded
Kiarra	Tonya and Michael	Reversed and remanded
Cian	Tonya and Michael	Reversed and remanded

1. Background

Tonya's appeal involves her six children: Stephanie, Justin, Nicholas, Zachary, Kiarra, and Cian. The current juvenile court proceedings were initiated in June 2007. However, Tonya and her children have been involved with the juvenile court on multiple occasions since 1999. Because Tonya's history with the juvenile court is relevant to the current proceedings, as we will further explain below, we briefly recount that history here.

In 1999, Stephanie, Justin, and Nicholas were removed from Tonya's home for reasons that are not clear from the record. All three children were eventually placed with Jeffrey. Stephanie, Justin, and Nicholas were returned to Tonya's home in June 2004. In 2005, Stephanie, Justin, and Nicholas were removed from Jeffrey's home after allegations that Jeffrey had an alcohol problem and had engaged in domestic violence. Later that year, the children were returned to Tonya's home. In 2006, Stephanie, Justin, Nicholas, and Zachary were removed from Tonya's parents' home while they were watching the children. The children were returned to Tonya's home after only a few days.

In the current proceedings, Stephanie, Justin, Nicholas, Zachary, and Kiarra were removed from Tonya's care and placed in the custody of the Department of Health and Human Services (DHHS) in June 2007. At the time of the removal, Tonya shared custody of Stephanie and Justin with Jeffrey, and Justin was residing with Jeffrey and Carrie. Stephanie, Nicholas, Zachary, and Kiarra were residing with Tonya and Michael.

In August 2007, Cian was born. Cian was removed from Tonya's care immediately after his birth and placed in the custody of DHHS.

The State filed petitions alleging that all of the children were within the meaning of § 43-247(3)(a) (Cum. Supp. 2006) as to Tonya as a result of Justin's subjecting Nicholas to inappropriate sexual contact, Jeffrey's subjecting Justin to inappropriate sexual contact, Michael's subjecting the children to inappropriate physical contact, and Tonya's knowing of such inappropriate conduct and failing to protect the children from harm. The petitions also alleged that Tonya failed to provide the children with safe and stable housing.

In December 2007, Tonya admitted to the allegations in the petitions which alleged that Justin subjected Nicholas to inappropriate sexual contact and that she failed to protect the children. Tonya also admitted that the children were at risk for harm. The court dismissed the remaining allegations in the petition.

As a result of Tonya's admissions, the children were adjudicated to be within the meaning of § 43-247(3)(a) as to Tonya. Tonya was ordered to undergo a psychological evaluation, participate in individual therapy, complete a parenting class, maintain safe and adequate housing and a legal source of income, and be involved in the children's individual therapy. The court also ordered Tonya to participate in supervised visitation with the children.

On October 7, 2008, approximately 10 months after the children were adjudicated with respect to Tonya, the State filed a motion to terminate Tonya's parental rights to Stephanie, Justin, Nicholas, Zachary, Kiarra, and Cian. In the motion, the State alleged that termination of Tonya's parental rights was warranted pursuant to § 43-292(2), (6), and (7) as to Stephanie, Justin, Nicholas, Zachary, and Kiarra and that termination of her parental rights was warranted pursuant to § 43-292(2) and (6) as to Cian. In addition, the State alleged that termination of Tonya's parental rights was in the best interests of all six children.

On June 11, 2009, a hearing was held. This hearing pertained not only to the State's motion to terminate Tonya's parental rights, but also to the State's motion to terminate Jeffrey's parental rights to his children and to the State's petition alleging that Michael's children were within the meaning

of § 43-247(3)(a) (Reissue 2008) as to Michael. Because the hearing included evidence pertaining to all three parents, it was quite lengthy. The hearing continued on various dates during both June and October. The hearing concluded on November 2. The evidence presented at this hearing spans 17 volumes. We have reviewed this evidence in its entirety. However, we do not set forth a detailed recitation of the evidence presented here. Rather, we will set forth the evidence pertinent to Tonya and her children in our analysis below.

At the conclusion of the hearing, the juvenile court entered an order finding that the State proved by clear and convincing evidence that grounds for termination of Tonya's parental rights existed under § 43-292(2), (6), and (7). The court also found that it would be in the children's best interests to terminate Tonya's parental rights. The court then terminated Tonya's parental rights to Stephanie, Justin, Nicholas, Zachary, Kiarra, and Cian.

Tonya appeals from the juvenile court's order.

2. Assigned Errors

On appeal, Tonya alleges that the juvenile court erred in finding that termination of her parental rights is warranted pursuant to § 43-292(2), (6), and (7) and that termination of her parental rights is in the children's best interests.

3. Statutory Basis for Termination

Tonya asserts that the juvenile court erred in determining that termination of her parental rights is warranted pursuant to § 43-292(2), (6), and (7). Upon our review, we find that the evidence presented at the hearing clearly and convincingly demonstrates that all six of Tonya's children were in an out-of-home placement for at least 15 of the most recent 22 months, pursuant to § 43-292(7). As such, we need not specifically address whether or not the State met its burden under § 43-292(2) or (6).

[4] Termination of parental rights is warranted whenever one or more of the statutory grounds provided in § 43-292 are established. If an appellate court determines that the lower court correctly found that termination of parental rights is

appropriate under one of the statutory grounds set forth in § 43-292, the appellate court need not further address the sufficiency of the evidence to support termination under any other statutory ground. *In re Interest of Jagger L.*, 270 Neb. 828, 708 N.W.2d 802 (2006).

[5] Section 43-292(7) provides for termination of parental rights when "[t]he juvenile has been in an out-of-home placement for fifteen or more months of the most recent twenty-two months." See, also, *In re Interest of Aaron D.*, 269 Neb. 249, 691 N.W.2d 164 (2005). Section 43-292(7) operates mechanically and, unlike the other subsections of the statute, does not require the State to adduce evidence of any specific fault on the part of a parent. *In re Interest of Aaron D., supra*.

In this case, the State alleged and the court found that termination of Tonya's parental rights to Stephanie, Justin, Nicholas, Zachary, and Kiarra was warranted pursuant to § 43-292(2), (6), and (7). At the termination hearing, there was uncontradicted evidence which demonstrated that Stephanie, Justin, Nicholas, Zachary, and Kiarra were removed from Tonya's care in June 2007. By the time the State filed its motion to terminate Tonya's parental rights in October 2008, the five oldest children had been in an out-of-home placement for approximately 15 months. By the time the hearing began in June 2009, they had been in an out-of-home placement for 23 months, and by the time the hearing concluded in November, they had been in an out-of-home placement for 28 months.

The juvenile court also found that termination of Tonya's parental rights to Cian was warranted pursuant to § 43-292(7). However, in the motion to terminate Tonya's parental rights, the State did not make an allegation concerning § 43-292(7) as it related to Cian, because in October 2008, when the motion was filed, Cian had been in an out-of-home placement for only approximately 14 months. While Tonya's other children were removed in June 2007, Cian was removed in early August, immediately after his birth. Nevertheless, by the time the hearing began in June 2009, Cian had been in an out-of-home placement for 21 months, and by the time the hearing concluded in November, Cian had been in an out-of-home placement for 26 months.

As such, when the court found that termination of Tonya's parental rights to Cian was warranted pursuant to § 43-292(7), Cian had been in an out-of-home placement for well over 15 of the last 22 months. We cannot say that the court erred in finding that termination of Tonya's parental rights to Cian was warranted pursuant to § 43-292(7). We note that in Tonya's appeal, she does not specifically argue that the court erred in finding that § 43-292(7) applied to Cian because the State did not make such an allegation in the motion. Rather, she focuses her argument on whether she was provided with adequate tools to achieve reunification when the children were in an out-of-home placement. As we explained above, though, § 43-292(7) operates mechanically such that it becomes applicable whenever a child has been out of the home for 15 of the most recent 22 months.

In sum, all six of the children had been in an out-of-home placement for at least 26 months at the time the termination hearing concluded. There is no dispute that Stephanie, Justin, Nicholas, Zachary, Kiarra, and Cian were in an out-of-home placement for 15 or more months of the most recent 22 months as § 43-292(7) requires.

There is clear and convincing evidence that termination of Tonya's parental rights was appropriate pursuant to § 43-292(7). In light of this fact, we need not, and do not, further address the sufficiency of the evidence to demonstrate that such termination was also appropriate pursuant to § 43-292(2) or (6).

4. Best Interests

(a) Stephanie, Zachary, Kiarra, and Cian

Tonya asserts that the juvenile court erred in determining that termination of her parental rights is in the best interests of Stephanie, Zachary, Kiarra, and Cian. Specifically, she argues that she has taken substantial steps toward reunification with the children and that she should be given the opportunity to continue to make efforts toward that goal. Upon our review of the record, we find insufficient evidence to demonstrate that terminating Tonya's parental rights to Stephanie, Zachary, Kiarra, and Cian is in the children's best interests. We reverse

that portion of the juvenile court's order terminating Tonya's parental rights to these four children.

[6,7] A termination of parental rights is a final and complete severance of the child from the parent and removes the entire bundle of parental rights. *In re Interest of Crystal C.*, 12 Neb. App. 458, 676 N.W.2d 378 (2004). Therefore, with such severe and final consequences, parental rights should be terminated only in the absence of any reasonable alternative and as the last resort. *Id*. The law does not require perfection of a parent. See *id*. Instead, we should look for the parent's continued improvement in parenting skills and a beneficial relationship between parent and child. *Id.*

Evidence presented at the termination hearing revealed that Tonya complied with every court order, that she consistently attended visitation with her children, and that she exhibited appropriate parenting techniques during the visitations. The evidence also revealed that there is a beneficial relationship between Tonya and Stephanie, Zachary, Kiarra, and Cian.

Throughout the proceedings, the juvenile court ordered Tonya to undergo a psychological evaluation, participate in individual therapy, complete a parenting class, maintain safe and adequate housing and a legal source of income, and be involved in the children's individual therapy. The family's DHHS caseworker, Dawn Coffey, testified that Tonya complied with everything the juvenile court ordered her to do.

Evidence presented at the termination hearing revealed that Tonya submitted to two psychological evaluations. The first psychological evaluation occurred in September 2007. An updated evaluation, conducted by Dr. Glenda Cottam, occurred in August 2008. Dr. Cottam testified at the termination hearing that Tonya requires additional insight, education, and therapy to assist her in adequately parenting her children. Dr. Cottam opined that reunification with the children was not "probable in the future." This opinion appeared to be based almost entirely on Tonya's history with the juvenile court system.

Tonya participated in individual therapy. Her therapist testified that Tonya consistently attended the therapeutic sessions and that she made progress in dealing with her depression and anxiety and in better understanding how to establish

boundaries for the children. The therapist testified that Tonya needed to continue to attend therapy to address such issues as becoming independent and identifying healthy relationships.

At the time of the termination hearing, Tonya had acquired appropriate housing. In fact, Tonya's visitations with the children had been moved to her home in the months prior to the termination hearing.

Tonya was unable to maintain consistent employment. However, there was evidence in the record to demonstrate that Tonya made efforts toward finding consistent and appropriate employment. Tonya was employed at various times throughout the proceedings. It appears as though Tonya's efforts were hampered by the visitation schedule and by her other obligations under the court orders.

Tonya was involved with the children's therapy when such involvement was requested by the children's therapists. For example, Tonya worked with one of Zachary's therapists from August 2007 to April 2008. That therapist testified that she offered suggestions to Tonya about how to better interact with Zachary and then observed Tonya implementing those suggestions when Tonya was with Zachary. Tonya also worked with another of Zachary's therapists from June 2008 to the time of the termination hearing. That therapist testified that Tonya had admitted to making mistakes and had indicated that she wants to change. That therapist also testified that she had observed improvement in Tonya's parenting skills since June 2008.

It is not clear from the record whether Tonya worked with any of the other children's therapists. There was evidence that Tonya repeatedly requested that family therapy between her and the children be established by DHHS; however, Coffey testified that for various reasons, family therapy did not occur more than five times from 2007 through the time of the hearing.

Tonya was consistent in attending supervised visitation with the children. Numerous visitation workers testified they observed that Tonya exhibited appropriate parenting skills with the children. Such testimony indicated that Tonya is an "active participant" during visitation and that she is nurturing, patient,

attentive, and affectionate with the children. There was evidence that Tonya provides appropriate meals and clothing for the children and is receptive to the suggestions and advice of the visitation workers. All of the visitation workers testified that they did not have any safety concerns while Tonya was with the children.

In contrast to the testimony of the visitation workers, Coffey testified that Tonya was often overwhelmed during visitations because of the number of children present. She also testified that Tonya appears to understand the advice of visitation workers but that she struggles to put that advice into practice when the children are present. Coffey indicated that most of her testimony was not based on personal observations, but, rather, came from reports authored by visitation workers. She admitted that she did not personally attend many visits between Tonya and the children. Moreover, all of the visitation workers who testified indicated that Coffey never came to a visit when they were working.

Evidence presented at the termination hearing revealed that there is a strong bond between Tonya and the children. There was evidence that the children are very excited to see Tonya when they arrive for visitation and that they are sad to have to leave her. Stephanie's therapist testified that Stephanie would be "devastated" if her parents' parental rights were terminated.

Upon our review of the record, we find that a large part of the evidence presented at the hearing revealed that Tonya has made efforts toward reunification with her children and has demonstrated continued improvement in her parenting skills. While we acknowledge that there is evidence to the contrary, such evidence consists mostly of Coffey's testimony. Coffey admitted that most of her testimony was based on other people's reports and not on her personal observations. While we do not disregard Coffey's testimony in its entirety, we also recognize that her testimony was in direct contradiction to the testimony of other witnesses who observed Tonya and her children firsthand.

In the juvenile court's order, it noted Tonya's efforts toward reunification; however, it indicated that any improvement on

Tonya's part was "superficial." The court based this finding on Tonya's repeated involvement with the juvenile court system. The court specifically found that Tonya "shows a pattern of doing well when she is court involved, and reverting back to the same harmful patterns once there is no longer court involvement."

We agree that Tonya's past involvement with the juvenile court system is relevant to her ability to appropriately and effectively parent her children and, accordingly, relevant to the children's best interests. Contrary to the judgment of the juvenile court, however, we do not find such evidence to be dispositive in this situation. There is no evidence to suggest that the improvement Tonya has made during the pendency of these proceedings is in any way "superficial" in nature. Moreover, these proceedings are somewhat different from those in the previous cases involving Tonya, which seemingly came about due to Tonya's inability to care for her children and manage her household on a daily basis. Here, the proceedings were initiated, in part, due to Justin's inappropriate behavior toward Nicholas and Tonya's lack of knowledge about how to handle such a situation.

Based on all of the evidence presented at the termination hearing, we find that Tonya has made efforts toward reunification with her children and has demonstrated continued improvement in her parenting skills. We appreciate that Tonya still has work to do before achieving reunification. However, as we stated above, we do not require perfection of a parent when deciding whether termination of parental rights is appropriate.

We conclude that there is insufficient evidence to prove that termination of Tonya's parental rights to Stephanie, Zachary, Kiarra, and Cian is in those children's best interests. We reverse that portion of the juvenile court's order which terminated Tonya's parental rights to Stephanie, Zachary, Kiarra, and Cian.

(b) Justin

Tonya also asserts that the juvenile court erred in determining that termination of her parental rights is in Justin's best

interests. Upon our de novo review of the record, we find that Tonya is unable to provide Justin with the kind of structured, supervised environment that he desperately requires. As such, we conclude that termination of Tonya's parental rights to Justin is in his best interests.

These juvenile court proceedings were initiated as a result of reports that Justin had sexually assaulted his brother Nicholas and another young child. Justin has been receiving intensive therapy since the time of his removal in June 2007. At the termination hearing, Justin's therapist testified that Justin has made some progress, but that he continues to struggle with sexual issues. The therapist testified that Justin requires direct and constant supervision because he still poses a risk to other children. The therapist also testified that Justin requires a caregiver who understands and vigorously implements a safety plan. The therapist indicated that Justin needs to be the only child in the home. The therapist opined that it was in Justin's best interests to terminate Tonya's parental rights because she is unable to provide the environment Justin needs.

Other evidence presented at the hearing revealed that Justin is doing well at his current placement because there is a strict safety plan in place that permits Justin to have friends and interact with children his own age without putting Justin or other children at risk. There was also some indication in the record that Tonya is not able to adequately supervise Justin when all of the other children are present. There was evidence that during one visitation, Justin put Ashley, Jeffrey's daughter, on his lap and Tonya did not immediately correct this behavior. During a separate visitation, Justin went into another, unsupervised, room alone with Zachary.

Although we recognize that Tonya has made efforts toward reunification with her children and has made improvement in her parenting skills, we find that Tonya is simply unable to provide Justin with the strict, structured environment he requires. Justin would not be the only child in Tonya's home. As a result, it would be difficult, if not impossible, for Tonya to supervise Justin as closely as is required. Justin needs, and deserves, a home where he can thrive and work on his behavioral problems. Because Tonya cannot provide the strict,

structured environment Justin needs, we conclude that it would be in Justin's best interests to terminate Tonya's parental rights. We affirm that portion of the juvenile court's order which terminated Tonya's parental rights to Justin.

(c) Nicholas

Tonya asserts that the juvenile court erred in determining that termination of her parental rights is in Nicholas' best interests. Upon our de novo review of the record, we find that there is not a "beneficial relationship" between Tonya and Nicholas. See *In re Interest of Crystal C.*, 12 Neb. App. 458, 465, 676 N.W.2d 378, 384 (2004). As such, we conclude that termination of Tonya's parental rights to Nicholas is in his best interests.

Evidence presented at the termination hearing revealed that Nicholas was sexually assaulted by Justin and, as a result, suffers from serious behavioral problems. At the hearing, Nicholas' therapist testified that she had been Nicholas' therapist since December 2007. She testified that Nicholas suffers from anger issues and posttraumatic stress disorder. She indicated that Nicholas has made some progress during therapy, but she testified that it would be in Nicholas' best interests to terminate Tonya's parental rights. The therapist testified that Nicholas has said that he would like to be adopted and does not want to return to Tonya's home. Nicholas feels like Tonya treats him differently from the other children. The therapist indicated Nicholas heard Tonya say that she did not want him and that she would not fight for him. The therapist also indicated that Tonya would have him removed from visits with her and his siblings when he would misbehave. Coffey testified that Tonya had "grounded" Nicholas from one or more such visits.

There is some evidence in the record to corroborate Nicholas' feelings about Tonya. Coffey testified that Tonya indicated to her that she would relinquish her parental rights to Stephanie, Justin, and Nicholas if it meant she could have her three younger children back in her home. There is no indication about what precipitated this comment by Tonya or about why Tonya appeared to favor the other children over Nicholas.

Nicholas' therapist testified that Nicholas "will never thrive" in Tonya's home. We agree. The evidence presented at the hearing revealed that there is not a beneficial relationship between Tonya and Nicholas. We conclude that it is in Nicholas' best interests to terminate Tonya's parental rights. We affirm that portion of the juvenile court's order which terminated Tonya's parental rights to Nicholas.

5. Conclusion

Upon our de novo review of the record, we conclude that there is clear and convincing evidence to demonstrate that each of Tonya's children has been in an out-of-home placement for 15 or more months of the most recent 22 months pursuant to § 43-292(7).

However, we also conclude that there is insufficient evidence to demonstrate that termination of Tonya's parental rights is in the best interests of Stephanie, Zachary, Kiarra, and Cian. As such, we reverse that portion of the juvenile court's order which terminated Tonya's parental rights to Stephanie, Zachary, Kiarra, and Cian.

We conclude that there is sufficient evidence to demonstrate that termination of Tonya's parental rights is in the best interests of Justin and Nicholas. We affirm that portion of the juvenile court's order which terminated Tonya's parental rights to Justin and Nicholas.

V. JEFFREY'S CROSS-APPEAL

The juvenile court terminated Jeffrey's parental rights to his four children: Stephanie, Justin, Ashley, and Austin. Jeffrey cross-appeals from this order, challenging both the statutory basis for termination of his parental rights and the juvenile court's finding that termination of his parental rights is in the children's best interests.

Upon our de novo review of the record, we conclude that there is clear and convincing evidence to demonstrate that the children have been in an out-of-home placement for 15 or more months of the most recent 22 months pursuant to § 43-292(7).

However, we also conclude that there is insufficient evidence to demonstrate that termination of Jeffrey's parental rights is

in the best interests of Stephanie, Ashley, and Austin. As such, we reverse that portion of the juvenile court's order terminating Jeffrey's parental rights to Stephanie, Ashley, and Austin.

We conclude that there is sufficient evidence to demonstrate that termination of Jeffrey's parental rights is in the best interests of Justin. We affirm that portion of the juvenile court's order terminating Jeffrey's parental rights to Justin.

Below, we provide a table to make clear the children involved in Jeffrey's cross-appeal and our resolution as to each child.

Child	Parents	Court of Appeals' Decision
Stephanie	Tonya and Jeffrey	Reversed and remanded
Justin	Tonya and Jeffrey	Affirmed
Ashley	Jeffrey and Carrie	Reversed and remanded
Austin	Jeffrey and Carrie	Reversed and remanded

1. Background

Jeffrey's cross-appeal involves his four children: Stephanie, Justin, Ashley, and Austin. The current juvenile court proceedings were initiated in June 2007. However, Jeffrey and his children have been involved with the juvenile court on multiple occasions since 1999. Because Jeffrey's history with the juvenile court is relevant to the current proceedings, as we will further explain below, we briefly recount that history here.

In 1999, Jeffrey intervened in juvenile court proceedings after Stephanie, Justin, and Nicholas were removed from Tonya's home. As a part of that case, Jeffrey was granted custody of Stephanie and Justin and was given guardianship of Nicholas. In April 2004, Stephanie, Justin, Nicholas, Ashley, and Austin were removed from Jeffrey's home due to allegations of a dirty house. Two months later, in June, Stephanie, Justin, and Nicholas were placed with Tonya, and Ashley and Austin were returned to Jeffrey's home. In 2005, Stephanie, Justin, Nicholas, Ashley, and Austin were removed from Jeffrey's care due to allegations of alcohol abuse and domestic violence. Stephanie, Justin, and Nicholas were returned to Tonya's home and Ashley and Austin were returned to Jeffrey's home later that same year.

In the current proceedings, Stephanie, Justin, Ashley, and Austin were removed from Jeffrey's care and placed in the

custody of DHHS in June 2007. At the time of the removal, Jeffrey shared custody of Stephanie and Justin with Tonya, and Stephanie was residing with Tonya and Michael. Justin, Ashley, and Austin were residing with Jeffrey and Carrie.

The State filed petitions alleging that all of the children were within the meaning of § 43-247(3)(a) (Cum. Supp. 2006) as to Jeffrey as a result of Jeffrey's subjecting Justin to inappropriate sexual contact, Justin's subjecting Nicholas to inappropriate sexual contact, and Jeffrey's knowing of the inappropriate sexual contact between Justin and Nicholas and failing to protect the children from harm. The petition also alleged that Jeffrey failed to provide the children with safe and stable housing.

In December 2007, Jeffrey admitted to the allegations in the petition which alleged that Justin subjected Nicholas to inappropriate sexual contact and that Jeffrey failed to protect the children. Jeffrey also admitted that the children were at risk for harm. The court dismissed the remaining allegations in the petition.

As a result of Jeffrey's admissions, the children were adjudicated to be within the meaning of § 43-247(3)(a) as to Jeffrey. Jeffrey was ordered to undergo a psychological evaluation, participate in individual therapy, complete an anger management class, complete a parenting class, maintain safe and adequate housing and a legal source of income, and be involved in the children's individual therapy. The court also ordered Jeffrey to participate in supervised visitation with Stephanie, Ashley, and Austin and to participate in therapeutic visitation with Justin.

On October 7, 2008, approximately 10 months after the children were adjudicated with respect to Jeffrey, the State filed a motion to terminate Jeffrey's parental rights to Stephanie, Justin, Ashley, and Austin. In the motion, the State alleged that termination of Jeffrey's parental rights was warranted pursuant to § 43-292(2), (6), and (7). In addition, the State alleged that termination of Jeffrey's parental rights was in the best interests of the children.

As we discussed above, the hearing on the State's motion for termination of Jeffrey's parental rights began on June 11, 2009,

continued on various dates during both June and October, and concluded on November 2. We will set forth the evidence pertinent to Jeffrey and his children in our analysis below.

At the conclusion of the hearing, the juvenile court entered an order finding that the State proved by clear and convincing evidence that grounds for termination of Jeffrey's parental rights existed under § 43-292(2), (6), and (7). The court also found that it would be in the children's best interests to terminate Jeffrey's parental rights. The court then terminated Jeffrey's parental rights to Stephanie, Justin, Ashley, and Austin.

Jeffrey cross-appeals from the juvenile court's order.

2. Assigned Errors

On cross-appeal, Jeffrey alleges that the juvenile court erred in finding that termination of his parental rights is warranted pursuant to § 43-292(2), (6), and (7) and that termination of his parental rights is in the children's best interests.

3. Statutory Basis for Termination

Jeffrey asserts that the juvenile court erred in determining that termination of his parental rights is warranted pursuant to § 43-292(2), (6), and (7). Upon our review, we find that the evidence presented at the hearing clearly and convincingly demonstrates that all four of Jeffrey's children were in an out-of-home placement for at least 15 of the most recent 22 months, pursuant to § 43-292(7). As such, we need not specifically address whether or not the State met its burden under § 43-292(2) or (6).

As we discussed more thoroughly above, termination of parental rights is warranted whenever one or more of the statutory grounds provided in § 43-292 are established. Section 43-292(7) provides for termination of parental rights when "[t]he juvenile has been in an out-of-home placement for fifteen or more months of the most recent twenty-two months." See, also, *In re Interest of Aaron D.*, 269 Neb. 249, 691 N.W.2d 164 (2005).

In this case, the State alleged and the court found that termination of Jeffrey's parental rights was warranted pursuant to § 43-292(2), (6), and (7). At the hearing, there was uncontradicted evidence which demonstrated that Stephanie,

Justin, Ashley, and Austin were removed from parental custody in June 2007. By the time the State filed its motion to terminate Jeffrey's parental rights in October 2008, all four of the children had been in an out-of-home placement for approximately 15 months. By the time the hearing began in June 2009, the children had been in an out-of-home placement for 23 months, and by the time the hearing concluded in November, the children had been in an out-of-home placement for 28 months. As such, there is no dispute that Stephanie, Justin, Ashley, and Austin were in an out-of-home placement for 15 or more months of the most recent 22 months as § 43-292(7) requires.

There is clear and convincing evidence that termination of Jeffrey's parental rights was appropriate pursuant to § 43-292(7). In light of this fact, we need not, and do not, further address the sufficiency of the evidence to demonstrate that such termination was also appropriate pursuant to § 43-292(2) or (6).

4. Best Interests

(a) Stephanie, Ashley, and Austin

Jeffrey asserts that the juvenile court erred in determining that termination of his parental rights is in the best interests of Stephanie, Ashley, and Austin. Specifically, he argues that he has taken substantial steps toward reunification with the children and that he should be given the opportunity to continue to make efforts toward that goal. Upon our review of the record, we find insufficient evidence to demonstrate that terminating Jeffrey's parental rights to Stephanie, Ashley, and Austin is in the children's best interests. We reverse that portion of the juvenile court's order terminating Jeffrey's parental rights to these three children.

As we discussed above, a termination of parental rights is a final and complete severance of the child from the parent. See *In re Interest of Crystal C.*, 12 Neb. App. 458, 676 N.W.2d 378 (2004). As such, termination of parental rights is appropriate only in the absence of any reasonable alternative and as the last resort. See *id.* The law does not require perfection of a parent. See *id*. Instead, the focus should be on the parent's continued

improvement in parenting skills and a beneficial relationship between parent and child. See *id.*

Evidence presented at the termination hearing revealed that Jeffrey complied with every court order, that he consistently attended visitation with his children, and that he exhibited appropriate parenting techniques during the visitations. The evidence also revealed that there is a beneficial relationship between Jeffrey and Stephanie, Ashley, and Austin.

Throughout the proceedings, the juvenile court ordered Jeffrey to undergo a psychological evaluation, participate in individual therapy, complete an anger management class, complete a parenting class, maintain safe and adequate housing and a legal source of income, and be involved in the children's individual therapy. Coffey testified that Jeffrey complied with everything the juvenile court ordered him to do.

Evidence presented at the hearing revealed that Jeffrey submitted to multiple mental health examinations. In July 2007, Jeffrey submitted to a psychiatric evaluation. The psychiatrist who conducted the evaluation testified that at the time of the evaluation, Jeffrey had limited insight into his problems. The psychiatrist indicated that Jeffrey could make progress if provided the right tools. At the time of the evaluation, the psychiatrist recommended that Jeffrey participate in therapy.

In December 2007 and July 2008, Jeffrey submitted to psychological evaluations and parenting assessments with Dr. Cottam, who testified at the hearing that she had concerns about the length of time Jeffrey had been in therapy and about whether he was making any progress. She testified that she observed Jeffrey interact with the children and that Jeffrey was able to keep order during his time with the children. However, Dr. Cottam indicated that she had concerns because Jeffrey made unrealistic promises to the children and had difficulty with discipline and structure.

Jeffrey participated in individual therapy throughout the duration of these proceedings. In fact, Jeffrey was participating in therapy prior to June 2007, when the children were removed from his home. Jeffrey's therapist at that time testified that she began providing therapy to Jeffrey in March 2006 and that she had been involved in Jeffrey's life through 2008. She testified

that prior to the removal, she assisted Jeffrey and the rest of the family with creating a safety plan due to Justin's sexual problems. She testified that Jeffrey has made "therapeutic progress." She described Jeffrey as a "[v]ery positive, very caring, very intuitive" parent. She testified that Jeffrey has insight into his children's needs. She indicated that she does not believe that Jeffrey's parental rights should be terminated.

Jeffrey has an additional therapist who, at the time of the termination hearing, had been Jeffrey's therapist for approximately 2 years. As early as May 2008, she had recommended that Jeffrey's children be returned to his home. By December, she had indicated in a report that Jeffrey had accomplished all of his treatment goals. She did not successfully discharge Jeffrey at that time only because the juvenile court required Jeffrey to continue with therapy. She testified at the hearing that Jeffrey has made "substantial progress." She testified that she has no concerns whatsoever about returning the children to his home. She testified that Jeffrey understands the needs and limitations of his children and puts his children first. She described him as an "excellent parent" who demonstrates consistency, caring, and protection. She testified that she did not agree with Dr. Cottam's assessment of Jeffrey.

At the time of the hearing, Jeffrey had appropriate housing. In fact, Coffey testified that housing was not an issue because Jeffrey had always had housing for the children. There was evidence that Jeffrey is currently working on renovating his house to better accommodate the children's needs.

Coffey also testified that Jeffrey has been consistently employed throughout the duration of the proceedings. At various times, Jeffrey accepted work in Texas when he was not able to find work in Nebraska. Jeffrey understood that this was not an ideal situation, but he wanted to be able to support his family. There was evidence that when Jeffrey was away, he always called the children during his scheduled visitation time, and that he called his therapist to conduct their regularly scheduled sessions.

Jeffrey was involved with the children's therapy when such involvement was requested by the children's therapists. Jeffrey worked with one of Ashley and Austin's therapists.

That therapist testified that both children appeared bonded with Jeffrey and indicated that she did not have any concerns with Jeffrey's parenting during family therapy sessions. It is not clear from the record whether Jeffrey worked with Stephanie's therapist.

Jeffrey was also involved in the children's activities and appointments. There was evidence that Jeffrey attended school meetings and attended the majority of the children's doctor's appointments. There was evidence that Ashley has a speech impairment and that Jeffrey went to great lengths to obtain a computer to assist Ashley in her communication skills.

Jeffrey was consistent in attending supervised visitation with the children. Although Jeffrey was working out of town during various periods of time, he telephoned the children during each scheduled visitation session. The conversations were monitored by the visitation workers. Numerous witnesses testified they observed that Jeffrey exhibited appropriate parenting skills during the visitation sessions. Such testimony revealed that Jeffrey was an active parent who understood his children's needs. He played educational games with the children and worked with them on their homework. He provided nutritional meals. He did not have a problem appropriately disciplining the children or maintaining order at the visits. Jeffrey was described as a nurturing, effective, and overall "good" parent.

In contrast to this testimony, Coffey testified that Jeffrey does not follow through with the instructions and suggestions of the visitation workers. She also testified that Jeffrey has exhibited anger at the visits and would spend time talking on his telephone rather than interacting with the children. Coffey admitted that she did not personally attend many visits between Jeffrey and the children. Moreover, all of the visitation workers who testified indicated that Coffey never came to a visit when they were working.

Evidence presented at the hearing revealed that there is a strong bond between Jeffrey and Stephanie, Ashley, and Austin. There was evidence that the children are very excited to see Jeffrey when they arrive for visitation and that they are sad to have to leave him. Although Stephanie's therapist testified that Stephanie is not always clear about her feelings for Jeffrey, the

therapist opined that Stephanie would be "devastated" if her parents' parental rights were terminated.

Upon our review of the record, we find that a large part of the evidence presented at the hearing revealed that Jeffrey has made efforts toward reunification with his children and has demonstrated continued improvement in his parenting skills. While we acknowledge that there is evidence to the contrary, such evidence consists mostly of Coffey's testimony. Coffey admitted that most of her testimony was based on other people's reports and not on her personal observations. While we do not disregard Coffey's testimony in its entirety, we also recognize that her testimony was in direct contradiction to the testimony of other witnesses who observed Jeffrey and his children firsthand.

In the juvenile court's order, it noted Jeffrey's efforts; however, it indicated that any improvement on his part was only "superficial." The court based this finding on Jeffrey's repeated involvement with the juvenile court system. The court specifically found that Jeffrey "shows a pattern of doing well when he is court involved, and reverting back to the same harmful patterns once there is no longer court involvement."

As we noted in Tonya's appeal concerning her court involvement and parenting ability, we agree that evidence of past involvement with the juvenile court system is relevant to Jeffrey's ability to appropriately and effectively parent his children and, accordingly, relevant to the children's best interests. However, we do not find such evidence to be dispositive in this situation. There is no evidence to suggest that the improvement Jeffrey has made during the pendency of these proceedings is in any way "superficial" in nature.

Based on all of the evidence presented at the termination hearing, we find that Jeffrey has made significant efforts toward reunification with his children and has demonstrated continued improvement in his parenting skills. We appreciate that Jeffrey still has work to do before achieving reunification. However, as we stated above, we do not require perfection of a parent when deciding whether termination of parental rights is appropriate.

We conclude that there is insufficient evidence to prove that termination of Jeffrey's parental rights to Stephanie, Ashley, and Austin is in those children's best interests. We reverse that portion of the juvenile court's order which terminated Jeffrey's parental rights to Stephanie, Ashley, and Austin.

(b) Justin

Jeffrey also asserts that the juvenile court erred in determining that termination of his parental rights is in Justin's best interests. Upon our de novo review of the record, we find that Jeffrey is unable to provide Justin with the kind of structured, supervised environment that he desperately requires. As such, we conclude that termination of Jeffrey's parental rights is in Justin's best interests.

As we discussed more thoroughly above, Justin continues to struggle with sexual issues. He requires direct and constant supervision because he continues to pose a risk to other children. Justin's therapist testified that Justin requires a caregiver who understands and vigorously implements a safety plan. The therapist indicated that Justin needs to be the only child in the home. The therapist opined that it was in Justin's best interests to terminate Jeffrey's parental rights because Jeffrey is unable to provide the environment Justin needs.

Upon our review of the record, we conclude that termination of Jeffrey's parental rights is in Justin's best interests for the same reasons that termination of Tonya's parental rights is in Justin's best interests. Despite Jeffrey's efforts, he is simply unable to provide Justin with the strict, structured environment he requires. Justin would not be the only child in Jeffrey's home. As a result, it would be difficult, if not impossible, for Jeffrey to supervise Justin as closely as is required. Justin needs, and deserves, a home where he can thrive and work on his behavioral problems. We affirm that portion of the juvenile court's order which terminated Jeffrey's parental rights to Justin.

5. Conclusion

Upon our de novo review of the record, we conclude that there is clear and convincing evidence to demonstrate that each

of Jeffrey's children has been in an out-of-home placement for 15 or more months of the most recent 22 months pursuant to § 43-292(7).

However, we also conclude that there is insufficient evidence to demonstrate that termination of Jeffrey's parental rights is in the best interests of Stephanie, Ashley, and Austin. As such, we reverse that portion of the juvenile court's order terminating Jeffrey's parental rights to Stephanie, Ashley, and Austin.

We conclude that there is sufficient evidence to demonstrate that termination of Jeffrey's parental rights is in the best interests of Justin. We affirm that portion of the juvenile court's order terminating Jeffrey's parental rights to Justin.

VI. MICHAEL'S CROSS-APPEAL

After the hearing, the juvenile court entered an order adjudicating Michael's two children, Kiarra and Cian, as being within the meaning of § 43-247(3)(a) (Reissue 2008) as to Michael. Michael cross-appeals from this order, challenging the sufficiency of the evidence to prove that the children are within the meaning of § 43-247(3)(a) as to Michael. Upon our de novo review of the record, we conclude that the evidence presented at the adjudication hearing was insufficient to warrant a finding that Kiarra and Cian were within the meaning of § 43-247(3)(a) as to Michael. We reverse the juvenile court's order.

Below, we provide a table to make clear the children involved in Michael's cross-appeal and our resolution as to each child.

Child	Parents	Court of Appeals' Decision
Kiarra	Tonya and Michael	Reversed and remanded
Cian	Tonya and Michael	Reversed and remanded

1. Background

Kiarra was removed from Michael and Tonya's home in June 2007. Cian was removed immediately after his birth in August. At the time of the children's removal, the State did not file a petition alleging any fault on Michael's part. As such, Michael was initially not a party to those juvenile court proceedings.

Michael filed a motion to intervene in the proceedings in September 2007. The juvenile court granted the motion in October. Sometime after Michael was permitted to intervene in the case, supervised visitation between Michael and the children was scheduled.

From November 2007 to June 2008, Michael did not consistently attend his scheduled visitation with the children. Michael attended approximately six visits during this time period.

Beginning in June 2008, Michael consistently attended his scheduled visitation. Around this same time, Michael began to attend individual therapy. He also voluntarily submitted to a psychological examination and a chemical dependency evaluation. In addition, Michael began weekly drug testing.

In October 2008, the State filed a petition alleging that Kiarra and Cian were within the meaning of § 43-247(3)(a) as to Michael because he failed to consistently attend visitation, provide safe and suitable housing, provide emotional support, and utilize the services offered by DHHS. The State alleged that Michael's actions put the children at risk for harm.

In that same petition, the State motioned for termination of Michael's parental rights. The State alleged that Kiarra and Cian were within the meaning of § 43-292(2), that Kiarra was within the meaning of § 43-292(7), and that termination of Michael's parental rights was in Kiarra's and Cian's best interests.

A hearing was held on these allegations by the State at the same time as the hearing concerning the State's motions to terminate Tonya's and Jeffrey's parental rights to their children. We will set forth the evidence pertinent to Michael, Kiarra, and Cian in our analysis below.

At the close of the hearing, the juvenile court entered an order adjudicating Kiarra and Cian to be children within the meaning of § 43-247(3)(a) as to Michael. The court found insufficient evidence to support the remaining allegations in the State's petition and did not terminate Michael's parental rights to Kiarra and Cian. The court noted the "substantial progress" Michael had made during the pendency of the proceedings.

Michael cross-appeals from the juvenile court's order.

2. Assigned Errors

On cross-appeal, Michael challenges the sufficiency of the evidence to prove that Kiarra and Cian are within the meaning of § 43-247(3)(a) as to Michael.

3. Insufficient Evidence to Support Adjudication

Michael argues that the juvenile court erred in finding that Kiarra and Cian were within the meaning of § 43-247(3)(a) as to Michael. Specifically, he alleges that the State failed to meet its burden of proof at the adjudication hearing.

Section 43-247(3)(a) grants the juvenile court jurisdiction over any juvenile

> who is homeless or destitute, or without proper support through no fault of his or her parent, guardian, or custodian; 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; whose parent, guardian, or custodian is unable to provide or neglects or refuses to provide special care made necessary by the mental condition of the juvenile; or who is in a situation or engages in an occupation dangerous to life or limb or injurious to the health or morals of such juvenile.

[8,9] To obtain jurisdiction over a juvenile, the court's only concern is whether the conditions in which the juvenile presently finds himself or herself fit within the asserted subsection of § 43-247. *In re Interest of Brian B. et al.*, 268 Neb. 870, 689 N.W.2d 184 (2004). At the adjudication stage, in order for a juvenile court to assume jurisdiction of minor children under § 43-247(3)(a), the State must prove the allegations of the petition by a preponderance of the evidence. *In re Interest of Rebekah T. et al.*, 11 Neb. App. 507, 654 N.W.2d 744 (2002). See *In re Interest of B.R. et al.*, 270 Neb. 685, 708 N.W.2d 586 (2005).

In this case, the State alleged that Kiarra and Cian lacked proper parental care because Michael failed to consistently attend visitation, provide safe and suitable housing, provide emotional support, and utilize the services offered by DHHS. The State alleged that Michael's actions put the children at risk for harm. Upon our de novo review of the record, we find that the State did not present sufficient evidence to prove the allegations in the petition by a preponderance of the evidence.

Evidence presented at the adjudication hearing revealed that Michael consistently attended visitations with Kiarra and Cian beginning in June 2008, that he appropriately parented them during those visitations, that he had acquired appropriate housing, and that he voluntarily participated in services offered by DHHS.

In approximately November 2007, Michael was initially provided with the opportunity to attend supervised visitation with Kiarra and Cian. Michael was not consistent in his attendance at visitations at that time. In fact, between November 2007 and June 2008, he attended only six visits with Kiarra and Cian. However, beginning in June 2008, Michael attended every visitation with them. Michael continued to consistently attend visitations through the end of the hearing in November 2009. Coffey testified that Michael has been consistent in attending visitations since June 2008 and that visitations are going well.

Numerous visitation workers testified about Michael's parenting during the visitation sessions. Such testimony revealed that Michael interacted appropriately with the children and that he was nurturing, attentive, and affectionate. Michael provides the children with age-appropriate toys, games, and books and provides nutritious meals. The visitation workers classified Michael as a "good parent" who was consistent and capable of taking care of the children. The visitation workers testified that they never had any safety concerns when Michael was with the children.

Evidence presented at the hearing revealed that Michael obtained appropriate housing during the pendency of these proceedings. At the time of the hearing, he had lived in his

home for over a year. The house was clean and appropriate for the children. In fact, in the months preceding the hearing, visitations between Michael and the children were held in Michael's home.

Michael voluntarily participated in services offered by DHHS. Michael submitted to a psychological evaluation and a chemical dependency evaluation. He started individual therapy in April 2008. He has been consistent in his attendance at therapy and has made progress. Michael's therapist testified that Michael is doing well in therapy. The therapist indicated that at the time of the adjudication hearing, Michael was employed, had obtained appropriate housing, and had demonstrated the skills and the desire to be a good parent to his children. The therapist testified that there was some concern about Michael's use of marijuana but indicated that Michael is currently receiving drug and alcohol education during his therapeutic sessions. In addition, Michael has submitted to weekly drug testing. At the time of the hearing, Michael had not had a positive test in the last 6 or 7 months.

Based on the evidence presented at the hearing, we find that the State did not present sufficient evidence to prove the allegations in the petition by a preponderance of the evidence. Michael had consistently attended visitation with Kiarra and Cian for approximately 17 months. The last time he missed a visit was in June 2008, more than a year prior to the hearing. Michael has demonstrated that he is capable of parenting his children. He has acquired appropriate housing, and he has voluntarily participated in the services offered by DHHS. There is no evidence that Michael's current actions have created a risk of harm to Kiarra and Cian. Accordingly, we reverse the juvenile court's order which adjudicated Kiarra and Cian to be within the meaning of § 43-247(3)(a) as to Michael.

4. Conclusion

We find that the State did not present sufficient evidence to prove the allegations in the petition by a preponderance of the evidence. We reverse the juvenile court's order which adjudicated Kiarra and Cian to be within the meaning of § 43-247(3)(a) as to Michael.

VII. CONCLUSION

As to Tonya's appeal, we conclude that there is sufficient evidence to warrant termination of Tonya's parental rights to Stephanie, Justin, Nicholas, Zachary, Kiarra, and Cian pursuant to § 43-292(7). However, we find insufficient evidence to demonstrate that termination of Tonya's parental rights is in the best interests of Stephanie, Zachary, Kiarra, and Cian. We find sufficient evidence to demonstrate that termination of Tonya's parental rights is in the best interests of Justin and Nicholas. As such, we affirm that portion of the juvenile court's order terminating Tonya's parental rights to Justin and Nicholas. We reverse that portion of the juvenile court's order terminating Tonya's parental rights to Stephanie, Zachary, Kiarra, and Cian. We remand the case for further proceedings consistent with this opinion.

As to Jeffrey's cross-appeal, we conclude that there is sufficient evidence to warrant termination of Jeffrey's parental rights to Stephanie, Justin, Ashley, and Austin pursuant to § 43-292(7). However, we find insufficient evidence to demonstrate that termination of Jeffrey's parental rights is in the best interests of Stephanie, Ashley, and Austin. We find sufficient evidence to demonstrate that termination of Jeffrey's parental rights is in the best interests of Justin. As such, we affirm that portion of the juvenile court's order terminating Jeffrey's parental rights to Justin. We reverse that portion of the juvenile court's order terminating Jeffrey's parental rights to Stephanie, Ashley, and Austin. We remand the case for further proceedings consistent with this opinion.

As to Michael's cross-appeal, we find that the State did not present sufficient evidence to prove the allegations in the petition by a preponderance of the evidence. Accordingly, we reverse the juvenile court's order which adjudicated Kiarra and Cian to be within the meaning of § 43-247(3)(a) as to Michael. We remand the case for further proceedings consistent with this opinion.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED.

STATE OF NEBRASKA, APPELLEE, V. RUSSELL SUMMERVILLE, APPELLANT.

792 N.W.2d 901

Filed December 14, 2010. No. A-09-930.

1. **Rules of Evidence: Proof.** Pursuant to Neb. Evid. R. 404(2), Neb. Rev. Stat. § 27-404(2) (Reissue 2008), evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person to show that he or she acted in conformity therewith.
2. **Rules of Evidence: Other Acts.** Evidence of other crimes, wrongs, or acts may be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.
3. **Rules of Evidence: Other Acts: Proof.** Before the State may offer prior bad acts evidence under Neb. Evid. R. 404(2), Neb. Rev. Stat. § 27-404(2) (Reissue 2008), it must first prove to the trial court, outside the presence of the jury, by clear and convincing evidence, that the accused committed the prior crime, wrong, or act.
4. **Rules of Evidence: Other Acts.** The admissibility of other crimes evidence under Neb. Evid. R. 404(2), Neb. Rev. Stat. § 27-404(2) (Reissue 2008), must be determined upon the facts of each case and is within the discretion of the trial court.
5. **Criminal Law: Motions for New Trial: Appeal and Error.** In a criminal case, a motion for new trial is addressed to the discretion of the trial court, and unless an abuse of discretion is shown, the trial court's determination will not be disturbed.
6. **Motions for New Trial: Time.** The 10-day limitation for filing a motion for new trial begins to run from the date of the verdict, not the date of sentencing.
7. **Sentences: Appeal and Error.** Where a sentence imposed within the statutory limits is alleged on appeal to be excessive, the appellate court must determine whether the sentencing court abused its discretion in considering and applying the relevant factors as well as any applicable legal principles in determining the sentence to be imposed.
8. ____: ____. The law is well established that an appellate court will not disturb sentences that are within statutory limits, unless the district court abused its discretion in establishing the sentences.

Appeal from the District Court for Douglas County: J. MICHAEL COFFEY, Judge. Affirmed as modified.

Thomas C. Riley, Douglas County Public Defender, and Kelly M. Steenbock for appellant.

Jon Bruning, Attorney General, and Erin E. Tangeman for appellee.

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

IRWIN, Judge.

I. INTRODUCTION

Russell Summerville appeals his convictions and sentences on counts of first degree sexual assault of a child, second offense, and third degree sexual assault of a child. On appeal, Summerville challenges the district court's admission of evidence, the court's denial of two motions for new trial, and the sentences imposed by the court. We find no merit to these assertions, and we affirm. We also modify a clerical error in the district court's sentencing order.

II. BACKGROUND

On October 22, 2008, Summerville was charged in an amended information with one count of first degree sexual assault of a child, second offense, and one count of third degree sexual assault of a child. In the amended information, the State alleged that Summerville, being over the age of 19 years, had subjected S.S., a child less than 12 years of age, to sexual penetration and sexual contact during the month of April 2006 and that Summerville had previously been convicted of first degree sexual assault on a child.

On October 6, 2008, the State filed notice of its intent to offer evidence pursuant to Neb. Evid. R. 404(2), Neb. Rev. Stat. § 27-404(2) (Reissue 2008). The State indicated that the evidence to be offered would be evidence of prior incidents of sexual misconduct perpetrated by Summerville between May and August 1997 upon two victims, K.G. and D.K., to demonstrate motive, intent, preparation, plan, and absence of mistake or accident. The State indicated that the evidence would consist of testimony, with Summerville having an opportunity to confront witnesses. After a hearing, the district court entered an order overruling Summerville's objection to the State's intent to offer this evidence, and the court found that "the evidence of prior acts is relevant evidence of [Summerville's] motive, intent, preparation, plan and absence of mistake or accident relative to the incidents alleged in the amended information."

At trial, the State adduced evidence that Summerville was born in 1958 and that S.S. was born in 1995. In April 2006, S.S.' mother was dating Summerville.

The evidence established that S.S. and her mother did not have a permanent residence in April 2006 and stayed at various places with friends. They stayed overnight with Summerville for several nights in April 2006. S.S. testified that when they spent the night with Summerville, they slept on the floor together, with S.S.' mother lying between Summerville and S.S.

S.S. testified that she spent time alone with Summerville in April 2006 and that Summerville took her to a park and bought her food and candy. Summerville also purchased an Easter outfit for S.S. consisting of a skirt and a shirt.

S.S. testified that on one occasion, her back hurt and her mother was giving her a massage and rubbing her back. When her mother indicated that her hand hurt, Summerville offered to give S.S. a massage and rub her back. S.S. testified that she was wearing nothing other than one of Summerville's T-shirts, because her clothes were being washed, and that Summerville massaged her lower back, near her tailbone. S.S. testified that she was not comfortable with Summerville massaging her because she did not know him very well. After the massage, the three went to sleep on the floor, again with S.S.' mother between her and Summerville. S.S. testified that early the next morning, she awoke to Summerville's touching her "inside [her] vagina" with "[h]is hands." S.S.' mother was still asleep. S.S. testified that she moved so that Summerville would pull away and that she then closed her legs tightly to prevent Summerville from repeating the act. She testified that Summerville "trie[d] to get back in" and that he "trie[d] to pull [her] legs apart." S.S. "silently cried [her]self to sleep."

After the occasion where S.S. awoke to Summerville's touching her, S.S. told her mother about the incident. S.S.' mother confronted Summerville, who denied touching S.S. After that, S.S.' mother continued to leave S.S. alone with Summerville. S.S. testified that she did not want to be around Summerville. Summerville continued to take S.S. to a park and

buy her food. Then, 2 or 3 days after the incident, S.S. was at a park with Summerville when police officers arrived and spoke to S.S. S.S. informed the police officers that Summerville had touched her.

S.S. was interviewed by a police officer, and she initially stated that Summerville had touched her. S.S. later indicated to the officer that "it must have been a dream." S.S. testified at trial that she had told the officer that it might have been a dream because she was scared and thought the officer, like her mother, would not believe her. The officer testified that it was possible that S.S. was "minimizing things due to what her mother had told her" and indicated that S.S. had spent some time with her mother prior to being interviewed. According to the officer, S.S.' mother was "very angry" when speaking to the officer, "was basically defending" Summerville, and also indicated to the officer that S.S. must have been dreaming.

Summerville was also interviewed by the officer. Summerville was asked if he had touched S.S.' vaginal area, and "[h]e advised numerous times throughout the interview that if he did it, that it was not consciously, that he would have been sleeping if that happened."

At trial, the State also presented evidence of Summerville's prior bad acts involving K.G. and D.K. in 1997. K.G.'s and D.K.'s testimony established that Summerville had been a friend of K.G.'s stepfather when K.G. and D.K. were 10 and 11 years old, respectively. K.G. testified that in the summer of 1997, Summerville would often come to K.G.'s house when her mother was at work and would sometimes baby-sit K.G. and her siblings. K.G. testified that at one point, Summerville began giving K.G. shoulder and back massages. K.G. testified that Summerville came into her bedroom at night while she was in bed and rubbed her vaginal area underneath her clothing. Later in the summer, Summerville began taking K.G. places like a library or bookstore and bought her food. Summerville would take K.G. to his apartment and perform oral sex on her. Summerville purchased a "see-through" black dress for K.G. that he had her model for him without wearing any clothes underneath.

On one occasion, K.G.'s friend D.K. went with K.G. to Summerville's apartment. Summerville offered to perform oral sex on D.K., but she declined. At a pretrial hearing, the State presented evidence establishing that Summerville was convicted in 1998 following a bench trial of first degree sexual assault on a child and was sentenced to 2 to 5 years' imprisonment.

Prior to testimony being received from K.G. and D.K., and again in the posttrial jury instructions, the district court gave the jury a detailed limiting instruction concerning the evidence of Summerville's prior bad acts. In the limiting instruction, the court informed the jury that the evidence was admissible and could be considered for only the limited purpose of determining Summerville's intent or motive to commit the crime of third degree sexual assault of a child or for determining whether Summerville had made a preparation or plan or that the sexual contact in this case was not a mistake or accident when determining whether Summerville committed first degree sexual assault of a child or third degree sexual assault of a child. The court also instructed the jury that the testimony was not properly used to determine Summerville's character or to determine his propensity to act in conformity with the prior sexual allegations.

The jury returned a verdict of guilty on both counts. Summerville filed two separate motions for new trial, both of which were overruled. The court found the conviction for first degree sexual assault of a child to be a second offense and sentenced Summerville to consecutive terms of 35 to 35 years' imprisonment for first degree sexual assault of a child and 5 to 5 years' imprisonment for third degree sexual assault of a child. This appeal followed.

III. ASSIGNMENTS OF ERROR

Summerville has assigned four errors on appeal, which we consolidate for discussion to three. First, Summerville asserts that the district court erred in admitting the prior bad acts evidence. Second, Summerville asserts that the court erred in overruling his motions for new trial. Third, Summerville asserts that the court erred in imposing excessive sentences.

IV. ANALYSIS

1. Prior Bad Acts Evidence

Summerville first challenges the district court's allowing testimony concerning his prior bad acts involving K.G. and D.K. Summerville asserts the court erred in allowing the testimony because the State failed to adduce sufficient evidence to establish by clear and convincing evidence that the prior bad acts had actually occurred and that Summerville was responsible for them. Summerville also asserts the court erred in allowing the testimony because the evidence was adduced solely to establish his propensity to commit sexual assault of a child. We find no merit to either assertion.

[1-4] Rule 404(2) provides that evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person to show that he or she acted in conformity therewith. Evidence of other crimes, wrongs, or acts may be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. See *id.* Before the State may offer prior bad acts evidence under rule 404(2), it must first prove to the trial court, outside the presence of the jury, by clear and convincing evidence, that the accused committed the prior crime, wrong, or act. See *State v. Sanchez*, 257 Neb. 291, 597 N.W.2d 361 (1999). The admissibility of other crimes evidence under rule 404(2) must be determined upon the facts of each case and is within the discretion of the trial court. *Id.*

Summerville argues that the prior bad acts evidence was not admissible because the State failed to adduce sufficient evidence to establish by clear and convincing evidence that the prior bad acts occurred and that Summerville was responsible for them. We disagree.

At the pretrial hearing on this matter, both K.G. and D.K. testified about the prior acts occurring during the summer of 1997. The State adduced evidence that those events led to Summerville's being convicted in 1998 on a charge of first degree sexual assault on a child. Although K.G. acknowledged some discrepancies between her testimony in the present case and her statements to law enforcement when investigating the

1997 events, those discrepancies do not prevent the State's evidence from failing to clearly and convincingly establish that the prior bad acts actually occurred or that Summerville was responsible for them. This argument is without merit.

In *State v. Sanchez, supra*, the Nebraska Supreme Court held that the proponent of evidence offered pursuant to rule 404(2) must, upon objection to its admissibility, be required to state on the record the specific purpose or purposes for which the evidence is being offered and that the trial court must similarly state the purpose or purposes for which the evidence is received. In the present case, the State indicated on the record that it was requesting the prior bad acts evidence be admitted for purposes of proving intent, motive, plan and preparation, and absence of mistake or accident. In ruling that the evidence would be admissible, the district court held that it was relevant evidence of Summerville's motive, intent, preparation and plan, and absence of mistake or accident relative to the incidents alleged in the amended information.

In the present case, Summerville argues that the evidence adduced by the State was not relevant for any of those purposes and that, rather, it was admitted solely to demonstrate his propensity to commit sexual assault of a child. We disagree.

First, the prior bad acts evidence was relevant in the present case to prove Summerville's intent and motive. Although Summerville cites this court to *State v. Sanchez, supra*, for the proposition that prior bad acts evidence is not admissible to prove intent when intent is not an element of the charged offense, the State in the present case charged Summerville with both first degree sexual assault of a child, for which intent is not an element, and third degree sexual assault of a child, for which intent is an element. Despite Summerville's arguments that the third degree sexual assault of a child charge was made solely to allow admission of the prior bad acts evidence, the State adduced sufficient testimony at trial to prove that Summerville committed third degree sexual assault of a child and the charge was properly supported by the evidence. We will not speculate about the State's underlying motives for bringing a supportable and proper charge based on Summerville's conduct. The district court also instructed

the jury that the prior bad acts evidence was admissible with respect to intent and motive concerning the third degree sexual assault of a child charge and not the first degree sexual assault of a child charge.

Additionally, we agree with the State that the evidence was properly admissible to show absence of mistake or accident. Summerville argues that he did not raise mistake or accident as a defense and that, accordingly, absence of mistake or accident was not a proper reason for admitting the evidence. The record establishes, however, that when Summerville was interviewed by law enforcement, he indicated on multiple occasions that he was "not aware" of having touched S.S.' vaginal area and had not done so "consciously" or that if he did do so, it happened while he was asleep. As such, the issue of mistake or accident was raised by Summerville's responses to law enforcement questioning, and the prior bad acts evidence was properly relevant on the issue of absence of mistake or accident.

We conclude that the prior bad acts evidence was properly admissible for reasons other than to show propensity and that Summerville's arguments to the contrary are without merit.

2. Motions for New Trial

Summerville next asserts that the district court erred in denying his two motions for new trial. He asserts that his first motion should have been granted because of evidence a member of the jury pool intentionally tainted the pool during jury selection and that his second motion should have been granted because the State listed the wrong statute number in the charging document. We find no merit to these assertions.

(a) First Motion for New Trial

[5] In a criminal case, a motion for new trial is addressed to the discretion of the trial court, and unless an abuse of discretion is shown, the trial court's determination will not be disturbed. *State v. Alford*, 278 Neb. 818, 774 N.W.2d 394 (2009). To be effective, the motion must be filed within 10 days of the verdict unless the motion is based on newly discovered evidence material to the moving party, which he could not with

reasonable diligence have discovered and produced at trial, or unless filing within 10 days was unavoidably prevented. *State v. McCormick and Hall*, 246 Neb. 271, 518 N.W.2d 133 (1994), *overruled in part on other grounds, State v. Thomas*, 262 Neb. 985, 637 N.W.2d 632 (2002).

Summerville's first motion for new trial was based on an assertion that one of the members of the jury pool intentionally tainted the jury pool with comments made during questioning by counsel as part of jury selection. There is no evidence that the jury pool was tainted as a result of any comments made by the potential juror, and during the hearing on the motion for new trial, the prospective juror testified and explained that he had not intended to taint the jury pool. We note that the prospective juror was not selected to serve as a juror on this case and that Summerville passed the panel of prospective jurors for cause and without objection to the prospective juror's comments. See *Regier v. Nebraska P.P. Dist.*, 189 Neb. 56, 199 N.W.2d 742 (1972) (no challenge for cause overruled and panel passed for cause). We find no abuse of discretion by the district court in denying this motion for new trial.

(b) Second Motion for New Trial

[6] The 10-day limitation for filing a motion for new trial begins to run from the date of the verdict, not the date of sentencing. *State v. McCormick and Hall, supra.* If the motion is filed more than 10 days after the verdict, the motion shall have no effect unless it falls within one of the two statutory exceptions stated above. *Id.*

The district court entered an order on the jury's verdict of guilty on November 6, 2008. Summerville filed a second motion for new trial and requested a hearing on May 19, 2009. As such, Summerville's second motion for new trial was filed outside the 10-day period set forth in Neb. Rev. Stat. § 29-2103 (Reissue 2008).

Further, we find no abuse of discretion by the district court in denying the second motion for new trial. The second motion for new trial was based on Summerville's challenge to the State's amended information charging him with having violated Neb. Rev. Stat. § 28-319.01(1) (Reissue 2008), which was

not in effect at the time of Summerville's actions related to S.S. The statute in effect at the time of Summerville's actions related to first degree sexual assault on a child was Neb. Rev. Stat. § 28-319(1)(c) (Reissue 1995), which stated that the crime was committed by any person who subjects another person to sexual penetration when the actor is 19 years of age or older and the victim is less than 16 years of age. Section 28-319.01(1) stated that the crime was committed by any person who subjects another person to sexual penetration when the actor is 19 years of age or older and the victim is under 12 years of age.

In the present case, the amended information specifically alleged that Summerville had subjected S.S. to sexual penetration when Summerville was 19 years of age or older and when S.S. was less than 12 years of age. There is no dispute in the record that S.S. was 10 years of age at the time of the events in this case. Although the amended information incorrectly referenced § 28-319.01(1), the allegations against Summerville also properly alleged violation of § 28-319(1)(c), the statute in effect at the time of the crime; informed Summerville with reasonable certainty of the crime charged so that he could prepare a defense; and allowed Summerville to plead the judgment of conviction as a bar to a later prosecution for the same offense. See *State v. Brunzo*, 262 Neb. 598, 634 N.W.2d 767 (2001). Further, as discussed below, the district court properly used the penalty classifications of § 28-319(1)(c) when sentencing Summerville. There was no abuse of discretion in denying this second motion for new trial.

3. Excessive Sentences

Summerville also challenges the sentences imposed by the district court. Summerville argues that the sentences, while within statutory limits, are excessive because of his age, history of employment, and criminal history. We find no merit to these assertions.

[7,8] Where a sentence imposed within the statutory limits is alleged on appeal to be excessive, the appellate court must determine whether the sentencing court abused its discretion in considering and applying the relevant factors as well as

any applicable legal principles in determining the sentence to be imposed. *State v. Alford*, 278 Neb. 818, 774 N.W.2d 394 (2009). The law is well established that an appellate court will not disturb sentences that are within statutory limits, unless the district court abused its discretion in establishing the sentences. *State v. Simnick*, 17 Neb. App. 766, 771 N.W.2d 196 (2009), *reversed in part* 279 Neb. 499, 779 N.W.2d 335 (2010).

In the present case, there is no dispute that the sentences imposed were within the statutory limits. The district court sentenced Summerville to 35 to 35 years' imprisonment on the first degree sexual assault of a child, second offense, conviction and to 5 to 5 years' imprisonment on the third degree sexual assault of a child conviction. The court ordered the two sentences to be served consecutively. Neither Summerville's age at the time of sentencing—he was approximately 51 years old—nor his personal history and the nature of the offense demonstrate an abuse of discretion.

The record indicates that Summerville sexually assaulted the 10-year-old daughter of a woman he was dating by digitally penetrating the girl while she was asleep. This is Summerville's second conviction for sexually assaulting a 10-year-old girl. The sentences imposed were well within the statutory limits permissible for these offenses, and we find no abuse of discretion.

The State notes on appeal that the district court, in the written sentencing order, indicated that the conviction for first degree sexual assault of a child, second offense, was a Class IB felony offense. The offense was actually a Class II felony offense under the statute in effect at the time the crime was committed. See § 28-319(2). Despite the indication in the written sentencing order that the offense was a Class IB felony offense, the district court sentenced Summerville for conviction of a Class II felony offense. The imposed sentence was properly within the limits for a Class II felony offense, and the court was sentencing him for a Class II felony offense, notwithstanding the clerical error referencing a Class IB felony offense in the written sentencing order. We amend the sentencing order to indicate that the conviction for first degree sexual assault of

a child, second offense, was a Class II felony offense, not a Class IB felony offense.

Finally, Summerville also asserts that the district court erred in crediting his time served on the third degree sexual assault of a child conviction instead of on the first degree sexual assault of a child conviction. Summerville has not demonstrated why it was an abuse of discretion for the court to order his credit applicable to the third degree sexual assault of a child conviction. We find no merit to this argument.

V. CONCLUSION

We find no merit to the assertions raised by Summerville on appeal. The district court did not commit reversible error in admitting prior bad acts evidence, did not abuse its discretion in overruling Summerville's motions for new trial, and did not impose excessive sentences. We amend the sentencing order to remedy a clerical error concerning the proper classification of Summerville's conviction for first degree sexual assault of a child, second offense.

AFFIRMED AS MODIFIED.

STATE OF NEBRASKA, APPELLEE, V.
BRAD CARNICLE, APPELLANT.
792 N.W.2d 893

Filed December 14, 2010. No. A-10-074.

1. **Motions to Suppress: Investigative Stops: Warrantless Searches: Probable Cause: Appeal and Error.** A trial court's ruling on a motion to suppress, 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.
2. **Investigative Stops: Appeal and Error.** The ultimate determination of reasonable suspicion to conduct an investigatory stop is reviewed de novo.
3. **Motor Vehicles.** Under Neb. Rev. Stat. § 60-6,225(2) (Reissue 2004), any motor vehicle may be equipped with not to exceed two auxiliary driving lights mounted on the front at a height not less than 12 inches nor more than 42 inches above the level surface on which the vehicle stands, and every such auxiliary driving light shall meet the requirements and limitations set forth in Neb. Rev. Stat. § 60-6,221 (Reissue 2004).

4. ____. Under Neb. Rev. Stat. § 60-6,225(2) (Reissue 2004), auxiliary driving lights shall be turned off at the same time a motor vehicle's headlights are required to be dimmed when approaching another vehicle from either the front or the rear.
5. ____. Neb. Rev. Stat. § 60-6,221(1) (Reissue 2004) provides that headlights shall produce a driving light sufficient to render clearly discernible a person 200 feet ahead, but that the headlights shall not project a glaring or dazzling light to persons in front of such headlights.
6. **Investigative Stops: Motor Vehicles: Police Officers and Sheriffs: Probable Cause.** The question is not whether the officer issued a citation for a traffic violation or whether the State ultimately proved the violation. Instead, a stop of a vehicle is objectively reasonable when an officer has probable cause to believe that a traffic violation has occurred.
7. **Investigative Stops: Motor Vehicles: Probable Cause.** A traffic violation, no matter how minor, creates probable cause to stop the driver of a vehicle.
8. **Investigative Stops: Police Officers and Sheriffs: Probable Cause.** If an officer has probable cause to stop a violator, the stop is objectively reasonable, and any ulterior motivation on the officer's part is irrelevant.
9. **Police Officers and Sheriffs: Probable Cause: Appeal and Error.** In reviewing a determination of probable cause, an appellate court focuses on the facts known to law enforcement officers, not the conclusions the officers drew from those facts.
10. **Investigative Stops: Police Officers and Sheriffs: Motor Vehicles.** A vehicle's lights, of whatever kind, could, subjectively, be so glaring or dazzling as to provide a law enforcement officer with reasonable suspicion to make a traffic stop for a violation of the statutes governing lighting equipment on vehicles.
11. **Criminal Law: Motor Vehicles: Words and Phrases.** While Nebraska law does not make it illegal to drive with statutory auxiliary driving lights per se, such lights must comply with certain requirements in order to be lawful. Auxiliary driving lights are defined by Neb. Rev. Stat. § 60-6,225(2) (Reissue 2004), and under that subsection, if they do not meet the criteria for headlights set forth in Neb. Rev. Stat. § 60-6,221 (Reissue 2004), it is a Class III misdemeanor under Neb. Rev. Stat. § 60-6,222 (Reissue 2004).
12. **Criminal Law: Motor Vehicles.** Neb. Rev. Stat. § 60-6,224(1) (Reissue 2004) provides that whenever any person operating a motor vehicle on any highway in Nebraska meets another person operating a motor vehicle, proceeding in the opposite direction and equipped with headlights constructed and adjusted to project glaring or dazzling light to persons in front of such headlights, upon signal of either person, the other shall dim the headlights of his or her motor vehicle or tilt the beams of glaring or dazzling light projecting therefrom downward so as not to blind or confuse the vision of the operator in front of such headlights. Violation of § 60-6,224 is a Class V misdemeanor.

Appeal from the District Court for Lancaster County, JOHN A. COLBORN, Judge, on appeal thereto from the County Court for Lancaster County, GERALD E. ROUSE and LAURIE YARDLEY,

Judges. Judgment of District Court reversed, and cause remanded with directions.

Matthew K. Kosmicki, of Brennan & Nielsen Law Offices, P.C., for appellant.

Jon Bruning, Attorney General, and Nathan A. Liss for appellee.

SIEVERS, MOORE, and CASSEL, Judges.

SIEVERS, Judge.

A Nebraska state trooper stopped Brad Carnicle's vehicle on U.S. Highway 34 because Carnicle failed to dim his "auxiliary driving lights," and the stop led to his arrest for driving while under the influence (DUI) and ultimately his conviction of that crime. The undisputed evidence is that Carnicle's vehicle was equipped with factory-installed fog lamps, which Carnicle argues are not within the purview of Neb. Rev. Stat. § 60-6,225 (Reissue 2004), defining auxiliary driving lights, and Carnicle argues that as a result, the trooper did not have probable cause for the stop. We conclude there is no evidence whatsoever that Carnicle violated the statute which determines when he must dim his vehicle's headlights. Moreover, Carnicle's fog lamps are not auxiliary driving lights under Nebraska statutes, and, in any event, there was no probable cause for the trooper to believe that the fog lamps were illegal or had to be dimmed. Therefore, Carnicle's motion to suppress evidence should have been sustained, and we reverse, and remand.

FACTUAL AND PROCEDURAL BACKGROUND

The stop at issue occurred at approximately 11 p.m. on April 4, 2008, as Trooper Caleb Bruggeman was proceeding eastbound, and Carnicle westbound, on Highway 34 in Lancaster County. Bruggeman observed two vehicles approaching him, and the second vehicle, which turned out to be Carnicle's, was, according to Bruggeman, 25 feet behind the first vehicle. Bruggeman did not flash his cruiser's headlights or otherwise "signal" the approaching drivers to dim their vehicles'

lights. Carnicle's vehicle had its headlights on low beam when Bruggeman passed by, and its fog lamps were also then illuminated. Bruggeman referred to these lights as "auxiliary lights," which he defined as "any lights mounted on the front of the vehicle other than headlights." Bruggeman admitted that the lights he was referring to were fog lamps and that after he made the stop, he could discern that they were "factory installed."

Carnicle testified that his vehicle's fog lamps were factory installed and that they are controlled by a separate switch on the dashboard. He testified that when the fog lamps are turned on, they automatically turn off when the headlights are switched to bright and then come back on when the driver dims the headlights to low beam. Portions of the vehicle's operator's manual were received in evidence, and the manual's contents mirrored Carnicle's testimony as to how the fog lamps operate.

After passing the approaching vehicles, Bruggeman turned around, caught up to the second vehicle in line, and stopped it. Upon contact with the driver, Carnicle, Bruggeman informed him that he was stopped for failing to "dim the auxiliary driving lights"—the factory-installed fog lamps. A DUI investigation ensued, and an Intoxilyzer breath test was obtained yielding a result of .10 of 1 gram of alcohol per 210 liters of breath. No challenge is made to the conduct of such test or the result. Upon being charged with first-offense DUI in Lancaster County Court, Carnicle filed a motion to suppress on the ground that there was no probable cause for the stop.

The county court granted Carnicle's motion to suppress, finding that the fog lamps were manufactured with the vehicle, were not "add-ons" and thus not auxiliary driving lights, and were not within the contemplation of the statutory language of § 60-6,225(2). Therefore, the court found that there was no probable cause for the stop and suppressed the evidence of DUI.

The State appealed the county court's decision on the motion to suppress to the district court, which reversed the suppression order and remanded the matter for trial. The district court reasoned, summarized, that the question was not

whether the fog lamps on Carnicle's vehicle actually violated § 60-6,225, but whether Bruggeman had an objectively reasonable basis to believe that they violated the statute when they were not dimmed. The district court found such reasonable basis, therefore deciding that Bruggeman had probable cause to stop the vehicle. After remand back to county court and a stipulated trial which preserved the suppression issue, Carnicle was found guilty of DUI, first offense, and placed on probation. Another appeal followed to the district court, which affirmed the conviction, and now Carnicle appeals to this court.

ASSIGNMENTS OF ERROR

We reduce Carnicle's several assignments of error to their essence: Did the district court err in reversing the county court's ruling on the motion to suppress and, after the conviction in county court, again err by affirming the county court's overruling of the motion to suppress during the trial after the district court's remand?

STANDARD OF REVIEW

[1,2] A trial court's ruling on a motion to suppress, 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. Bjorklund*, 258 Neb. 432, 604 N.W.2d 169 (2000), *abrogated on other grounds, State v. Mata*, 275 Neb. 1, 745 N.W.2d 229 (2008); *State v. Konfrst*, 251 Neb. 214, 556 N.W.2d 250 (1996). The ultimate determination of reasonable suspicion to conduct an investigatory stop is reviewed de novo. See *State v. Konfrst, supra.*

ANALYSIS

[3-5] The facts are not disputed, and thus, we approach the appeal as involving only questions of law. We begin our analysis with the statute allowing vehicles to be equipped with "auxiliary driving lights" and defining such, § 60-6,225(2), which provides in pertinent part:

> Any motor vehicle may be equipped with not to exceed two auxiliary driving lights mounted on the front at a

> height not less than twelve inches nor more than forty-two inches above the level surface on which the vehicle stands, and every such auxiliary driving light shall meet the requirements and limitations set forth in section 60-6,221. . . . Auxiliary driving lights shall be turned off at the same time the motor vehicle's headlights are required to be dimmed when approaching another vehicle from either the front or the rear.

The terms of the above statute require that we refer to Neb. Rev. Stat. § 60-6,221 (Reissue 2004). Section 60-6,221(1) provides that headlights shall "produce a driving light sufficient to render clearly discernible a person two hundred feet ahead, but the headlights shall not project a glaring or dazzling light to persons in front of such headlights." Section 60-6,221(2) then provides:

> Headlights shall be deemed to comply with the provisions prohibiting glaring and dazzling lights if none of the main bright portion of the headlight beam rises above a horizontal plane passing through the light centers parallel to the level road upon which the loaded vehicle stands and in no case higher than forty-two inches, seventy-five feet ahead of the vehicle.

The lights on Carnicle's vehicle with which we are concerned are referenced in the owner's manual as "fog lamps." They are controlled by a separate switch. Once the "fog lamps" are switched on by the driver, they operate in the following manner as described in the owner's manual for Carnicle's vehicle: "The fog lamps will go off whenever your high-beam headlamps come on. When the high beams go off, the fog lamps will come on again." However, we note that this operating sequence is the opposite of how § 60-6,225(2) requires that "auxiliary driving lights" operate. That statute provides: "Auxiliary driving lights shall be turned off at the same time the motor vehicle's headlights are required to be dimmed when approaching another vehicle from either the front or the rear." The statutory provision allowing for a vehicle to be equipped with "two auxiliary driving lamps" has been part of Nebraska law since 1931. See Comp. Stat. § 39-1175(b) (Supp. 1931). Given that under the statutes just discussed,

"auxiliary driving lights" have the same operating attributes as "headlights," and given that there is no evidence that the "fog lamps" on Carnicle's vehicle have such attributes, we agree with the county court's conclusion that "fog lamps" are not statutorily defined auxiliary driving lights. However, we agree with the district court that such conclusion is not necessarily determinative with respect to whether there was probable cause for the stop.

[6-8] As said, the county court sustained the motion to suppress on the basis that the fog lamps were not auxiliary driving lights. In contrast, the district court undertook an analysis of whether it was objectively reasonable for Bruggeman to believe that Carnicle's failure to turn off what turned out to be fog lamps was a law violation, which would in turn provide probable cause for the traffic stop that led to the DUI investigation and arrest. The district court's approach was fundamentally correct because the determinative issue is whether there was probable cause for the traffic stop, not whether Carnicle was actually in violation of the statutes regarding headlights and auxiliary driving lights. In this regard, we recall the fundamental proposition that "the question is not whether the officer issued a citation for a traffic violation or whether the State ultimately proved the violation. Instead, a stop of a vehicle is objectively reasonable when the officer has probable cause to believe that a traffic violation has occurred." *State v. Draganescu*, 276 Neb. 448, 459, 755 N.W.2d 57, 73 (2008). A traffic violation, no matter how minor, creates probable cause to stop the driver of a vehicle. *State v. Bartholomew*, 258 Neb. 174, 602 N.W.2d 510 (1999). If an officer has probable cause to stop a violator, the stop is objectively reasonable, and any ulterior motivation on the officer's part is irrelevant. *Id.* Put another way, in the context of determining whether there was probable cause for a traffic stop, "objectively reasonable" equates to probable cause.

[9] Our determination of probable cause is made de novo. Importantly, the validity of an arrest hinges on the existence of probable cause, not the officer's knowledge that probable cause exists. *State v. Ball*, 271 Neb. 140, 710 N.W.2d 592 (2006). See, also, *State v. Vermuele*, 234 Neb. 973, 453

N.W.2d 441 (1990). In *State v. Ball*, the court quoted from the Seventh Circuit:

> "Police officers are not required to be legal scholars. This means, among other things, that the arresting officer's knowledge of facts sufficient to support probable cause is more important to the evaluation of the propriety of an arrest than the officer's understanding of the legal basis for the arrest."

271 Neb. at 154, 710 N.W.2d at 605, quoting *Williams v. Jaglowski*, 269 F.3d 778 (7th Cir. 2001). Thus, the *Ball* court said that "we focus on the facts known to the officers, not the conclusions the officers drew from those facts." 271 Neb. at 154, 710 N.W.2d at 605. The *Ball* court's observation just quoted is another way of pointing out that appellate courts review determinations of probable cause de novo and reach independent conclusions of law.

What Bruggeman knew and observed is derived from his report and testimony at the suppression hearing—all of which is undisputed. We quote from Bruggeman's report:

> Bruggeman observed two westbound vehicles and noted the second vehicle was following the first vehicle by approximately 25′. . . . Bruggeman also noted the second vehicle was driving with its auxiliary driving lights on. The second vehicle failed to dim its lights when it met . . . Bruggeman. . . . Bruggeman turned around behind the vehicle and performed a traffic stop.

[10] When asked why he stopped the vehicle, Bruggeman testified, "For failing to dim the auxiliary driving lights." However, given the undisputed evidence about the way Carnicle's factory-installed fog lamps operated, it is clear that Carnicle had his headlights dimmed when Bruggeman passed by him; otherwise, the fog lamps would not have been on. Bruggeman answered in the affirmative when asked whether these lights "provide[d] any glare [in his] direction," but that affirmative answer to an arguably leading question is the sum total of the evidence about glare or its severity. And, it was not until after the vehicle was stopped that Bruggeman knew that the lights were "fog lamps." However, as outlined above, whether a vehicle's front lights are unlawfully "glaring" or

"dazzling" requires, at least for a conviction of the associated crime, an objective measurement under § 60-6,221(2), which was not performed in this case. However, even absent such measurement, we recognize the possibility that a vehicle's lights, of whatever kind, could, subjectively, be so "glaring" or "dazzling" as to provide a law enforcement officer with reasonable suspicion to make a traffic stop for a violation of the statutes governing lighting equipment on vehicles. However, in the case before us, Bruggeman provided no testimony so as to justify the stop on that basis—his reason was solely "failing to dim the auxiliary driving lights." The State argues that these lights were auxiliary lights that had to be dimmed, directing us initially to Black's Law Dictionary 155 (9th ed. 2009), which defines auxiliary as "**1.** Aiding or supporting. **2.** Subsidiary." As part of its argument, the State notes that the owner's manual in evidence says, "Your parking lamps and/or low-beam headlamps must be on for your fog lamps to work." The owner's manual also states, "Remember, fog lamps alone will not give off as much light as your headlamps"; "Never use your fog lamps in the dark without turning on your headlamps"; and "Use the fog lamps for better vision in foggy or misty conditions." Thus, the State contends that fog lamps are clearly "aiding or supporting" lights and, therefore, are properly described from a grammatical standpoint by the adjective "auxiliary." Brief for appellee at 7. But, that is different from whether the fog lamps are "auxiliary driving lights," as defined by § 60-6,225(2), that might have to be dimmed for an oncoming vehicle.

[11] While Nebraska law does not make it illegal to drive with statutory auxiliary driving lights per se, such lights must comply with certain requirements in order to be lawful. Auxiliary driving lights are defined by § 60-6,225(2), and under that subsection, if they do not meet the criteria for headlights set forth in § 60-6,221, it is a Class III misdemeanor under Neb. Rev. Stat. § 60-6,222 (Reissue 2004). The standard for a lawful headlight, and, by extension, a lawful auxiliary driving light, is found in § 60-6,221:

> (1) The headlights of motor vehicles shall be so constructed, arranged, and adjusted that, except as provided

> in subsection (2) of this section, they will at all times mentioned in section 60-6,219 produce a driving light sufficient to render clearly discernible a person two hundred feet ahead, but the headlights shall not project a glaring or dazzling light to persons in front of such headlights.
>
> (2) Headlights shall be deemed to comply with the provisions prohibiting glaring and dazzling lights if none of the main bright portion of the headlight beam rises above a horizontal plane passing through the light centers parallel to the level road upon which the loaded vehicle stands and in no case higher than forty-two inches, seventy-five feet ahead of the vehicle.

Therefore, what violates the prohibition against "glaring" and "dazzling" that applies to headlights and auxiliary driving lights is determined by precise measurements delineated by statute. Such measurements simply would not be feasible through mere visual observation by a state trooper driving toward an oncoming vehicle in the dark when both vehicles are traveling at highway speeds. As stated above, where a headlight or auxiliary driving light is so "glaring" or "dazzling" that an officer reasonably believes the light violates § 60-6,221, such subjective belief could provide probable cause for a traffic stop. However, there is no evidence to that effect in the instant case, as the testimony elicited from Bruggeman was merely that Carnicle's fog lamps provided a glare in his direction. When a law enforcement officer has knowledge, based on information reasonably trustworthy under the circumstances, which justifies a prudent belief that a suspect is committing or has committed a crime, the officer has probable cause to arrest without a warrant. *State v. Vermuele*, 241 Neb. 923, 492 N.W.2d 24 (1992). We find upon our de novo review that under the reasonably objective standard, probable cause to believe that Carnicle's oncoming vehicle was equipped with illegal auxiliary driving lights, or, for that matter, legal auxiliary driving lights that had to be dimmed but were not, was not present.

[12] Moreover, there is another aspect of this case that appears to have escaped analysis, or at least comment, by either

the county or the district court. According to Bruggeman's testimony, the stop was for "failing to dim the auxiliary driving lights," which basis is also stated in Bruggeman's written report of these events prepared shortly after they occurred. The specific duty of a driver such as Carnicle to dim a vehicle's lights in response to a signal from Bruggeman's oncoming cruiser is set forth in § 60-6,224 (Reissue 2004), which provides:

> (1) Whenever any person operating a motor vehicle on any highway in this state meets another person operating a motor vehicle, proceeding in the opposite direction and equipped with headlights constructed and adjusted to project glaring or dazzling light to persons in front of such headlights, upon signal of either person, the other shall dim the headlights of his or her motor vehicle or tilt the beams of glaring or dazzling light projecting therefrom downward so as not to blind or confuse the vision of the operator in front of such headlights[.]

Violation of this statute is a Class V misdemeanor. *Id.* But, the evidence is undisputed that Bruggeman did not flash his cruiser's headlights or otherwise signal at Carnicle as he approached—which would be the appropriate action to take if Carnicle's vehicle's lights were truly "glaring" or "dazzling." See *id.* Therefore, because Bruggeman did not do so, the predicate facts for a violation of § 60-6,224 are simply absent, and thus, there was no probable cause to stop Carnicle for failure to dim his vehicle's lights on that ground. And this is true irrespective of whether the "fog lamps" are considered headlights, auxiliary driving lights, or some other kind of lights.

And, we note, if fog lamps are contemplated under § 60-6,225(4) as "[a]ny device, other than headlights, spotlights, or auxiliary driving lights, which projects a beam of light of an intensity greater than twenty-five candlepower," then such fog lamps must be "so directed that no part of the beam will strike the level of the surface on which the vehicle stands at a distance of more than fifty feet from the vehicle." *Id.* There is no evidence Bruggeman's stop was based on a reasonable suspicion that Carnicle's fog lamps

violated § 60-6,225(4). Bruggeman's police report, in evidence, referred to such fog lamps as "auxiliary driving lights" that Carnicle failed to dim, not lights in excess of 25 candlepower which struck the surface of the ground more than 50 feet ahead of his vehicle.

CONCLUSION

Therefore, in the end, we find after our de novo review that there was no probable cause for the traffic stop of Carnicle, and as a result, the evidence of his DUI must be suppressed. Accordingly, we remand the cause to the district court for Lancaster County with directions to reverse the conviction and remand the matter to the Lancaster County Court with directions to sustain Carnicle's motion to suppress.

REVERSED AND REMANDED WITH DIRECTIONS.

KELLY J. LENNERS, APPELLANT, V. ST. PAUL FIRE AND MARINE INSURANCE COMPANY, A MINNESOTA CORPORATION, ET AL., APPELLEES, AND AMERICAN FAMILY MUTUAL INSURANCE COMPANY, INTERVENOR-APPELLEE.

793 N.W.2d 357

Filed December 28, 2010. No. A-09-1042.

1. **Motions to Dismiss: Pleadings: Appeal and Error.** An appellate court reviews a district court's order granting 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.
2. **Limitations of Actions: Appeal and Error.** Which statute of limitations applies is a question of law that an appellate court must decide independently of the conclusion reached by the trial court.
3. **Decedents' Estates: Claims: Limitations of Actions.** For purposes of any statute of limitations, the proper presentation of a claim under Neb. Rev. Stat. § 30-2486 (Reissue 2008) is equivalent to commencement of a proceeding on the claim.
4. **Decedents' Estates: Claims.** The mere filing of a claim with a probate court does not constitute commencement of a proceeding to enforce a claim within the meaning of Neb. Rev. Stat. § 30-2404 (Reissue 2008).
5. **Decedents' Estates: Courts: Jurisdiction.** Neb. Rev. Stat. § 24-517(1) (Cum. Supp. 2006) confers upon the county court exclusive original jurisdiction of all matters relating to decedents' estates, including the probate of wills and the construction thereof, except as provided in Neb. Rev. Stat. §§ 30-2464(c) and 30-2486 (Reissue 2008).

6. **Decedents' Estates: Executors and Administrators: Claims.** Neb. Rev. Stat. § 30-2488(a) (Reissue 2008) treats a failure to disallow a claim as an allowance of the claim, but also authorizes a personal representative to change his or her decision regarding allowance or disallowance of a claim.
7. **Decedents' Estates: Claims: Time.** Neb. Rev. Stat. § 30-2488(a) (Reissue 2008) imposes a time limitation on a decision changing disallowance of a claim to allowance but does not impose a time limit on changing an allowance to a disallowance.

Appeal from the District Court for Gage County: PAUL W. KORSLUND, Judge. Reversed and remanded for further proceedings.

Danene J. Tushar, of Fraser Stryker, P.C., L.L.O., for appellant.

Stephen L. Ahl and Krista M. Carlson, of Wolfe, Snowden, Hurd, Luers & Ahl, L.L.P., for appellees.

Stephanie F. Stacy and Derek C. Zimmerman, of Baylor, Evnen, Curtiss, Grimit & Witt, L.L.P., for intervenor-appellee.

SIEVERS, MOORE, and CASSEL, Judges.

CASSEL, Judge.

INTRODUCTION

The district court held that the appellant's action for underinsured motorist benefits under the insurance policy covering her vehicle was barred by the statute of limitations. The instant appeal turns upon whether the appellant made a "proper" presentation of her claim in the other driver's estate. Because we conclude that the claim filed with the probate court was the equivalent, for purposes of the statute of limitations, of commencement of a proceeding on the claim, we reverse, and remand for further proceedings consistent with this opinion.

BACKGROUND

Collision and Parties.

On March 4, 2003, two motor vehicles collided. Kelly J. Lenners was the driver of one vehicle, and David Leafty, who was killed in the collision, was the other driver.

We identify the other parties in the action and their respective roles: St. Paul Fire and Marine Insurance Company (St. Paul) is the issuer of the liability insurance policy, including underinsured motorist coverage, on the vehicle Lenners was driving. Farm Credit Services of America (Farm Credit) is St. Paul's insured and was Lenners' employer and the lessee of the Lenners vehicle. In an amended complaint, Lenners joined herself, in her capacity as the personal representative of Leafty's estate, as an additional defendant. Finally, American Family Mutual Insurance Company (American Family), which intervened in the district court proceeding, is the liability insurance carrier for Leafty and his estate. For convenience, we refer to St. Paul, Farm Credit, and American Family collectively as the insurers.

Leafty's Estate.

Before we set forth the history of the case now before us, we describe the proceedings in Leafty's estate in the county court for Gage County, because the contentions of the parties focus on these proceedings. A certified transcript of the county court's filings is included in our bill of exceptions.

On February 21, 2007, Lenners, as a creditor of the estate, filed a petition seeking formal adjudication of intestacy, determination of heirs, and appointment of herself as personal representative. Lenners' petition disclosed that she was injured in the 2003 automobile accident and was seeking monetary damages for her injuries from Leafty's automobile insurance policy, i.e., from American Family. Lenners listed American Family and Leafty's wife and children as interested parties, and notice was given to American Family at all relevant stages of the estate proceedings.

On February 26, 2007—the same day on which the county court entered an order scheduling a hearing on Lenners' probate petition for April 10—Lenners filed a statement of claim in the Leafty estate for damages for personal injuries sustained by Lenners and her children in the automobile accident. The claim form recited that the due date of the claim was "[u]nknown" and that "negotiations have not yet begun on this claim as . . . Lenners is still undergoing medical treatment."

The document also stated that the amount of the claim was "[u]nknown - policy limits of [Leafty's] liability policy in effect on March 4, 2003, and any other applicable insurance policies, or an amount to be determined by a jury, if lesser."

On April 10, 2007, the county court appointed Lenners as personal representative of Leafty's estate, determined Leafty's heirs, found that he died intestate, and ordered that Lenners serve without being required to post a bond, as there were "no known assets except liability insurance." Lenners accepted appointment, letters of appointment were issued to her, and notice of her appointment was published. On April 17, Lenners filed an inventory listing American Family's insurance policy as the only asset of the estate.

The estate remained in this posture until February 28, 2008, when the county court issued an order to show cause why the estate had not been closed. We digress to note that the complaint in Lenners' district court proceeding was filed on February 29, 2008—1 day after the entry of this show cause order. In response to the county court's order, Lenners filed a motion to continue the date of hearing on the show cause order to "a date approximately six months out" and stated in the motion that Lenners had filed the claim on February 26, 2007; that on February 12, 2008, she had made demand on American Family for payment of damages for her injuries; and that "[t]he parties [were] currently negotiating the personal representative's claim." The county court continued the show cause hearing to September 23. On July 11, new counsel entered an appearance for Lenners, and on September 8, counsel sought a further continuance for "not less than 180 days" because "there [was] pending litigation against the estate." The county court extended the hearing date to March 24, 2009.

On October 3, 2008, Lenners filed a petition seeking the court's order requiring Lenners, as personal representative, to pay her claim for personal injuries. A copy of the petition was mailed to American Family's counsel. On November 17, American Family filed an objection to Lenners' petition on the grounds that (1) the petition violated Lenners' fiduciary responsibilities as personal representative; (2) Lenners' statement of

claim was untimely and "[did] not represent a viable claim" against the estate; (3) Lenners was attempting to engage in simultaneous litigation in multiple forums; (4) the probate court was an improper forum and Lenners' claim was barred by the applicable statute of limitations; (5) there had been no legal determination that Leafty was legally liable to Lenners; (6) Lenners' petition sought an order that would have "no legal effect," presented a "nonjusticiable issue," and would result in an "advisory opinion"; (7) Lenners' February 26, 2007, statement of claim was a frivolous pleading; and (8) the October 3, 2008, petition was a frivolous pleading. American Family attached a copy of Lenners' amended complaint in the district court to its objection in county court.

On December 3, 2008, Lenners filed a petition for directions to the personal representative, reciting that her claim against the estate "prevent[ed] her from simultaneously representing the interests of the estate" and that she desired to resign as personal representative, but that she had been "unable to find a replacement."

According to a county court order entered on December 23, 2008, Lenners withdrew her petition to require the personal representative to pay her claim and the court denied her petition for directions.

On March 24, 2009, the county court entered another order requiring Lenners to show cause why the estate should not be closed or a new personal representative appointed. On March 31, Lenners' counsel filed a response reciting that the district court case was pending and that the estate needed to remain open pending resolution of Lenners' personal injury lawsuit. The record does not disclose the disposition of the court's order to show cause.

Instant Case.

We now return to the proceedings in the instant case. On February 29, 2008, a few days short of 5 years after the accident, Lenners brought an action in the district court for Gage County, asserting a contractual claim on underinsured motorist coverage provided by an insurance policy covering the vehicle she was driving at the time of the collision. The initial

complaint named only St. Paul and Farm Credit as defendants and sought only to recover upon the underinsured motorist coverage in St. Paul's policy. On July 31, Lenners filed an amended complaint joining herself, in her capacity as personal representative of Leafty's estate, as an additional defendant and seeking recovery both from Leafty's estate and from the underinsured motorist coverage. American Family, as Leafty's insurer, was allowed to intervene.

St. Paul and Farm Credit filed a motion to dismiss Lenners' amended complaint, utilizing Neb. Ct. R. Pldg. § 6-1112(b)(6). American Family filed a similar motion. The district court held a hearing and, in due course, entered a written order containing extensive discussion and reasoning.

The district court sustained the insurers' motions, holding that Neb. Rev. Stat. § 44-6413(1)(e) (Reissue 1998) barred Lenners' underinsured motorist coverage claim because the 4-year statute of limitations provided by Neb. Rev. Stat. § 25-207 (Reissue 2008) for Lenners' claim against Leafty had expired. The district court rejected Lenners' assertion that her claim in Leafty's estate commenced a proceeding sufficient to prevent the 4-year statute of limitations from expiring.

Lenners timely appeals.

ASSIGNMENTS OF ERROR

Lenners asserted eight assignments of error, which we have consolidated, restated, and renumbered, claiming that the district court erred in (1) holding that the filing of Lenners' claim in Leafty's estate did not operate to timely commence an action within the period prescribed by § 25-207, (2) determining that the claim was not properly presented because it was filed before the date of appointment of the personal representative, (3) finding that Lenners' claim was not properly presented because it had never been disallowed due to Lenners' status both as claimant and as personal representative and because of Lenners' failure to seek appointment of a special administrator, (4) finding that Neb. Rev. Stat. § 30-2485 (Reissue 2008)—the nonclaim statute—does not apply, and (5) finding that Lenners' amendment to her complaint was ineffective to join Leafty's estate as a party.

STANDARD OF REVIEW

[1] An appellate court reviews a district court's order granting 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. *Doe v. Board of Regents*, 280 Neb. 492, 788 N.W.2d 264 (2010).

[2] Which statute of limitations applies is a question of law that an appellate court must decide independently of the conclusion reached by the trial court. *Corona de Camargo v. Schon*, 278 Neb. 1045, 776 N.W.2d 1 (2009).

ANALYSIS

We begin by setting forth a brief summary of the detailed analysis which follows. In the succeeding sections, we will first set forth the insurers' basic statute of limitations argument and Lenners' basic response. We next discuss in detail a Nebraska Supreme Court decision, which applies the particular statute upon which Lenners relies. We then introduce numerous provisions of the uniform act upon which the Nebraska Probate Code is based and set forth relevant comments provided by the drafters of the uniform act. Finally, in a series of sections, we address the specific arguments of the insurers and reasoning of the district court, all of which attempt to avoid the result dictated by the statute and the Nebraska Supreme Court decision applying it.

Insurers' Statute of Limitations Rationale.

The insurers argue that § 44-6413(1)(e) bars Lenners' action under the policy because Lenners did not commence an action against Leafty's estate within the 4-year statute of limitations provided by § 25-207. The district court agreed with the insurers. Although § 44-6413 was amended in 2009, the changes do not affect our analysis, and for convenience, we quote from the current version. Section 44-6413(1) (Cum. Supp. 2010) states that "[t]he . . . underinsured motorist coverag[e] provided in the Uninsured and Underinsured Motorist Insurance Coverage Act shall not apply to: . . . (e) [b]odily injury . . . of the insured with respect to which the applicable statute of limitations has expired on the insured's claim against the . . . underinsured

motorist." Thus, if Lenners allowed the applicable statute of limitations against Leafty's estate to expire, this section bars her underinsured motorist claim.

Lenners does not dispute that § 25-207 provides the "applicable statute of limitations" under § 44-6413(1), that § 25-207 allows 4 years from the accrual of the cause of action in which to commence the action, and that the cause of action accrued on the date of the accident on March 4, 2003. Thus, Lenners implicitly concedes that to preserve her underinsured motorist coverage claim, her action against Leafty's estate must have been commenced prior to March 4, 2007.

In support of Lenners' first assignment of error, she maintains that, for purposes of the statute of limitations, the claim she filed in Leafty's estate on February 26, 2007, constituted the necessary commencement of an action against the underinsured motorist. She argues that this was accomplished prior to March 4, when the limitations period would have expired. The insurers dispute that Lenners' claim had this effect and advance numerous reasons in support of their position.

Mulinix v. Roberts *Decision.*

Because Lenners relies principally upon the decision of the Nebraska Supreme Court in *Mulinix v. Roberts*, 261 Neb. 800, 626 N.W.2d 220 (2001), and the insurers' arguments attempt to distinguish the instant case from *Mulinix*, we recall the facts and rationale of the *Mulinix* decision.

On April 17, 1993, Patricia A. Mulinix was injured in a truck-car accident, in which Charles V. Weber, a driver of one of the vehicles, died. In April 1997, Paige J. Roberts was appointed personal representative of Weber's estate. On April 16, Mulinix filed a claim in Weber's estate proceedings seeking monetary damages for injuries suffered in the accident. Roberts denied the claim and mailed a notice of disallowance to Mulinix on June 9. On August 8, within 60 days of this notice, Mulinix filed a petition in district court against Roberts seeking to enforce the claim. Roberts demurred, alleging that Mulinix's petition failed to state a cause of action because the applicable statute of limitations barred the action. The district court, relying on § 25-207 and Neb. Rev. Stat.

§ 30-2486 (Reissue 2008), sustained the demurrer and dismissed Mulinix's petition, reasoning that because § 30-2486 specified two separate and distinct means of presenting a claim—(1) filing a claim in the county court probate proceeding or (2) commencing a proceeding against the personal representative in another court having subject matter jurisdiction—the filing of a claim in the county court estate proceeding did not equal the commencement of a proceeding. The district court also relied upon the language in § 30-2486(2) requiring that presentation of a claim by commencement of a proceeding in another court "must occur within the time limited for presenting the claim."

On appeal, the Nebraska Supreme Court reversed. The Supreme Court held that Mulinix's April 16, 1997, claim in Weber's estate constituted the commencement of a proceeding 1 day before the 4-year statute of limitations ran. The Supreme Court relied upon the last sentence of Neb. Rev. Stat. § 30-2484 (Reissue 2008), noting its provision that "'[f]or purposes of *any* statute of limitations, the proper presentation of a claim under section 30-2486 is equivalent to commencement of a proceeding on the claim.' (Emphasis supplied.)" 261 Neb. at 804, 626 N.W.2d at 223. Thus, the *Mulinix* court concluded that presenting a claim by filing it against the estate commences a proceeding on the claim for purposes of the running of the 4-year statute of limitations.

Lenners argues that the district court erred in failing to apply the *Mulinix* decision in the instant case. She claims that for purposes of § 25-207, the filing of her February 26, 2007, claim was equivalent to commencement of a proceeding on the claim. The insurers focus on the word "proper" in § 30-2484 and argue that Lenners' claim was not properly presented.

Probate Code Framework.

Before turning to the parties' specific arguments regarding application of the *Mulinix* decision in the instant case, we think it is helpful to recall several statutes in the Nebraska Probate Code bearing on claims and statutes of limitation and to examine certain provisions of the uniform act upon which the Nebraska statutes are based.

One important lesson drawn from the comments to the uniform act is that Unif. Probate Code § 3-802, 8 U.L.A. 211 (1998), upon which § 30-2484 was modeled, sets forth three separate ideas, the last of which is presented by the last sentence of § 30-2484, which underlies the decision in *Mulinix v. Roberts*, 261 Neb. 800, 626 N.W.2d 220 (2001). The comment to § 3-802 of the Uniform Probate Code (hereinafter UPC) states, in part:

> In 1989, in connection with other amendments recommended in sequel to [a U.S. Supreme Court case], the Joint Editorial Board recommended the splitting out, into Subsections (b) and (c), of the last two sentences of what formerly was a four-sentence section. The first two sentences now appear as Subsection (a). The rearrangement aids understanding that the section deals with three separable ideas. No other change in language is involved, and the timing of the changes to coincide with [the U.S. Supreme Court] case amendments is purely coincidental.

8 U.L.A. at 212. Thus, the last sentence of § 30-2484—the heart of the *Mulinix* decision—is a separate concept from the preceding sentences in the section. Although Nebraska has not adopted the change to depict the separate concepts by subsection markers, the language directly tracks the original model act, which the comment indicates was not changed in substance by the rearrangement.

The comment to UPC § 3-802 also points out that several statutes of limitation may have potential application in a particular case and that the first to apply controls: "[T]he regular statute of limitations applicable during the debtor's lifetime, the non-claim provisions of [UPC] Sections 3-803 and 3-804, and the three-year limitation of [UPC] Section 3-803 all have potential application to a claim. The first of the three to accomplish a bar controls." 8 U.L.A. at 211-12. Section 30-2485 corresponds to UPC § 3-803, 8 U.L.A. 56 (Supp. 2010), and § 30-2486 tracks UPC § 3-804, 8 U.L.A. 235 (1998).

In addition to the regular statute of limitations, there are five provisions of the Nebraska Probate Code which could act to impose a bar. Four of these provisions fall within the two

categories identified in the comment—the nonclaim provisions and the 3-year limitation. There is one other nonclaim provision under yet another statute. The comment instructs us that the first statute to apply will accomplish a bar. The first statutory bar, which would apply only if Lenners' claim against Leafty arose before Leafty's death, is that of § 30-2485(a)(1), which bars claims not presented within 2 months after publication of notice to creditors of the estate. The second statutory bar, which also applies only if the claim arose before death, is that of § 30-2485(a)(2), which bars claims not presented within 3 years after the decedent's death if notice to creditors has not been given. On the other hand, the third statutory bar, under § 30-2485(b), applies to claims arising at or after the decedent's death and bars claims not presented within 4 months after the claim arose. The fourth statutory bar flows from § 30-2486(3), which bars commencement of a proceeding to enforce a claim which has been presented by filing a statement of claim with the probate court, if the proceeding is commenced more than 60 days after the personal representative mailed a notice of disallowance. The last statutory bar is set forth in Neb. Rev. Stat. § 30-2488(a) (Reissue 2008), which imposes a bar where a notice of disallowance is given by the personal representative after a claim has been allowed and the claimant fails to commence a proceeding against the personal representative within 60 days after the mailing of the notice of disallowance.

Section 30-2485(c)(2) eliminates any potential application of the first three of these five statutory bars. Section 30-2485(c) states: "Nothing in this section[, i.e., § 30-2485,] affects or prevents: . . . (2) [t]o the limits of the insurance protection only, any proceeding to establish liability of the decedent or the personal representative for which he or she is protected by liability insurance." Thus, because Lenners' claim sought relief only as to liability insurance proceeds, § 30-2485(c)(2) renders inapplicable the potential bars of § 30-2485(a)(1), (a)(2), and (b).

And, as the record presently stands, the absence of a notice of disallowance of Lenners' claim renders inapplicable the other two of these five statutory bars. Section 30-2486(3)

provides a bar for failure to commence a proceeding within 60 days after the personal representative has mailed a notice of disallowance. And § 30-2488(a) provides a comparable bar for a claim disallowed after being first allowed, where the claimant fails to commence a proceeding within 60 days after mailing of the notice of disallowance. But, in the case before us, the personal representative has neither filed nor mailed a notice of disallowance. Thus, at least at this point in time, there has been no triggering of the potential bars of § 30-2486(3) or § 30-2488(a)—the only remaining possibilities under the Nebraska Probate Code. This leaves only the regular statute of limitations as a possible bar.

We observe that Nebraska rejected one of the UPC's methods for presentation of a claim—the option to "deliver or mail to the personal representative a written statement of the claim indicating its basis, the name and address of the claimant, and the amount claimed." UPC § 3-804(1), 8 U.L.A. 235 (1998). Section 30-2486(1) proclaims that "[t]he claim is deemed presented on the filing of the claim with the court." In contrast, UPC § 3-804(1) stated the claim was "deemed presented on the first to occur of receipt of the written statement of claim by the personal representative, or the filing of the claim with the [c]ourt." 8 U.L.A. at 235. Thus, from the time of adoption of Nebraska's version of the UPC, Nebraska has authorized only two methods of presenting a claim—filing a statement of claim with the probate court (§ 30-2486(1)) or commencing a proceeding against the personal representative "in any court which has subject matter jurisdiction and [where] the personal representative may be subjected to jurisdiction" (§ 30-2486(2)).

Finally, we note that the comment to UPC § 3-804 specifically states that the filing of a claim with the probate court "does not serve to initiate a proceeding concerning the claim. Rather, it serves merely to protect the claimant who may anticipate some need for evidence to show that his claim is not barred. The probate court acts simply as a depository of the statement of claim . . . ." 8 U.L.A. at 236.

[3] With this framework in mind, we now turn to the specific grounds advanced by the insurers and adopted by the

district court to distinguish the instant case from *Mulinix v. Roberts*, 261 Neb. 800, 626 N.W.2d 220 (2001), or to show that Lenners' claim was not "properly" presented. We specifically focus on the sentence in § 30-2484 stating that "[f]or purposes of any statute of limitations, the proper presentation of a claim under section 30-2486 is equivalent to commencement of a proceeding on the claim."

Filing of Claim Before Appointment of Personal Representative.

Lenners assigns error to the district court's finding that by "fil[ing] her claim before there was an open estate," she did not properly present her claim. In support of the district court's finding on this point, the insurers rely on Neb. Rev. Stat. § 30-2404 (Reissue 2008), which states, in pertinent part, as follows:

> No *proceeding to enforce a claim* against the estate of a decedent or his successors may be revived or commenced before the appointment of a personal representative. After the appointment and until distribution, all proceedings and actions to enforce a claim against the estate are governed by the procedure prescribed by this article.

(Emphasis supplied.) The insurers argue that because the personal representative had not yet been appointed, Lenners was not permitted to file her claim with the county court. We disagree.

[4] First, we do not believe that the mere filing of the claim constitutes commencement of a "proceeding to enforce a claim" within the meaning of § 30-2404. The Nebraska Probate Code refers both to "presenting" and to "enforcing" a claim. Our reading of the code and the applicable case law persuades us that presentment and enforcement are not synonymous, although in some instances they can be accomplished by the same act. Section 30-2485 bars claims against an estate unless they are "presented" within certain time parameters. Under § 30-2488(d), "[a] final judgment in a proceeding in any court against a personal representative to *enforce* a claim against a decedent's estate is an allowance of the claim." (Emphasis supplied.)

Section 30-2486 specifies two methods of "present[ing]" claims. Section 30-2486(1) allows a claim to be presented by filing the required form with the clerk of the probate court. Section 30-2486(2) allows a claim to be both presented and enforced by a separate proceeding in a court having jurisdiction. But § 30-2486(3) makes it clear that where the claim has been presented by filing it with the probate court pursuant to § 30-2486(1) and has been disallowed, the claimant must commence a proceeding to enforce the claim within the specified time after disallowance. Thus, it is clear that presentation of a claim under § 30-2486(1) is not a proceeding to enforce the claim.

Moreover, the comment to UPC § 3-804, 8 U.L.A. 235 (1998), which we quoted above, supports this view. The comment expressly states that filing of the claim does not serve to initiate a proceeding concerning the claim and explains the probate court's function as a depository. Because § 30-2484 equates presentation of a claim to commencement of a proceeding on the claim only "[f]or purposes of any statute of limitations," it necessarily follows that for other purposes, presentation of a claim is not equivalent to commencement of a proceeding.

Second, we reject the insurers' argument that our decision in *Mach v. Schmer*, 4 Neb. App. 819, 550 N.W.2d 385 (1996), supports their position. That case concerned an attempt to *enforce* a claim by commencing a proceeding against the personal representative in district court. We rejected the claimant's attempt to commence a proceeding for enforcement of a claim against a former personal representative who had been discharged and whose appointment had been terminated. Our *Mach* opinion makes it clear that the proceeding was attempted under § 30-2486(2) and that § 30-2486(1) was not implicated.

Third, we find support in the Nebraska Supreme Court's decision in *In re Estate of Cooper*, 275 Neb. 297, 746 N.W.2d 653 (2008). The *In re Estate of Cooper* court recognized the effect of § 30-2486(3) in distinguishing the filing of a claim under § 30-2486(1) and the commencement of a subsequent proceeding to obtain payment of the claim. The court also quoted from

the UPC comment we have already recited, describing the probate court's function as a depository. The court additionally quoted a Florida appellate court decision describing the filing of a statement of claim as merely a procedural step in the administration of an estate whereby the personal representative is advised, within the statutorily limited time, who the creditors are and what their claims are. The *In re Estate of Cooper* court recognized that the key sentence of § 30-2484 draws a distinction between the filing of a claim and the commencement of a separate proceeding. The court observed that the sentence's application is limited by its terms to the context of determining whether the statute of limitations on a claim has run and cited its decision in *Mulinix v. Roberts*, 261 Neb. 800, 626 N.W.2d 220 (2001).

Thus, we reject the insurers' arguments that the Nebraska Probate Code prohibited Lenners from filing her statement of claim with the probate court before the appointment of a personal representative.

Lenners' Status as Personal Representative.

Lenners assigns as error the district court's determinations that her status as personal representative and her failure to seek appointment of a special administrator established a "fail[ure] to follow the probate code." The court stated, in part:

> [T]he method employed by [Lenners] placed her on both sides of an unliquidated personal injury claim. Consequently, [Lenners] is now in a position where she can neither allow nor disallow the claim without subverting either [Leafty's] estate or her own personal interest. [Lenners] could have avoided her current predicament had she sought the appointment of a special administrator pursuant to Neb. Rev. Stat. § 30-2457 [(Reissue 2008)] when she realized the limitations period was set to expire. However, the court cannot countenance, without concrete authority for doing so, the current state of affairs and the potential for such claims to languish in virtual perpetuity - not to mention beyond the statute of limitations - at the behest of a creditor, whose claim is unliquidated and disputed, who is also the estate's personal representative

responsible for allowing or disallowing the claim, but has failed to do so.

In our view, the district court conflated proper presentation of Lenners' claim with failure to take necessary actions to enforce the claim—the former being the proper focus of the statute of limitations analysis, while the latter falls within the exclusive original jurisdiction of the county court.

[5] Neb. Rev. Stat. § 24-517(1) (Cum. Supp. 2006) confers upon the county court "[e]xclusive original jurisdiction of all matters relating to decedents' estates, including the probate of wills and the construction thereof, except as provided in subsection (c) of section 30-2464 and section 30-2486." The exceptions relate to proceedings in other courts by or against a personal representative.

The insurers attack the procedure followed by Lenners, not in filing the statement of claim, but, rather, in enforcing or failing to enforce the claim. The Nebraska Probate Code empowers the county court to make appropriate orders regarding administration of an estate by means of proceedings initiated either by "any person who appears to have an interest in the estate," see Neb. Rev. Stat. § 30-2450(a) (Reissue 2008), or by the personal representative, who "may invoke the jurisdiction of the court, in proceedings authorized by this code, to resolve questions concerning the estate or its administration," see Neb. Rev. Stat. § 30-2465 (Reissue 2008). The record shows that the county court has entered orders requiring Lenners to show why the estate should not be closed. American Family, as Leafty's liability insurance carrier, has been provided with notice of the probate proceedings, but has not invoked the jurisdiction of the county court to seek an order requiring Lenners to perform her duty as personal representative or to seek appointment of a special administrator in accordance with § 30-2457.

The insurers concede that the Nebraska Probate Code allows a creditor to be appointed as personal representative of a decedent's estate where others fail to act within a specified time. See Neb. Rev. Stat. § 30-2412(a)(6) (Reissue 2008). Thus, there was nothing improper about Lenners' filing her statement of claim while she was seeking appointment as personal

representative. And at the time Lenners filed her statement of claim—which "presented" the claim within the meaning of §§ 30-2485 and 30-2486—she had not yet been appointed as personal representative, and thus, no fiduciary obligation had then been imposed upon her.

Lenners' actions or inactions as personal representative, and particularly her failure to pursue proceedings to enforce her claim, fall within the exclusive original jurisdiction of the county court and do not relate to whether her claim was "proper[ly] present[ed]" under § 30-2484. The concern expressed both by the district court and the insurers about the potential for a properly presented claim to languish indefinitely is properly addressed to the county court, which has jurisdiction of the administration of the estate. And the record shows that the county court was taking steps to require that the administration be accomplished.

[6,7] Lenners' action as personal representative in not giving notice of disallowance of her claim has not prejudiced the estate, because a notice of disallowance could still be given. Section 30-2488(a) treats a failure to disallow a claim as an allowance of the claim, but also authorizes a personal representative to change his or her decision regarding allowance or disallowance of a claim. While § 30-2488(a) imposes a time limitation on a decision changing disallowance to allowance, it does not impose a time limit on changing an allowance to a disallowance. Thus, Lenners' claim could still be disallowed.

Because the issues before us pertain only to the applicable statute of limitations, we express no opinion regarding the propriety or effect of Lenners' joinder of herself, in her capacity as personal representative, as an additional party defendant in the district court action.

Nonclaim Statute.

Lenners assigns error to the district court's determination that § 30-2485 does not apply in the instant case. The district court determined that § 30-2485(c) does not apply because Lenners' claims against the insurers in the district court were "not claims for the limits of [Leafty's] liability insurance protection."

Of course, in one sense, the district court was partially correct—in the district court action, Lenners was seeking to recover proceeds of the underinsured motorist coverage afforded to Lenners by the policy issued by St. Paul to Farm Credit. Thus, in this regard, Lenners' initial complaint in the district court was not seeking damages against Leafty's estate for the coverage provided by American Family's liability policy to Leafty. However, the amended complaint was apparently seeking such damages. But whether Lenners was seeking damages under only St. Paul's policy or under both policies is not the critical question presented by the insurers' motions to dismiss, both of which were specifically based on the bar of the statute of limitations. And in relation to the statute of limitations, § 30-2485(c) has an important application.

The critical question is whether the applicable statute of limitations has expired on Lenners' claim against Leafty's estate. As we set forth at the outset, § 44-6413(1)(e) excludes from required underinsured motorist coverage "[b]odily injury . . . of the insured with respect to which the applicable statute of limitations has expired on the insured's claim against the . . . underinsured motorist."

Section 30-2485(c) removes the potential bars of § 30-2485(a) or (b) from the case before us. Because Lenners' statement of claim clearly sought only proceeds of liability insurance protecting Leafty and his estate, neither subsection (a) nor (b) of § 30-2485 can operate to bar Lenners' claim. There is still the possibility that a failure to commence a proceeding to enforce Lenners' claim, after 60 days following a notice of disallowance not yet given, could operate to bar Lenners' claim, see § 30-2488(a), or that a final judgment made against Lenners in a proceeding to enforce the claim would operate to bar the claim, see § 30-2488(d). But these events have not yet occurred, and the filing of Lenners' claim operates under § 30-2484 as the equivalent to commencement of a proceeding on the claim for purposes of the only other potential statute of limitations—the regular statute of limitations of § 25-207. Thus, we conclude the district court erred in determining, for purposes of the statute of limitations imposed by § 25-207, that Lenners' February 26, 2007,

statement of claim was not equivalent to commencement of a proceeding on the claim.

Amended Complaint Joining Lenners as Defendant.

Before concluding, we turn to Lenners' assignment that the district court erred in finding that her amended complaint was ineffective to join Leafty's estate as a party defendant. Lenners argues that "under the holding in *Mulinix* [*v. Roberts*, 261 Neb. 800, 626 N.W.2d 220 (2001)], [she] timely commenced a proceeding on her claim in the [e]state [p]roceedings for purposes of the statute of limitations." Brief for appellant at 23. She then reasons that this "effectively tolled her cause of action under [§] 25-207" and that the fact that "the [e]state was not added as a defendant in the [d]istrict [c]ourt suit [was] of no legal consequence." Brief for appellant at 23. Lenners then argues that her amendment of the district court complaint to add herself as a defendant, in her capacity as personal representative, related back to the original filing of the complaint.

We think it is important to first set forth what the district court decided on this issue. The court's order stated:

> The addition of Lenners [as personal representative] to the lawsuit against [the insurers] by amended complaint does not "relate back" and save [Lenners'] case against [the insurers]. [Lenners] does not receive the benefit of the five-year limitations period for written agreements pursuant to Neb. Rev. Stat. § 25-205 [(Reissue 2008)] because she failed to properly pursue her personal injury claim against the estate prior to expiration of the four-year limitations period pursuant to . . . § 25-207. Therefore, as stated above, . . . § 44-6413(1)(e) applies and [Lenners'] action as to [the insurers] is time-barred. [Lenners'] amended complaint naming Lenners [as personal representative] is of no consequence because her original action against [the insurers] was commenced outside of the applicable four-year limitations period.

We read the district court's decision merely as rejecting Lenners' relation-back argument because of its earlier conclusion that Lenners' statement of claim was not the equivalent of commencing a proceeding on the claim for purposes of the

statute of limitations. We have already concluded that the court erred in not applying the plain language of § 30-2484 to overrule the statute of limitations argument. Thus, to the extent that the court's ruling on the relation-back argument merely relied on its earlier reasoning, the court erred. The motions before the district court were expressly based upon and limited to the statute of limitations. We decline to address other issues not raised by the motions or decided by the district court.

CONCLUSION

We conclude that the district court erred in determining that Lenners' statement of claim filed with the county court on February 26, 2007, was not equivalent, for purposes of § 25-207, to commencement of a proceeding on the claim. Because presentment of a claim is separate and distinct from a proceeding to enforce a claim, we find no merit to the insurers' argument that Lenners filed her claim too soon and particularly find no merit to the argument that she violated § 30-2404 by filing the claim before appointment of a personal representative. We also determine that neither Lenners' status as personal representative nor her failure to seek appointment of a special administrator has any effect upon the operation of § 30-2484. Finally, because the district court's discussion of Lenners' relation-back argument was premised solely upon its erroneous determination that Lenners' statement of claim was not, pursuant to § 30-2484, the equivalent of commencing a proceeding on the claim, it was also incorrect. We therefore reverse the judgment of the district court and remand for further proceedings consistent with this opinion.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

[By order of the court, *State v. Meduna*, 18 Neb. App. 792 (2011), withdrawn. See *State v. Meduna*, 18 Neb. App. 818, 794 N.W.2d 160 (2011). (Pages 793-817 omitted.)]

STATE OF NEBRASKA, APPELLEE, V. JASON MEDUNA, APPELLANT.

794 N.W.2d 160

Filed January 11, 2011. No. A-10-185.

1. **Judgments: Appeal and Error.** When dispositive issues on appeal present questions of law, an appellate court has an obligation to reach an independent conclusion irrespective of the decision of the court below.
2. ____: ____. In making the determination as to factual questions, 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.
3. **Constitutional Law: Search and Seizure.** To determine whether an individual has an interest protected by the Fourth Amendment, one must determine whether the individual has a legitimate or justifiable expectation of privacy in the invaded place.
4. ____: ____. To determine whether an individual has a legitimate or justifiable expectation of privacy in the invaded place, ordinarily, two inquiries are required: First, the individual must have exhibited an actual, or subjective, expectation of privacy, and second, the expectation must be one that society is prepared to recognize as reasonable.

5. ____: ____. Open fields do not provide the setting for those intimate activities that the Fourth Amendment is intended to shelter from government interference or surveillance.
6. **Police Officers and Sheriffs: Search and Seizure: Evidence.** A warrantless seizure is justified under the plain view doctrine if (1) a law enforcement officer has a legal right to be in the place from which the object subject to the seizure could be plainly viewed, (2) the seized object's incriminating nature is immediately apparent, and (3) the officer has a lawful right of access to the seized object itself.
7. **Police Officers and Sheriffs: Search and Seizure: Probable Cause.** For an object's incriminating nature to be immediately apparent, the officer must have probable cause to associate the property with criminal activity.
8. **Courts: Expert Witnesses.** Under the framework of *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1984), and *Schafersman v. Agland Coop*, 262 Neb. 215, 631 N.W.2d 862 (2001), the burden to weed out unreliable expert testimony is placed directly on the trial court.
9. ____: ____. Before admitting any expert opinion testimony, the trial court must determine whether the expert's knowledge, skill, experience, training, and education qualify the witness as an expert. If the opinion involves scientific or specialized knowledge, trial courts must also determine whether the reasoning or methodology underlying the expert's opinion is scientifically valid.
10. **Expert Witnesses: Appeal and Error.** The standard for reviewing the admissibility of expert testimony is abuse of discretion.
11. **Trial: Expert Witnesses: Appeal and Error.** An appellate court reviews the record de novo to determine whether a trial court has abdicated its gatekeeping function when admitting expert testimony.
12. **Courts: Expert Witnesses.** A court performing a *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993), and *Schafersman v. Agland Coop*, 262 Neb. 215, 631 N.W.2d 862 (2001), inquiry should not require absolute certainty. Instead, a trial court should admit expert testimony if there are good grounds for the expert's conclusion, even if there could possibly be better grounds for some alternative conclusion.
13. **Criminal Law: Trial: Juries: Appeal and Error.** In a jury trial of a criminal case, harmless error exists when there is some incorrect conduct by the trial court which, on review of the entire record, did not materially influence the jury in reaching a verdict adverse to a substantial right of the defendant.
14. **Verdicts: Appeal and Error.** Harmless error review looks to the basis on which the trier of fact actually rested its verdict; the inquiry is not whether in a trial that occurred without the error a guilty verdict would surely have been rendered, but, rather, whether the actual guilty verdict rendered in the questioned trial was surely unattributable to the error.
15. **Venue: Juror Qualifications: Presumptions.** A court will not presume unconstitutional partiality because of media coverage unless the record shows a barrage of inflammatory publicity immediately prior to trial, amounting to a huge wave of public passion or resulting in a trial atmosphere utterly corrupted by press coverage.

16. **Venue: Juror Qualifications.** Under most circumstances, voir dire examination provides the best opportunity to determine whether a court should change venue.
17. **Expert Witnesses.** The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to him or her at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.
18. **Evidence: Words and Phrases.** Cumulative evidence means evidence tending to prove the same point of which other evidence has been offered.
19. **Evidence: Proof.** A document may be authenticated by testimony by one with personal knowledge that it is what it is claimed to be, such as a person familiar with its contents; a showing of specific authorship is not always necessary.
20. **Criminal Law: Statutes: Sentences.** Because all crimes in Nebraska are statutory in nature, so, too, are the sentences imposed upon the persons convicted of such crimes.
21. **Criminal Law: Sentences: Animals.** Under Neb. Rev. Stat. § 28-1019 (Reissue 2008), if a person is convicted of a Class IV felony under Neb. Rev. Stat. § 28-1009 (Reissue 2008), the sentencing court shall order such person not to own, possess, or reside with any animal for at least 5 and no more than 15 years after the date of conviction.
22. **Appeal and Error.** To be considered by an appellate court, an alleged error must be both specifically assigned and specifically argued in the brief of the party assigning the error.
23. **Constitutional Law: Courts: Jurisdiction.** The Nebraska Court of Appeals has jurisdiction to determine whether a constitutional question has been properly raised, when necessary to a decision in the case before it.
24. **Effectiveness of Counsel: Proof.** To prevail on a claim of ineffective assistance of counsel under *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), the defendant must show that counsel's performance was deficient and that this deficient performance actually prejudiced his or her defense.
25. ____: ____. In order to show prejudice as an element of ineffective assistance of counsel, the defendant must demonstrate a reasonable probability that but for counsel's deficient performance, the result of the proceeding would have been different.
26. **Effectiveness of Counsel: Records: Appeal and Error.** A claim of ineffective assistance of counsel need not be dismissed merely because it is made on direct appeal; the determining factor is whether the record is sufficient to adequately review the question.
27. **Effectiveness of Counsel: Appeal and Error.** When the issue of ineffective assistance of counsel has not been raised or ruled on at the trial court level and the matter necessitates an evidentiary hearing, an appellate court will not address the matter on direct appeal.
28. **Effectiveness of Counsel: Proof.** If it is more appropriate to dispose of an ineffectiveness claim due to the lack of sufficient prejudice, that course should be followed.

29. **Effectiveness of Counsel: Words and Phrases.** Prejudice means that there is a reasonable probability that but for counsel's deficient performance, the result of the proceeding would have been different.

Appeal from the District Court for Morrill County: LEO DOBROVOLNY, Judge. Affirmed.

Lyle J. Koenig for appellant.

Jon Bruning, Attorney General, and Kimberly A. Klein for appellee.

SIEVERS, MOORE, and CASSEL, Judges.

SIEVERS, Judge.

This appeal stems from a jury's conviction of Jason Meduna on 145 counts of cruel neglect of an animal pursuant to Neb. Rev. Stat. § 28-1009(1) (Reissue 2008), a Class IV felony. The charges arose after feral horses and burros acquired by Meduna were discovered in extremely poor conditions at his "3-Strikes Ranch Mustang Outpost" (3-Strikes Ranch) near Alliance, Nebraska. Upon Meduna's convictions, the district court for Morrill County sentenced him to two consecutive terms of 20 to 60 months' imprisonment and ordered him not to own, possess, or reside with any animal for a total of 30 years. Meduna assigns error to the district court's denial of several of his motions, receipt of certain evidence, and imposition of excessive sentences. He also alleges that he received ineffective assistance of counsel at trial. Because we find that any claimed error by the trial court was harmless, we affirm Meduna's convictions. We should point out that we had earlier released an opinion in this case on January 4, 2011, but that opinion was incorrect with respect to its treatment of the claim that the sentences imposed were excessive. Therefore, that earlier opinion is withdrawn and is of no force and effect, and this opinion shall supersede and replace our earlier opinion.

FACTUAL BACKGROUND

Meduna was the owner of the now-defunct 3-Strikes Ranch, formerly located in Morrill County. The ranch spanned approximately 1,900 acres and was a home to feral horses, i.e., "mustangs," and burros acquired by Meduna for training and

eventual sale. Meduna adopted several mustangs and burros through the Bureau of Land Management (BLM) adoption program and purchased approximately 213 additional mustangs from the BLM pursuant to its sale authority. In addition, Meduna's ranch took in mustangs and burros from rescue organizations and private individuals.

In April 2009, the Morrill County sheriff, John Edens, received several complaints about the conditions on 3-Strikes Ranch. As a result, on April 17, Edens executed an affidavit for a warrant authorizing the inspection and care of the animals at the ranch. According to the affidavit, Edens was informed by a law enforcement officer with the BLM that four of the five mustangs adopted by Meduna from the BLM had died and that the fifth was removed due to health concerns. The affidavit states that a veterinarian from Overton, Nebraska, examined the removed mustang and opined that her poor health condition was due to starvation. In addition, the affidavit recites that a specialist with the BLM inspected other mustangs at the ranch and reported that they needed five to six times the amount of feed they were receiving and that the pastures were severely overgrazed. The affidavit was accompanied by photographs of the mustang removed from the ranch and the BLM "Adopter Compliance Report" prepared by the specialist after a BLM inspection team toured the ranch. The summary section of that report states:

> Based on my 20 years of experience working in wild horse management for the BLM, it is my opinion that 3 Strikes Ranch is not providing appropriate or adequate care for the horses and burros on the ranch. A significant number of these animals are in an emaciated condition and may not be able to be saved. The BLM needs to take the necessary actions to address their [private maintenance and care agreement] violations and prohibit the Medunas from adopting or purchasing horses or burros from the BLM in the future.

Finding cause to believe animals were being cruelly neglected at 3-Strikes Ranch, a district court judge issued a warrant on April 17. The warrant authorized entry on the ranch "to inspect and care for the animals."

On April 18, 2009, Edens executed that warrant, and a warrant for Meduna's arrest, and entered 3-Strikes Ranch together with his deputy sheriffs, officers of the Nebraska State Patrol, and a veterinarian from Alliance. At that time, Edens claimed to have observed two dead mustangs and approximately 170 emaciated mustangs in the corrals. Necropsies were performed on the two animals that had died within the previous 24 hours, and symptoms of starvation and parasitic infestation were found. Over the course of the next 9 days, Edens learned that Meduna had relinquished all of his mustangs and burros to representatives of "Habitat for Horses" and "Lifesavers," and that the animals were moved to the Morrill County fairgrounds to be watered, fed, and administered medical treatment.

Veterinarian David Hardin, director of the School of Veterinary Medicine and Biomedical Sciences at the University of Nebraska-Lincoln and associate dean at Iowa State University College of Veterinary Medicine, traveled to the Morrill County fairgrounds to help oversee the processing of the mustangs and burros. At trial, Hardin explained the procedure that was employed. He testified that after the animals were assigned identifying numbers, they were run through a "chute" system, wherein blood was drawn and they were dewormed, vaccinated, and then assigned a "Henneke" body condition score—based on a system of assessing equine body condition originally published in the Equine Veterinary Journal in 1983. The Henneke system has been peer reviewed and is generally accepted within veterinary practices for equines. Henneke scoring involves evaluating a horse's neck, withers, shoulders, loins, tail, head, and ribs, and is considered a good measure of the equine's energy intake versus its energy expenditure. After such evaluation, a score of "1" (extremely emaciated) to "9" (extremely obese) is assigned to the animal. Hardin explained on direct examination:

> [E]ssentially, you are looking at kind of body cover over the horse, the optimum condition is considered a five, in the middle . . . . [A] body condition score of three is considered that there is little or no body fat left on the animal . . . . [I]f you go below a three, . . . they are actually metabolized or are using up their muscle mass. . . .

> . . . .
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> [At a score of one or two,] they will lose the muscle mass. At some point in time they lose enough muscle mass that they can't stand up any more. . . . [T]he internal muscles like the heart muscle, the muscles that affect the digestive tract would, also, be metabolized. And, so lots of things can go awry and so getting those additional stressors that come along, they are just not in a position to handle.
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> . . . .
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> . . . [T]hey will use muscle for energy. . . . And, then at some point there is no muscle there and they would die.

Hardin explained that the Henneke assessments have been found to be "very repeatable" and "adaptable" to various breeds of horses under various management conditions. We note that there are Henneke body scores of "1" or "2" in evidence for 110 mustangs and burros. Of those 110 animals, 15 were assigned a score of "1" and the remaining 95 were assigned a score of "2." The prosecution for cruel neglect was based on these 110 animals that were scored "1" or "2" (as well as 4 additional animals deemed seriously injured or ill without Henneke scores); the remaining 35 counts were for horses and burros that died or were euthanized on Meduna's ranch, and thus no Henneke scores were assigned to them.

On April 21, 2009, Edens executed an affidavit in support of a search warrant with respect to 3-Strikes Ranch. The affidavit contains much of the same information used to secure the prior warrant to inspect and care for the mustangs and burros, as well as a description of certain property on the ranch to be searched, including, inter alia, "[g]rass clippings." With regard to the grass clippings, the affidavit explains, "Affiant observed that the pastures had been grazed to the point that the sand was noticeably exposed. Affiant states that stocking rates for the pastures can be determined by the grass species and condition." On that same date, a Morrill County clerk magistrate issued the search warrant, which authorized Edens, "with the necessary and proper assistance," to search all of the property described in his supporting affidavit and further authorized the "viewing, photographing and mapping of [3-Strikes Ranch]

for location of fences, horse and burro carcasses and skeletal remains."

After the issuance of this search warrant, Edens asked a rangeland management specialist, David Cook, to accompany him to the ranch. Cook had been employed by the U.S. Department of Agriculture (USDA) Natural Resources Conservation Service for 21 years and was then serving in the position of rangeland management specialist in Oshkosh, Nebraska. At a deposition taken on August 24, 2009, Cook testified that he was not acting within the scope of his USDA employment when he visited 3-Strikes Ranch. Cook's narrative report of what occurred during the search is included in evidence. The report states, in pertinent part:

> The original plan was to use a 1.92 square foot hoop to clip standing plant material to estimate forage production for each site. This method was soon abandoned for two reasons: 1. the growing season is just beginning and very little growth has occurred and 2. there was little, if any, previous year forage left standing on the ranch. The method I chose was to visually estimate plant residue on the soil surface and standing forage utilization levels, take photographs, and record the GPS reading of each location. At each observation point, the clipping hoop was thrown in the air and the observations made at the point it landed.

In the conclusion section of his report, Cook explained that a preliminary stocking rate—an estimation of the number of livestock the range at 3-Strikes Ranch could support for grazing purposes—was calculated. That rate was based on the assumption that the range was in "good" condition, because such was the condition of neighboring ranches and no previous range study had been conducted on Meduna's ranch to determine its condition. Cook testified at trial that conditions of "poor," "fair," "good," and "excellent" are assigned to a range based on the amount of forage available for grazing. Cook concluded that if the animals on 3-Strikes Ranch were to graze year round with no added hay, the stocking rate on the ranch would be 74 animal units, but less during dry years. And, if the animals were to graze 8 months out of the year and were "hayed"

4 months, the stocking rate would be 111 animal units. Cook testified that the number of animal units would be greater if the ranch was in "excellent" condition and less if the condition was "poor" or "fair." Meduna, however, kept in excess of 200 mustangs and burros on his ranch.

Cook's report also recites that one animal unit is equal to one 1,000-pound animal. Cook testified that although mustangs weigh an average of 850 pounds, it is standard practice to use the 1,000-pound animal unit, and that his calculation could easily be converted by dividing the stocking rate figure by .85. Such calculations aside, Cook stated, "[I]n my 20 years as a Rangeland Management Specialist in the Nebraska Panhandle, I have never seen a ranch overgrazed to the extent that the 3-Strikes Ranch is."

PROCEDURAL BACKGROUND

On July 10, 2009, an information was filed by the State alleging 149 counts of cruel neglect of an animal pursuant to § 28-1009(1), a Class IV felony, against Meduna. On November 10, a hearing was held before the trial court on various motions, including Meduna's motion to suppress evidence obtained by Cook, his motion in limine to exclude Cook's expert testimony, and his motion for a supplemental juror questionnaire. The trial court denied each of those motions. A jury trial was held on January 11, 2010, and, after hearing all of the evidence, the jury found Meduna guilty on 145 counts of cruel neglect of an animal, all Class IV felonies.

With regard to sentencing, the trial court divided the 145 convictions into two groups—one related to the 31 deceased animals and the other to the 114 animals with malnourishment and health problems. For each group, Meduna was sentenced to a term of 20 to 60 months' imprisonment and ordered not to own, possess, or reside with any animal for a period of 15 years. The trial judge ordered that the two 20- to 60-month terms would run consecutively and that each individual conviction within the group would run concurrently. As for the portion of the sentence prohibiting owning, possessing, or residing with any animal for 15 years, the court ordered that the two 15-year periods would run consecutively, for a total of

30 years. Meduna was also ordered to pay costs in the amount of $3,813.64. He now appeals.

ASSIGNMENTS OF ERROR

Meduna alleges that the trial court erred in (1) denying his motion to suppress evidence illegally seized by Cook, (2) denying his motion in limine to exclude testimony under Nebraska's expert testimony rule, (3) denying his motion for a supplemental juror questionnaire, (4) receiving evidence of the Henneke body scores of the mustangs, and (5) imposing excessive sentences. Finally, Meduna alleges that he received ineffective assistance of counsel at trial.

STANDARD OF REVIEW

[1,2] When dispositive issues on appeal present questions of law, an appellate court has an obligation to reach an independent conclusion irrespective of the decision of the court below. *State v. Anderson*, 279 Neb. 631, 781 N.W.2d 55 (2010). In making the determination as to factual questions, 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. *State v. Vela*, 279 Neb. 94, 777 N.W.2d 266 (2010).

ANALYSIS

Motion to Suppress.

Initially, Meduna alleges that the trial court erred in denying his motion to suppress evidence illegally seized by Cook, the State's rangeland management specialist. He argues that although Cook's duty was to seize grass clippings as specified in the warrant, Cook decided to change course and attempted to determine the amount of cover on the land and the amount of utilization of the grasses. Meduna claims that this "data gathering" by Cook "far exceeded the scope of the warrant" and that, consequently, Meduna's right to be free from unreasonable searches and seizures was violated. Brief for appellant at 8. We disagree for a number of reasons.

[3,4] The U.S. Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches

> and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. amend. IV. Accord Neb. Const. art. I, § 7. To determine whether an individual has an interest protected by the Fourth Amendment, one must determine whether the individual has a legitimate or justifiable expectation of privacy in the invaded place. See *State v. Smith*, 279 Neb. 918, 782 N.W.2d 913 (2010). To determine whether an individual has a legitimate or justifiable expectation of privacy in the invaded place, ordinarily, two inquiries are required: First, the individual must have exhibited an actual, or subjective, expectation of privacy, and second, the expectation must be one that society is prepared to recognize as reasonable. See *id*.

In the present case, Meduna does not contend that probable cause was lacking for the issuance of the search warrant; thus, he concedes that Cook had a legal right to be on his ranch. The search warrant permitted "Morrill County Sheriff . . . Edens or Any Peace Officer" to search 3-Strikes Ranch and seize certain items, which items included "grass clippings." However, as it turned out, the range was in a very poor state, such that Cook could not use this method to assess its condition and stocking rate. Thus, he employed a method which did not result in a seizure of anything, and which did not run afoul of the Fourth Amendment's limitations on searches.

As Cook explained in his report on the range condition inventory at 3-Strikes Ranch, the original intention was to "clip standing plant material to estimate forage production for each site." However, Cook was unable to do so because the grasses on the range were extremely sparse. Forced to improvise under the circumstances, Cook employed a different methodology. Instead of clipping grass, Cook tossed a hoop onto the ground at six different locations throughout Meduna's ranch. He visually estimated the plant levels within the hoop at each site, took a "GPS reading" of his precise location, and photographed each observation point.

Meduna asserts that Cook's visual estimation "far exceeded the scope of the warrant." However, the affidavit in support

of that warrant recites, as stated above, that "stocking rates for the pastures can be determined by the grass species and condition." Thus, not only did Cook engage in less invasive activity than the warrant authorized because he did not seize any items from the ranch, his assessment as to the stocking rate for the range was contemplated by the affidavit upon which, Meduna does not dispute, probable cause for the search was established.

[5] Moreover, under the open fields doctrine, Meduna had no reasonable expectation of privacy on the range. Pursuant to that well-settled legal principle, open fields do not provide the setting for those intimate activities that the Fourth Amendment is intended to shelter from government interference or surveillance. See *State v. Ramaekers*, 257 Neb. 391, 597 N.W.2d 608 (1999). Here, aside from the curtilage—that area so intimately tied to the home that an individual reasonably may expect that the area in question will be treated as the home itself—the range at 3-Strikes Ranch is an open field and is thus not protected from government inspection. See *id*. There is uncontroverted testimony from Edens at the November 10, 2009, suppression hearing that none of the six sites observed by Cook during his inventory of 3-Strikes Ranch are within the curtilage of Meduna's home.

[6,7] We additionally agree with the State that Cook's observations were clearly admissible under the plain view doctrine. A warrantless seizure is justified under the plain view doctrine if (1) a law enforcement officer has a legal right to be in the place from which the object subject to the seizure could be plainly viewed, (2) the seized object's incriminating nature is immediately apparent, and (3) the officer has a lawful right of access to the seized object itself. *State v. Buckman*, 259 Neb. 924, 613 N.W.2d 463 (2000). For an object's incriminating nature to be immediately apparent, the officer must have probable cause to associate the property with criminal activity. *State v. Keup*, 265 Neb. 96, 655 N.W.2d 25 (2003).

Here, Cook indisputably had a legal right to be on Meduna's ranch, from which location the sparse ground cover was plainly visible. The poor condition of the grasses on Meduna's ranch is clearly associated with criminal activity, i.e., neglect of the

animals, because that condition tends to show that the mustangs and burros were not being provided with adequate sustenance. Thus, Cook's observations also fall within the purview of the plain view doctrine. For these several reasons, there is no merit to this assignment of error.

Motion in Limine to Exclude Cook's Testimony.

Meduna next asserts that the trial court erred in denying his motion in limine to exclude Cook's expert testimony under the framework of *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993), and *Schafersman v. Agland Coop*, 262 Neb. 215, 631 N.W.2d 862 (2001). Meduna's claim is essentially that the methodology behind Cook's estimation of the stocking rate on 3-Strikes Ranch was inaccurate and unreliable and thus should have been excluded. We find that the trial court did not abuse its discretion in admitting Cook's expert testimony, but, even if it did, such admission would amount to harmless error.

[8,9] Under the *Daubert*/*Schafersman* framework, the burden to weed out unreliable expert testimony is placed directly on the trial court. *State v. Casillas*, 279 Neb. 820, 782 N.W.2d 882 (2010). Before admitting any expert opinion testimony, the trial court must determine whether the expert's knowledge, skill, experience, training, and education qualify the witness as an expert. *Id.* If the opinion involves scientific or specialized knowledge, trial courts must also determine whether the reasoning or methodology underlying the expert's opinion is scientifically valid. *Id.* In order to properly conduct appellate review, it is the duty of the trial court to adequately demonstrate by specific findings on the record that it has performed its gatekeeping functions. *Id.*

[10,11] The standard for reviewing the admissibility of expert testimony is abuse of discretion. *Id.* An abuse of discretion occurs when a trial court's decision is based upon reasons that are untenable or unreasonable or if its action is clearly against justice or conscience, reason, and evidence. *Id.* We review the record de novo to determine whether a trial court has abdicated its gatekeeping function when admitting expert testimony. *Id.*

In his motion in limine requesting a *Daubert*/*Schafersman* hearing, Meduna alleged that the factual basis, data, and method behind Cook's range estimate (regarding the stocking rate at 3-Strikes Ranch) were unreliable, essentially because the sample of land was too small and the data was speculative in nature. A *Daubert*/*Schafersman* hearing was held on November 10, 2009, and, after receiving argument from both parties, the court took the matter under advisement. The trial court overruled Meduna's motion in limine in a December 14 journal entry. That journal entry recites Cook's credentials—he has a bachelor's degree in agronomy with a "'range management option,'" and he is a "'rangeland management specialist'" who has been employed by the USDA Natural Resources Conservation Service for 21 years. The court then explains Cook's methodology, which included visual observation of six sites on Meduna's ranch accessible by vehicle. The court details that the individual sites were 1.92-square-foot circles of ground within a hoop which Cook tossed into the air and which landed randomly on the ground. Based on this observation method, Cook's "preliminary stocking rate," i.e., the number of animals Meduna's ranch could support for grazing purposes, was 74 to 111 animal units. Meduna concedes that he maintained in excess of 200 mustangs and burros on the ranch.

[12] The trial court's journal entry recites:

> [Cook] testified the method used was not the most accurate, but other methods were not possible either because there was insufficient foliage to "clip" vegetation, or other methods require multiple visits to the land over a period of time, and Cook only had one visit. Cook testified the method he used was "an accepted method", which he learned while attending the University of Nebraska.

Citing *State v. Daly*, 278 Neb. 903, 775 N.W.2d 47 (2009), the journal entry goes on to set forth the following propositions of law:

> A trial court acts as a gatekeeper to ensure the evidentiary relevance and reliability of an expert's opinion. This gate-keeping function entails a preliminary assessment whether the reasoning or methodology underlying the

> testimony is valid and whether that reasoning or methodology properly can be applied to the facts in issue.
>
> In determining the admissibility of an expert's testimony, a trial judge may consider several more specific factors that might bear on a judge's gate-keeping determination. These factors include whether a theory or technique can [be] (and has been) tested; whether it has been subjected to peer review and publication; whether, in respect to a particular technique, there is a high known or potential rate of error; whether there are standards controlling the technique's operation; and whether the theory or technique enjoys general acceptance within a relevant scientific community. These factors are, however, neither exclusive nor binding; different factors may prove more significant in different cases, and additional factors may prove relevant under particular circumstances.
>
> A court performing a *Daubert* and *Schafersman* inquiry should not require absolute certainty. Instead, a trial court should admit expert testimony if there are good grounds for the expert's conclusion, even if there could possibly be better grounds for some alternative conclusion.

The trial court found the reasoning and methodology underlying Cook's testimony valid and properly applied to the facts in issue. The court explained that the allegation against Meduna was that he "'intentionally, knowingly, or recklessly abandon[ed] or cruelly neglect[ed] an animal resulting in serious injury or illness or death of the animal . . . .'" See § 28-1009(1). And, the court further explained that abandonment or neglect could be proved by showing that the appropriate stocking rate was exceeded on the rangeland where the animals were located. While Cook testified the method he used to determine stocking rate was an "'accepted' method," the court acknowledged there was little evidence offered by either party of whether the method used had been tested, whether it had been subjected to peer review and publication, whether it had a high rate of potential error, or whether there were standards controlling the operation of the technique. However, because those factors are "neither exclusive nor binding," see *State v. Daly, supra*, the court found that Cook's opinion regarding

stocking rates was admissible on the evidence submitted and that "[i]ssues of size of sample, different weight of the animals, and the number and location of samples affect the weight, but not the admissibility, of the opinion." We find no error or abuse of discretion in the trial court's analysis and ultimate admission of this evidence.

[13,14] However, even if we were to conclude that the trial court committed error by allowing Cook's testimony with regard to the estimated stocking rate on 3-Strikes Ranch, such error was harmless because there was ample other evidence to support Meduna's convictions aside from Cook's rangeland assessment. In a jury trial of a criminal case, harmless error exists when there is some incorrect conduct by the trial court which, on review of the entire record, did not materially influence the jury in reaching a verdict adverse to a substantial right of the defendant. *State v. Casillas*, 279 Neb. 820, 782 N.W.2d 882 (2010). Harmless error review looks to the basis on which the trier of fact actually rested its verdict; the inquiry is not whether in a trial that occurred without the error a guilty verdict would surely have been rendered, but, rather, whether the actual guilty verdict rendered in the questioned trial was surely unattributable to the error. *State v. Rogers*, 277 Neb. 37, 760 N.W.2d 35 (2009).

In this case, even though the stocking rate testimony was presented as scientific evidence, it was but a small part of the State's evidence leading to Meduna's convictions—which evidence Meduna implicitly concedes was sufficient, given that he does not assign error on the basis that the evidence was insufficient to sustain the convictions. The record contains voluminous testimony from the State's 19 witnesses, including a great deal of evidence on the dismal condition of the range and of the animals on 3-Strikes Ranch. For example, various individuals—such as Steve Trent, who runs a privately funded horse rescue facility and spent five nights at Meduna's ranch beginning April 9, 2010, and Steve Lattin, a Morrill County deputy sheriff who flew over 3-Strikes Ranch on two different occasions—testified that the pastures were in very poor condition with no vegetation for the animals to graze. Photographs of Lattin's "flyover" are in evidence and show a sandy, sparsely

covered range. Trent also testified that the only food source for the mustangs and burros during his five-night stay was hay brought in from an outside source and that the mustangs required 1½ times the amount of feed provided by the hay. A veterinarian from Overton examined a sickly mustang removed from 3-Strikes Ranch on April 15. He testified that his medical diagnosis of that mustang was chronic weight loss due to starvation. A veterinarian from Alliance testified that he examined another mustang removed from Meduna's ranch, and his diagnosis was malnourishment and parasitic infestation. Henneke body scores, which we discuss in length below, were assigned to the living animals, and those scores reflect dangerously low veterinary health ratings. Photographs in evidence depict each of the animals Meduna was convicted of cruelly neglecting (other than the animals that were already dead), and from the photographs, their emaciated and sickly appearance is obvious, to say nothing of the inferences a jury could draw from the fact that there were numerous deceased mustangs found on the ranch. The jury determined that 31 of those deaths were attributable to Meduna, and Meduna testified that many of those animals had been "euthanized" by him with a gunshot to the head, and then dumped in a pile on the range for coyotes to consume.

In sum, we find there is sufficient evidence in the record to support Meduna's convictions without the inclusion of Cook's expert testimony regarding the stocking rate on 3-Strikes Ranch. Thus, even if the trial court erred in admitting Cook's rangeland estimation, any such error was harmless. As a result, there is no merit to this claim.

Motion for Supplemental Juror Questionnaire.

Meduna's next assertion is that his motion for a supplemental juror questionnaire should have been granted. In his brief, Meduna points out that prior to trial, he moved for a change of venue based on the "extensive pre-trial publicity the case garnered." Brief for appellant at 11. He contends that the supplemental juror questionnaire "would have substantiated whether the considerable publicity in this small community had compromised the ability of jurors to be impartial." *Id.* However,

because Meduna had ample opportunity to uncover juror bias during voir dire, and there is no assignment of error that a change of venue should have been granted, the supplemental juror questionnaire was essentially superfluous.

The record reflects that a pretrial hearing was held on a number of motions, including Meduna's motions for a change of venue and for a supplemental juror questionnaire. At that hearing, Meduna's trial counsel conceded, with regard to the change of venue, that he was unable to meet his burden; however, he stated that he wanted to bring the issue to the court's attention because there had been "a lot of publicity" in this case. Meduna's trial counsel stated:

> I do not know whether this will reach the point where I will feel compelled during voir dire to ask for a change of venue based on the answers we get . . . and I'd ask not to address it today but perhaps to be able to address it at a later date and probably wait through voir dire . . . .

Thus, the trial court "deferred" the motion and announced that it would not be heard "unless the defense [brought] it back up and ask[ed] it to be ruled on." The record reflects that Meduna never revisited or revived the motion for a change of venue.

With respect to the supplemental juror questionnaire, Meduna's trial counsel argued at the pretrial hearing that such questionnaire would maximize juror candor and increase efficiency in that it would eliminate repetitive questions during voir dire. The State's position, on the other hand, was that the court's standard questionnaire was sufficient and that using the additional juror questionnaire would have the effect of placing undue weight on Meduna's voir dire questions. After reviewing the proposed supplemental questions, the court denied Meduna's motion, finding that the additional questionnaire was unnecessary. The court reasoned that the supplemental questions appeared to be in large part matters that could be handled orally with the jury panel. In addition, the court wanted to avoid a situation where biased questions were inadvertently selected for the questionnaire.

[15,16] We review the trial court's denial of Meduna's motion for the use of the supplemental questionnaire for an

abuse of discretion. We note that a court will not presume unconstitutional partiality because of media coverage unless the record shows a barrage of inflammatory publicity immediately prior to trial, amounting to a huge wave of public passion or resulting in a trial atmosphere utterly corrupted by press coverage. *State v. Schroeder*, 279 Neb. 199, 777 N.W.2d 793 (2010). Under most circumstances, voir dire examination provides the best opportunity to determine whether a court should change venue. *Id.*

Because Meduna was free to ask the jurors questions from the proposed supplemental juror questionnaire during voir dire, he had sufficient opportunity to uncover "whether the considerable publicity in this small community had compromised the ability of jurors to be impartial." Brief for appellant at 11. Yet, after voir dire, Meduna was still unable to make a viable argument for a change of venue, because his pretrial motion was deferred and never again mentioned. It is evident the supplemental juror questionnaire would not have affected the outcome of this case in any way. We find that the trial court did not abuse its discretion when it denied the motion for use of a supplemental questionnaire. Accordingly, there is no merit to this claim.

Henneke Body Score.

Next, Meduna assigns error "in receiving evidence of the Henneke body score of the mustangs." *Id.* The Henneke scores were handwritten on a form designed to record a "Coggins" test for infectious equine anemia, for which the animal had blood drawn. Separate forms were used for each animal, and offered and received in evidence as separate exhibits. Additionally, there are two distinct photographs of each horse (head and body shots) in evidence that correspond to the sheet containing the Henneke scores. For ease of reference, we will refer to the sheets with the Henneke scores as "Coggins reports" in order to differentiate the pieces of paper received in evidence from the actual Henneke scores assigned to each animal and recorded on the Coggins reports. Meduna argues that the Coggins reports on which the Henneke body scores were recorded "are hearsay in its purest form," because a veterinarian verbally called out

the scores after examining each animal and a veterinary student then recorded the score on a form. *Id.* at 12. The objections made at trial were hearsay and foundation. The foundational argument made in this appeal is that the Coggins reports were not authenticated.

The State argues that the forms were admissible under the exception to the hearsay rule for statements made for the purpose of medical diagnosis or treatment. See Neb. Evid. R. 803(3), Neb. Rev. Stat. § 27-803(3) (Reissue 2008) (hearsay exception for statements made to treating physician for diagnosis or treatment). It is clear that the exception extends to statements made to medical personnel other than physicians. See *Vacanti v. Master Electronics Corp.*, 245 Neb. 586, 514 N.W.2d 319 (1994). In *Vacanti*, the court said that the heart of § 27-803(3) is statements made to the medical provider—but mustangs cannot make the verbal statements the exception intends to admit in evidence. Accordingly, we reject the notion that the Henneke scores were properly received as an exception to the hearsay rule under § 27-803(3).

The State also argues that the Coggins reports were admissible "for a non hearsay purpose; that is, to supply the basis for the doctors' opinions as to the condition of the horses." Brief for appellee at 17. We conclude that the issue is not really the admissibility of the Henneke scores, but, rather, the admissibility of Hardin's opinion that the Henneke body condition scores of "1" and "2" meant that those horses or burros "were at risk of death or prolonged impairment of health, or prolonged loss or impairment of function of any bodily organ," as Hardin testified. The Henneke scores of the animals from Meduna's ranch were a basis for the veterinarians' expert opinions that the animals were in such condition that they were at risk of serious bodily injury or death.

[17] The evidence shows that the Henneke scores were "perceived by" or "made known to" the two veterinarians, Hardin and Arden Wohlers, who testified as experts. And, the evidence shows that the Henneke scores were "facts or data" upon which they relied, and such were a type of fact or data reasonably relied upon by experts, such as veterinarians, to assess the health of equines. Thus, we turn to Neb.

Evid. R. 703, Neb. Rev. Stat. § 27-703 (Reissue 2008), which provides:

> The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to him at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

Accordingly, while the Henneke scores were admitted over objection, any error in doing so was harmless, given that under the foregoing evidentiary rule, the veterinarians could, and did, testify about such—even if the scores were not admissible in evidence.

[18] Moreover, the veterinarians responsible for assigning the body scores—Hardin and Wohlers—testified that they had reviewed the photographs of each animal and compared such to the score on the form, and, to a reasonable degree of medical certainty, determined that the forms in evidence truly and accurately reflected the Henneke scores given to each animal on the date it was examined by them. Thus, despite the fact that the handwritten body scores found on the Coggins reports may have been hearsay, they were nonetheless cumulative of the testimony given by Hardin and Wohlers regarding the body condition of the animals, and their admission at trial was therefore harmless. See, *State v. Rieger*, 260 Neb. 519, 618 N.W.2d 619 (2000) (where evidence is cumulative and other competent evidence supports conviction, improper admission or exclusion of evidence is harmless beyond reasonable doubt); *State v. McBride*, 250 Neb. 636, 550 N.W.2d 659 (1996) (cumulative evidence means evidence tending to prove same point of which other evidence has been offered). In this case, the poor state of the range, the horrible condition of the animals testified to by a number of witnesses, and simply the photographs of each animal provided what can only be characterized as overwhelming evidence to sustain the convictions. Thus, the evidence of the Henneke body scores was cumulative, and of no real prejudice to Meduna.

[19] With respect to Meduna's assertion that the forms lack foundation because they were not authenticated, Hardin and Wohlers testified that the forms were what they purported to be—Coggins reports used to record identifying and health-related information about each of the animals examined at the fairgrounds. The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims. Neb. Evid. R. 901(1), Neb. Rev. Stat. § 27-901(1) (Reissue 2008). A document may be authenticated by testimony by one with personal knowledge that it is what it is claimed to be, such as a person familiar with its contents; a showing of specific authorship is not always necessary. *State v. Jacobson*, 273 Neb. 289, 728 N.W.2d 613 (2007). We find that the authentication requirement was satisfied by the trial testimony of Hardin and Wohlers. For the foregoing reasons, there is no merit to this claim, and there was no prejudicial error in the admission of the exhibits containing the handwritten Henneke body scores for the mustangs.

Excessive Sentences.

Meduna next alleges that the trial court imposed excessive sentences. More specifically, Meduna takes issue with the court's order that he not own, possess, or reside with any animal for a period of 30 years. Without citing any authority whatsoever, Meduna contends that "[s]uch a condition is a form of custody that is an unconstitutional restraint upon his liberty subsequent to the completion of his sentence and is a violation of [his] right to be free from cruel and unusual punishment under the U.S. Eighth and Fourteenth Amendments and Nebraska Constitution." Brief for appellant at 13-14. This argument spans a sum total of 13 lines in Meduna's brief. The State briefly responds that Meduna's argument is merely an assertion that is not presented to this court "in a manner that permits resolution of the issue, and it is therefore defaulted." Brief for appellee at 20, citing *In re Interest of Hope L. et al.*, 278 Neb. 869, 775 N.W.2d 384 (2009). We take the State's response to be simply that the claim of error is procedurally barred—and we agree.

[20] When considering sentences imposed by the trial court, the law is clear that, absent an abuse of discretion by the trial court in sentencing within statutory limits, this court will not disturb the action of the trial court on appeal. See *State v. Segura*, 265 Neb. 903, 660 N.W.2d 512 (2003). And, because all crimes in Nebraska are statutory in nature, so, too, are the sentences imposed upon the persons convicted of such crimes. See *State v. White*, 256 Neb. 536, 590 N.W.2d 863 (1999). The sentence restricting Meduna's ownership of or residence with animals is specifically authorized by the Legislature. Under § 28-1009(1), a person who intentionally, knowingly, or recklessly abandons or cruelly neglects an animal is guilty of a Class I misdemeanor, unless the abandonment or cruel neglect results in serious injury or illness or death of the animal, in which case it is a Class IV felony. Here, Meduna was convicted of 145 counts of cruel neglect of an animal resulting in serious injury or illness or death, all Class IV felonies. Meduna does not challenge the incarceration portion of his sentences.

[21] Under Neb. Rev. Stat. § 28-1019 (Reissue 2008), if a person is convicted of a Class IV felony under § 28-1009, as Meduna was 145 times, the sentencing court shall order such person not to own, possess, or reside with any animal for at least 5 and no more than 15 years after the date of conviction. At sentencing, the trial judge explained that Meduna's 145 convictions would be broken down into two groups—one for the deceased animals and another for those animals that were seriously injured or ill. For each group, Meduna was sentenced to a term of 20 to 60 months' imprisonment and also ordered not to own, possess, or reside with any animal for a period of 15 years. The court ordered that each of the two 15-year terms would run consecutively, for a total of 30 years. Thus, Meduna's sentences are statutorily authorized and not in excess of the statutory limit.

[22,23] Although Meduna's assignment of error is that his sentences are excessive, his only argument is simply that the portion of his sentences prohibiting him from owning, possessing, or residing with any animal for a total of 30 years runs afoul of his constitutional right to be free from cruel and

unusual punishment. This argument does not match his assignment of error because there is no assignment that § 28-1019 provides for an unconstitutional penalty. To be considered by an appellate court, an alleged error must be both specifically assigned and specifically argued in the brief of the party assigning the error. *Bellino v. McGrath North*, 274 Neb. 130, 738 N.W.2d 434 (2007). Thus, we cannot consider the constitutional claim Meduna attempts to raise in his brief for this reason. In addition to that deficiency, we note that while this court cannot determine the constitutionality of a statute, we do have jurisdiction to determine whether a constitutional question has been properly raised, when necessary to a decision in the case before us. See, *State v. Johnson*, 12 Neb. App. 247, 670 N.W.2d 802 (2003); *Harvey v. Harvey*, 6 Neb. App. 524, 575 N.W.2d 167 (1998). The Nebraska Supreme Court insists upon strict compliance with Neb. Ct. R. App. P. § 2-109(E) (rev. 2008) before it will consider a constitutional challenge. See *Harvey v. Harvey, supra*. Section 2-109(E) requires that a party presenting a case involving the federal or state constitutionality of a statute must file and serve a separate written notice thereof with the Supreme Court Clerk at the time of filing such party's brief. This was not done, and thus, there is another deficiency that also constitutes a procedural bar to Meduna's claim of unconstitutionality of the district court's sentence imposed under the authority of § 28-1019. Thus, for these reasons, we do not consider the assignment of error of excessive sentences any further because it is procedurally barred.

Ineffective Assistance of Counsel.

Because Meduna has new counsel for the present appeal, his final assignment of error includes nine individual claims of ineffective assistance by his trial counsel. In his brief, Meduna asserts that "[f]or each claim asserted in this section, the record is absent or incomplete." Brief for appellant at 14. However, he raises the issues to preserve them for postconviction review. Meduna's specific claims are that trial counsel failed to (1) timely advise him of the particulars of an offer of plea agreement by the State; (2) seek a change of venue; (3) move to suppress evidence derived from the illegal seizure of 16 of his

mustangs removed from his property on April 22, 2009, without his permission or consent and without a warrant authorizing the seizure; (4) conduct a proper pretrial investigation; (5) present exculpatory evidence known to the defense at trial; (6) obtain exculpatory evidence after he was granted a motion to compel discovery of the evidence; (7) call experts for the defense; (8) cross-examine the witnesses effectively; and (9) subject the State's case to meaningful adversarial testing.

[24,25] To prevail on a claim of ineffective assistance of counsel under *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), the defendant must show that counsel's performance was deficient and that this deficient performance actually prejudiced his or her defense. *State v. Sandoval*, 280 Neb. 309, 788 N.W.2d 172 (2010). The two prongs of this test, deficient performance and prejudice, may be addressed in either order. *State v. McGhee*, 280 Neb. 558, 787 N.W.2d 700 (2010). Counsel's performance is deficient if counsel did not perform at least as well as a criminal lawyer with ordinary training and skill in the area. *State v. Sandoval, supra*. In order to show prejudice as an element of ineffective assistance of counsel, the defendant must demonstrate a reasonable probability that but for counsel's deficient performance, the result of the proceeding would have been different. See *State v. McGhee, supra.*

[26,27] A claim of ineffective assistance of counsel need not be dismissed merely because it is made on direct appeal; the determining factor is whether the record is sufficient to adequately review the question. *State v. Young*, 279 Neb. 602, 780 N.W.2d 28 (2010). When the issue of ineffective assistance of counsel has not been raised or ruled on at the trial court level and the matter necessitates an evidentiary hearing, an appellate court will not address the matter on direct appeal. See *State v. McDaniel*, 17 Neb. App. 725, 771 N.W.2d 173 (2009). While we find that the record is insufficient to address the majority of Meduna's claims of ineffective assistance of trial counsel, and thus we decline to address them, there are two such claims that can be disposed of presently.

First, there is no merit to Meduna's claim that trial counsel was deficient for failing to move for a change of venue

subsequent to the pretrial hearing when the motion was initiated. In his brief, Meduna argues that trial counsel "could have adduced copious evidence" of the pretrial publicity in this case. Brief for appellant at 16. Meduna's brief recites that "[t]he jury was admonished at one point to ignore 'demonstrators' outside the court house." *Id.* These allegations are simply insufficient to overcome the high hurdle required for a change of venue.

Juror exposure to information about a defendant's prior convictions or to news accounts of the crime with which he is charged does not alone presumptively deprive the defendant of due process. *State v. Galindo*, 278 Neb. 599, 744 N.W.2d 190 (2009) (massive publicity of five murders committed during attempted bank robbery insufficient for change of venue). A court will not presume unconstitutional partiality because of media coverage unless the record shows a barrage of inflammatory publicity immediately prior to trial, amounting to a huge wave of public passion or resulting in a trial atmosphere utterly corrupted by press coverage. *State v. Schroeder*, 279 Neb. 199, 777 N.W.2d 793 (2010).

[28,29] There is no allegation that the community where these crimes occurred and Meduna was tried was subjected to a barrage of inflammatory publicity creating a wave of public passion or a corrupted trial atmosphere. Meduna's trial counsel acknowledged at the pretrial hearing that he could not meet the burden required for a change of venue, and the competency of counsel is presumed. See *State v. Nielsen*, 243 Neb. 202, 498 N.W.2d 527 (1993), *disapproved on other grounds, State v. Canbaz*, 270 Neb. 559, 705 N.W.2d 221 (2005). The fact that trial counsel never reasserted the motion shows that, even after voir dire, he was unable to do so—and we again presume that decision to be a competent decision. Defense counsel is not ineffective for failing to raise an argument that has no merit. See *State v. Young, supra.* In this case, the allegations on this point are plainly insufficient, and moreover, given the overwhelming evidence against Meduna, there could be no prejudice in any event. See *State v. Long*, 264 Neb. 85, 645 N.W.2d 553 (2002) (defendant must show that his or her counsel's performance was deficient and that this deficient

performance actually prejudiced his or her defense). If it is more appropriate to dispose of an ineffectiveness claim due to the lack of sufficient prejudice, that course should be followed. *Id.* Prejudice means that there is a reasonable probability that but for counsel's deficient performance, the result of the proceeding would have been different. See *State v. Thomas*, 262 Neb. 985, 637 N.W.2d 632 (2002). Thus, in this case, prejudice means that but for the failure to file a motion for a change of venue, Meduna would have been acquitted—a result that is closer to impossible rather than probable, given the evidence arrayed against Meduna.

Meduna also argues that his trial counsel was ineffective for failing to subject the State's case to meaningful adversarial testing. He argues that "each action and inaction of trial counsel is questionable; viewed in their entirety, the actions and inactions are inexcusable." Brief for appellant at 30. In his brief, Meduna cites to *United States v. Cronic*, 466 U.S. 648, 656-57, 104 S. Ct. 2039, 80 L. Ed. 2d 657 (1984), for the following proposition:

> [T]he adversarial process protected by the Sixth Amendment requires that the accused have "counsel acting in the role of an advocate." . . . The right to the effective assistance of counsel is thus the right of the accused to require the prosecution's case to survive the crucible of meaningful adversarial testing. When a true adversarial criminal trial has been conducted—even if defense counsel may have made demonstrable errors—the kind of testing envisioned by the Sixth Amendment has occurred. But if the process loses its character as a confrontation between adversaries, the constitutional guarantee is violated.

Without further analysis or explanation, Meduna's brief then recites, "There simply was ***no*** adversarial testing at . . . Meduna's trial." Brief for appellant at 31.

Having reviewed the trial record, we can say that such does not support the claim that Meduna's trial counsel entirely failed to subject the prosecution's case to meaningful adversarial testing. On the contrary, the record contains volumes of evidence documenting the cross-examination by Meduna's trial counsel

of the State's 19 witnesses. A "confrontation between adversaries" clearly occurred at trial. See *Untied States v. Cronic, supra*. There is thus no merit to this claim.

CONCLUSION

Because we find that Meduna's assigned errors are without merit or were not prejudicial to him or are procedurally barred, we affirm Meduna's convictions and sentences.

AFFIRMED.

IN RE INTEREST OF EMILY R., A CHILD UNDER 18 YEARS OF AGE. STATE OF NEBRASKA, APPELLEE, V. EMILY R., APPELLEE, AND NEBRASKA DEPARTMENT OF HEALTH AND HUMAN SERVICES, APPELLANT.

793 N.W.2d 762

Filed January 11, 2011. No. A-10-374.

1. **Juvenile Courts: Appeal and Error.** An appellate court reviews juvenile cases de novo on the record and reaches its conclusions independently of the juvenile court's findings.
2. **Statutes: Appeal and Error.** To the extent an appeal calls for statutory interpretation or presents questions of law, an appellate court must reach an independent conclusion irrespective of the determination made by the court below.
3. ____: ____. Statutory language is to be given its plain and ordinary meaning, and an appellate court will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous.
4. **Juvenile Courts: Jurisdiction: Statutes.** As a statutorily created court of limited and special jurisdiction, a juvenile court has only such authority as has been conferred on it by statute.

Appeal from the Separate Juvenile Court of Lancaster County: TONI G. THORSON, Judge. Reversed and remanded for further proceedings.

Sarah E. Sujith, Special Assistant Attorney General, of Department of Health and Human Services, for appellant.

No appearance for appellees.

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

INBODY, Chief Judge.

INTRODUCTION

The Nebraska Department of Health and Human Services (DHHS) appeals from a March 9, 2010, order of the separate juvenile court of Lancaster County simultaneously committing Emily R. to the custody of DHHS' Office of Juvenile Services (OJS) and placing her on probation.

STATEMENT OF FACTS

In April 2007, Emily was adjudicated as a child within the meaning of Neb. Rev. Stat. § 43-247(1) (Cum. Supp. 2006) on the basis that Emily had committed certain law violations. In August, the juvenile court committed her to the custody of OJS. Regular review and permanency hearings were held, and Emily remained committed to the custody of OJS.

In November 2009, a supplemental adjudication petition was filed alleging that Emily was a child within the meaning of § 43-247(1) (Reissue 2008) on the basis that Emily had committed additional criminal law violations, and she was again adjudicated as a child within the meaning of § 43-247(1). On March 9, 2010, the juvenile court continued custody of Emily in OJS for in-home placement, but also placed her on probation for the remaining period of her minority. It is from this order that DHHS has appealed.

ASSIGNMENT OF ERROR

DHHS contends that the juvenile court erred in committing Emily to the OJS and simultaneously placing her on probation.

STANDARD OF REVIEW

[1,2] An appellate court reviews juvenile cases de novo on the record and reaches its conclusions independently of the juvenile court's findings. *In re Interest of Jorge O.*, 280 Neb. 411, 786 N.W.2d 343 (2010); *In re Interest of Dakota M.*, 279 Neb. 802, 781 N.W.2d 612 (2010). To the extent an appeal calls for statutory interpretation or presents questions of law, an appellate court must reach an independent conclusion irrespective of the determination made by the court below.

In re Interest of Jorge O., supra; *In re Interest of Dakota M., supra*.

ANALYSIS

DHHS contends that the juvenile court erred in simultaneously committing Emily to the OJS and placing her on probation. DHHS argues that Neb. Rev. Stat. § 43-286 (Reissue 2008) provides for a number of dispositions in cases arising under § 43-247(1), but that such dispositions are provided for in the alternative, and consequently, the juvenile court lacked the statutory authority to order more than one disposition at the same time in the same case.

Section 43-286 provides, in pertinent part:

> (1) When any juvenile is adjudicated to be a juvenile described in subdivision (1), (2), or (4) of section 43-247:
>
> (a) The court may continue the dispositional portion of the hearing, from time to time upon such terms and conditions as the court may prescribe, including an order of restitution of any property stolen or damaged or an order requiring the juvenile to participate in community service programs, if such order is in the interest of the juvenile's reformation or rehabilitation, and, subject to the further order of the court, may:
>
> (i) Place the juvenile on probation subject to the supervision of a probation officer;
>
> (ii) Permit the juvenile to remain in his or her own home or be placed in a suitable family home, subject to the supervision of the probation officer; or
>
> (iii) Cause the juvenile to be placed in a suitable family home or institution, subject to the supervision of the probation officer. If the court has committed the juvenile to the care and custody of [DHHS], the department shall pay the costs of the suitable family home or institution which are not otherwise paid by the juvenile's parents.
>
> Under subdivision (1)(a) of this section, upon a determination by the court that there are no parental, private, or other public funds available for the care, custody, and maintenance of a juvenile, the court may order a

> reasonable sum for the care, custody, and maintenance of the juvenile to be paid out of a fund which shall be appropriated annually by the county where the petition is filed until a suitable provision may be made for the juvenile without such payment; or
>
> (b) The court may commit such juvenile to the [OJS], but a juvenile under the age of twelve years shall not be placed at the Youth Rehabilitation and Treatment Center-Geneva or the Youth Rehabilitation and Treatment Center-Kearney unless he or she has violated the terms of probation or has committed an additional offense and the court finds that the interests of the juvenile and the welfare of the community demand his or her commitment. This minimum age provision shall not apply if the act in question is murder or manslaughter.

These options are provided for in the alternative. *In re Interest of Torrey B.*, 6 Neb. App. 658, 577 N.W.2d 310 (1998).

[3] Statutory language is to be given its plain and ordinary meaning, and an appellate court will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous. *In re Interest of Matthew P.*, 275 Neb. 189, 745 N.W.2d 574 (2008).

[4] The language of § 43-286(1)(a)(iii) authorizes a juvenile court to place care and custody of a juvenile with DHHS while also causing the juvenile to be placed in a suitable family home or institution subject to the supervision of a probation officer; however, the plain language of this statute does not extend to a juvenile permitted to remain in his or her own home. When a juvenile court permits the juvenile to remain in his or her own home, § 43-286(1)(a)(ii) provides that this placement is subject to the supervision of a probation officer. "As a statutorily created court of limited and special jurisdiction, a juvenile court has only such authority as has been conferred on it by statute." *In re Interest of Gabriela H.*, 280 Neb. 284, 288, 785 N.W.2d 843, 846 (2010). In this case, the juvenile court, by simultaneously committing Emily to the care and custody of DHHS for in-home placement and placing her on probation, combined two of the subsections of § 43-286(1)(a) without strictly

applying either. Such a disposition is beyond the authority granted by statute.

CONCLUSION

Because the juvenile court lacked the statutory authority to simultaneously commit Emily to the care and custody of DHHS for in-home placement and place her on probation, we reverse the order of the district court and remand the cause for further proceedings.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

GAYLE MANN, APPELLANT, V.
LAZELL RICH, APPELLEE.
794 N.W.2d 183

Filed January 18, 2011. No. A-10-171.

1. **Child Custody: Appeal and Error.** Child custody 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. ____: ____. Ordinarily, custody of a minor child will not be modified unless there has been a material change of circumstances showing that the custodial parent is unfit or that the best interests of the child require such action.
3. **Child Custody.** When deciding custody issues, the best interests of the minor children are the court's paramount concern.
4. ____. In determining the best interests of a child, a court can look to the relationship of the child with each parent; the general health, welfare, and social behavior of the child; the moral fitness of the parents; the respective environments each parent offers; the emotional relationship between the child and the 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; and the capacity of each parent to provide physical care and to satisfy the needs of the child.
5. ____. When determining the best interests of a child, a court must have an understanding of the parents' and the child's history, in addition to an awareness of their current circumstances.
6. **Modification of Decree: Child Custody: Evidence: Time.** As a general rule, evidence of a parent's behavior during the year or so prior to a hearing on a motion to modify is of more significance than the behavior prior to that time.

7. **Moot Question: Final Orders: Appeal and Error.** Generally, an appellate court cannot afford relief to a party from a court's ruling on a temporary order because any issue relating to the temporary order is moot after it is replaced by a more permanent order.

Appeal from the District Court for Douglas County: J. MICHAEL COFFEY, Judge. Reversed and remanded with directions.

Stephen D. Stroh and Ryan D. Caldwell, of Bianco Stroh, L.L.C., for appellant.

Joan Watke Stacy for appellee.

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

IRWIN, Judge.

I. INTRODUCTION

This appeal involves an ongoing custody dispute. The proceedings currently at issue were initiated by a customary application to modify. The salient issue in this appeal is whether a trial court must consider evidence from the time after the date an application to modify was filed. We answer this question in the affirmative, because the current environment that the parties would be providing to the children is essential to any custody determination.

II. BACKGROUND

This appeal involves the parties' continuing dispute over custody of their two minor children: a child born in October 1998 and a child born in November 2000. The custody proceedings have been ongoing since September 2003, when Gayle Mann filed a petition alleging that Lazell Rich is the biological father of the two children and requesting that the district court grant custody of the children to her and order Lazell to pay a reasonable sum of child support.

On August 21, 2006, a decree of paternity was entered. In the decree, the district court determined that Lazell is the father of the children; awarded custody of the children to Gayle, subject to Lazell's reasonable rights of visitation; and ordered Lazell to pay child support.

On December 11, 2006, just 3 months after the decree was entered, Lazell, proceeding pro se, filed an application

to modify the decree of paternity to award him custody of the children. After a hearing, the district court issued an order modifying the decree of paternity by awarding Lazell custody of the children, subject to Gayle's reasonable rights of visitation.

Gayle appealed the district court's order to this court. In *Mann v. Rich*, 16 Neb. App. 848, 755 N.W.2d 410 (2008), we found that Gayle was not afforded procedural due process because there was insufficient evidence to establish that she received notice of the hearing on Lazell's application to modify the decree of paternity. As a result of this finding, we reversed the order of the district court which modified the decree of paternity and remanded the case for a new hearing on the issue of custody of the parties' minor children. On December 23, 2008, the mandate of this court was issued.

On January 14, 2009, a month after the mandate was issued, a hearing was held concerning temporary custody of the children while a new hearing on Lazell's application to modify was pending. At the January 14 hearing, Gayle argued that, as a result of our opinion in *Mann v. Rich, supra*, the custody order in the original paternity decree was still in effect. That custody order awarded her custody of the children subject to Lazell's reasonable rights of visitation. In contrast, Lazell argued that he should be granted temporary custody of the children pending the rehearing because the children had been in his custody for the preceding 18 months while Gayle's appeal to this court was pending. Lazell asserted that it would not be in the children's best interests to change custody for the short period of time before the new hearing on his application to modify.

The district court granted Lazell temporary custody of the children pending the new hearing on his application to modify the paternity decree. The court indicated:

> I'm worried uprooting these kids at this time when they've been where they have been for the last 18 months is too traumatic of an event for them at this time based on what's occurred.
>
> . . . [I]t's in the best interest of these minor children to remain where they are . . . .

On October 19 and November 24, 2009, a new hearing was held on Lazell's application to modify the paternity decree. Prior to the start of this hearing, the district court informed the parties, "All I want to hear is evidence of things that occurred between the time the [original paternity] decree was entered in August of 2006 and the time [Lazell] filed [his] motion in December of 2006 that justifies a change in custody."

Based on the district court's instructions, the parties focused their presentation of evidence on events that had occurred between August and December 2006. Such evidence revealed that during this period of time, the parties did not get along with each other and struggled to communicate effectively. Lazell presented evidence to demonstrate that Gayle hindered his relationship with the children. Gayle presented evidence to demonstrate that she was afraid of Lazell and that the children felt more comfortable with her than with Lazell.

After the hearing, the district court entered an order modifying the original paternity decree such that Lazell was granted custody of the parties' children.

Gayle appeals from the district court's order here.

III. ASSIGNMENTS OF ERROR

On appeal, Gayle argues that the district court abused its discretion in granting temporary custody of the children to Lazell in January 2009, in finding a material change of circumstances had occurred since the entry of the paternity decree in August 2006, and in modifying the paternity decree to award Lazell custody.

IV. ANALYSIS

1. Standard of Review

[1] Child custody 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. *Maska v. Maska*, 274 Neb. 629, 742 N.W.2d 492 (2007).

2. Modification of Custody

We first address the district court's decision to modify the original paternity decree by awarding Lazell custody of the

parties' children. However, before we can address Gayle's assertion that the district court abused its discretion in modifying the decree, we must examine whether the evidence presented at the hearing in October and November 2009 was sufficient to make any determination about custody of the minor children.

[2,3] Ordinarily, custody of a minor child will not be modified unless there has been a material change of circumstances showing that the custodial parent is unfit or that the best interests of the child require such action. *Vogel v. Vogel*, 262 Neb. 1030, 637 N.W.2d 611 (2002). When deciding custody issues, the best interests of the minor children are the court's paramount concern. See *Hassenstab v. Hassenstab*, 6 Neb. App. 13, 570 N.W.2d 368 (1997). The best interests inquiry has its foundation in both statutory and case law. *Walters v. Walters*, 12 Neb. App. 340, 673 N.W.2d 585 (2004). Statutory law directs courts to consider the best interests of the minor children in determining custody arrangements and time to be spent with each parent. See Neb. Rev. Stat. § 42-364(1) and (2) (Cum. Supp. 2010).

[4,5] In determining the best interests of a child, a court can look to the relationship of the child with each parent; the general health, welfare, and social behavior of the child; the moral fitness of the parents; the respective environments each parent offers; the emotional relationship between the child and the 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; and the capacity of each parent to provide physical care and to satisfy the needs of the child. See *McDougall v. McDougall*, 236 Neb. 873, 464 N.W.2d 189 (1991). Consideration of each of these factors requires an understanding of the parents' and the child's history, in addition to an awareness of their current circumstances.

As we discussed above, the district court limited the presentation of evidence at the hearing to events that occurred between the time the original paternity decree was entered in August 2006 and the time Lazell filed his application to

modify in December 2006. Specifically, the judge instructed the parties as follows:

> [The original] decree was entered August 21, 2006. [Lazell] filed . . . an application to modify . . . about three months later. What you have to show is that there was a material change in circumstances that occurred between the time that decree was entered and the time [the application was filed] that justifies a change in custody. It doesn't matter what's been going on since. You're stuck with what you filed back in '06, all right?

The judge reminded the parties of this admonition on multiple occasions during the hearing. As a result of this limitation on the presentation of evidence, our record reveals the parties' circumstances as they existed during the fall and winter of 2006, but does not provide an accurate portrayal of the parties' circumstances at the time of the hearing in October and November 2009.

[6] We first note that we cannot find any case law or other authority which suggests that a court is precluded from considering evidence from the time after the filing of an application to modify in determining whether a material change of circumstances has occurred or in determining the best interests of the children. Rather, our review of the case law in this area suggests that courts routinely consider evidence from the time after the filing of an application to modify to the time of the modification proceedings. In fact, the Nebraska Supreme Court has indicated that as a general rule, evidence of a parent's behavior during the year or so prior to a hearing on a motion to modify is of more significance than the behavior prior to that time. See *Heistand v. Heistand*, 267 Neb. 300, 673 N.W.2d 541 (2004).

The district court clearly based its decision to modify the decree solely on the parties' history, without considering the parties' current circumstances. Because the court did not consider the parties' current circumstances, it did not consider the environment that the parties would be providing to the children at the time of the hearing.

The 300-page bill of exceptions contains a few scant lines about events that occurred after December 2006 and through

the time of the hearing in October and November 2009. This evidence that the parties did sporadically present, about the prohibited timeframe, revealed significant changes in the parties' circumstances. There was evidence to suggest that during this time period, Gayle had removed the children from Nebraska without Lazell's knowledge. Such evidence revealed that Gayle enrolled the children in an out-of-state school and that she intended to reside in this other state indefinitely. Although the record indicates Gayle returned the children to Nebraska at some point, the record does not reveal how long she was gone or other circumstances surrounding this incident.

Other evidence presented at the hearing revealed that during the time period between December 2006 and October 2009, Lazell was arrested for child abuse after hitting one of the parties' children. In addition, there was evidence that Lazell's current wife had been granted a protection order against Lazell in the months prior to the hearing. There is no evidence about the specifics of either of these incidents.

We conclude that the district court erred in limiting the presentation of evidence at the hearing and in basing its decision about custody of the children on the parties' circumstances as they existed 3 years prior to the hearing. We reverse the district court's decision to modify the original decree and remand the case with directions to hold a new hearing where the parties can present evidence of their current circumstances. Such evidence should demonstrate events that occurred after December 2006 up to the time of the new hearing.

3. Temporary Custody Order

We next consider the district court's decision to grant temporary custody of the children to Lazell in January 2009, prior to the modification hearing. On appeal, Gayle argues that the court abused its discretion in granting temporary custody to Lazell. Specifically, she argues that the court erred in granting temporary custody to Lazell without receiving sufficient evidence of the children's best interests.

[7] Generally, we cannot afford relief to a party from a court's ruling on a temporary order because any issue relating to the temporary order is moot after it is replaced by a more

permanent order. See *Coleman v. Kahler*, 17 Neb. App. 518, 766 N.W.2d 142 (2009). However, in this case, we are reversing the permanent custody order issued by the district court. The January 2009 temporary custody order will remain in effect pending a new modification hearing, and such order is not moot. Accordingly, we address the district court's temporary custody order.

At the January 2009 hearing, the parties presented limited evidence. Gayle offered her own affidavit into evidence as well as affidavits from her pastor and from the children's childcare provider. Lazell offered his own affidavit into evidence. In addition, he attempted to offer the testimony of someone from the children's school; however, the court did not allow him to present such evidence. The content of the affidavits allowed into evidence is not clear because they are not included in our record.

In awarding temporary custody of the children to Lazell, the court indicated that it was concerned about "uprooting" the children and found that it would be in their best interests to remain with Lazell pending the rehearing. While the court indicated that it had considered the children's best interests in awarding temporary custody to Lazell, it appears that it limited its consideration to the effects of moving the children to a new home. There is no indication that the court considered the current circumstances of either of the parties.

As we discussed above, at the modification hearing, there was some suggestion that the parties' circumstances had significantly changed in the recent past, including Gayle's attempt to relocate to another state with the children, Lazell's arrest for child abuse, and the protection order granted against Lazell and in favor of his current wife. Given that these significant changes were apparently not considered by the court at the January 2009 hearing, we conclude that the district court had insufficient evidence to make a determination about custody, even if such determination was temporary in nature.

We reverse the district court's order awarding Lazell temporary custody of the children. We remand the case with directions to hold a new hearing to determine temporary custody of the children pending the new modification hearing. At the

temporary custody hearing, the parties should present evidence of their current circumstances.

V. CONCLUSION

Because the district court failed to consider evidence of the parties' current circumstances, we reverse the district court's decision to modify the original paternity decree and remand the case with directions to hold a new hearing where the parties can present evidence of their current circumstances. Such evidence should demonstrate events that occurred after December 2006 up to the time of the new hearing. The district court should also hold a new hearing to determine temporary custody of the children pending a new modification hearing.

REVERSED AND REMANDED WITH DIRECTIONS.

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

794 N.W.2d 190

Filed January 18, 2011. No. A-10-735.

1. **Judgments: Jurisdiction: Appeal and Error.** A jurisdictional question which does not involve a factual dispute is determined by an appellate court as a matter of law, which requires the appellate court to reach a conclusion independent from the lower court's decision.
2. **Statutes: Appeal and Error.** Statutory interpretation is a question of law, which an appellate court resolves independently of the trial court.
3. **Jurisdiction: Words and Phrases.** Jurisdiction is the inherent power or authority to decide a case.
4. ____: ____. Jurisdiction of the subject matter means the authority to hear and determine both the class of actions to which the action before the court belongs and the particular question which it assumes to decide.
5. **Juvenile Courts: Jurisdiction: Statutes.** As a statutorily created court of limited and special jurisdiction, a juvenile court has only such authority as has been conferred on it by statute.
6. **Statutes.** Statutes relating to the same subject matter will be construed so as to maintain a sensible and consistent scheme, so that effect is given to every provision.
7. **Child Custody: Jurisdiction.** The jurisdiction of a state to regulate the custody of infants found within its territory does not depend upon the domicile of the

child, but it arises out of the power that every sovereignty possesses as parens patriae to every child within its borders to determine its status and the custody that will best meet its needs and wants, and residence within the state suffices even though the domicile may be in another jurisdiction.

8. **Juvenile Courts: Venue: Proof.** In a proceeding under the Nebraska Juvenile Code, the State is not required to prove proper venue.
9. **Minors: Venue: Proof.** Proof of venue is immaterial to the determination of whether a juvenile falls within the meaning of Neb. Rev. Stat. § 43-247 (Reissue 2008).
10. **Juvenile Courts: Jurisdiction.** Although the grounds for adjudication alleged in an amended juvenile petition supersede those in the original petition, the physical locus of the child at the time the amended petition is filed does not affect the juvenile court's subject matter jurisdiction.
11. **Juvenile Courts: Minors.** The Nebraska Juvenile Code must be liberally construed to accomplish its purpose of serving the best interests of the juveniles who fall within it.
12. **Parental Rights: Trial: Time.** A parent and a child, both being parties, have a right to a speedy adjudication hearing.

Appeal from the Separate Juvenile Court of Douglas County: VERNON DANIELS, Judge. Reversed and remanded for further proceedings.

Donald W. Kleine, Douglas County Attorney, Jordan Boler, and Daniel Gubler and Austin Vandeveer, Senior Certified Law Students, for appellant.

Michaela Skogerboe, of Harris Kuhn Law Firm, L.L.P., for appellee.

Lynnette Z. Boyle, of Tietjen, Simon & Boyle, guardian ad litem.

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

SIEVERS, Judge.

The State of Nebraska appeals from an order of the Douglas County Separate Juvenile Court that sustained Mikalle S.' motion to dismiss the adjudication proceedings concerning her minor child, Tegan V. Although the juvenile court did not provide any explanation for sustaining Mikalle's motion, the motion to dismiss was premised on an alleged lack of subject matter jurisdiction. That alleged jurisdictional defect

stems from the fact that Tegan was placed in foster care with her paternal grandmother in Sarpy County by the Nebraska Department of Health and Human Services (DHHS) after the child's removal from Mikalle's custody and prior to the time the State filed its amended petition. We find that the juvenile court's undisputed jurisdiction over the original petition for adjudication was not lost merely because Tegan was placed in foster care in another county before the amended petition was filed. Thus, the dismissal of the State's petition for lack of subject matter jurisdiction was erroneous as a matter of law. We therefore reverse the dismissal order of the Douglas County Separate Juvenile Court and remand the cause to that court for further proceedings.

BACKGROUND

On December 7, 2009, the State filed a petition alleging that Tegan, a child less than a year old, came within the meaning of Neb. Rev. Stat. § 43-247(3)(a) (Reissue 2008), being a minor lacking in proper parental care by reason of the faults or habits of Mikalle, the child's natural mother. The State filed the petition after Mikalle took Tegan to the emergency room at a Douglas County hospital for second-degree burns the child sustained on the majority of her face, both ears, and her neck. The affidavit in support of the State's accompanying motion for immediate removal recites that Tegan's treating physician expressed that the burn pattern on Tegan's head and neck did not "'match'" the explanation for the injuries provided by Mikalle, and the juvenile court's order granting DHHS immediate custody cites the physician's assertion that the burns were "nonaccidental" in nature. Thus, the factual basis for adjudication provided in the petition was that Tegan was observed with second-degree burns on her head and neck which occurred while she was in the custody and care of Mikalle, that Mikalle "failed to provide any reasonable explanation for said injuries," and that as a result, Tegan was at risk for harm. At the detention hearing held thereafter, the court ordered that Tegan would remain in DHHS custody until further notice and provided Mikalle with "reasonable rights of strictly supervised visitation."

On February 23, 2010, the State filed an amended petition that added the following counts to those regarding the second-degree burns on Tegan's head and neck: (1) "[Mikalle] has failed to attend visits or otherwise have any contact with [Tegan] for approximately 10 weeks while said child has been in the care and custody of [DHHS]," and (2) "[Mikalle] has failed to provide proper parental care, support and/or supervision for said child." On March 1, an adjudication hearing was held on the amended petition and was continued to March 8. At the continued adjudication hearing, a deputy Douglas County Attorney informed the court that the State would be proceeding with only the claim from the amended petition, quoted above, and not with the claims related to the burns on Tegan's head and neck. In addition, the juvenile court was advised that DHHS had temporarily placed Tegan in foster care with her paternal grandmother in Sarpy County and that the child was living there at the time the amended petition was filed. Upon learning that information, Mikalle moved to dismiss the case for lack of subject matter jurisdiction, arguing that because Tegan was residing in Sarpy County on the date the amended petition was filed, the Douglas County Separate Juvenile Court no longer had jurisdiction. In response, the State argued that because Tegan was in the custody of a DHHS office located in Douglas County, "the child is found in Douglas County at the time of the filing of the amended petition," meaning that the Douglas County Separate Juvenile Court retained jurisdiction. The guardian ad litem joined the argument of the State and moved for a continuance to allow the parties to brief the issue of subject matter jurisdiction, which motion the juvenile court sustained. Accordingly, the parties were ordered to submit briefs on the following issue:

> In a situation where the state has filed an amended petition following a detention hearing where the Separate Juvenile Court for Douglas County has placed a child with [DHHS] for placement, does the Separate Juvenile Court for Douglas County have subject matter jurisdiction if at the time the amended petition was filed the child was placed in another county by [DHHS].

On July 16, 2010, after receiving briefs from the parties and taking the matter under advisement, the court issued an order sustaining Mikalle's motion to dismiss for lack of subject matter jurisdiction, without prejudice, and ordering that DHHS be relieved from any further responsibility in the matter. Significantly, the court did not provide any authority or explanation for its action. The State now timely appeals.

ASSIGNMENT OF ERROR

The State alleges that the Douglas County Separate Juvenile Court erred in sustaining Mikalle's motion to dismiss, because the court had jurisdiction to hear the case.

STANDARD OF REVIEW

[1] A jurisdictional question which does not involve a factual dispute is determined by an appellate court as a matter of law, which requires the appellate court to reach a conclusion independent from the lower court's decision. *US Ecology v. State*, 258 Neb. 10, 601 N.W.2d 775 (1999).

[2] Statutory interpretation is a question of law, which an appellate court resolves independently of the trial court. *State v. State Code Agencies Teachers Assn.*, 280 Neb. 459, 788 N.W.2d 238 (2010).

ANALYSIS

While an explicit ruling providing the basis for the dismissal would have been desirable, we assume that the juvenile court concluded that it lacked subject matter jurisdiction because that was the basis of the motion to dismiss and subject matter jurisdiction was the issue the court ordered briefed.

[3,4] Thus, we begin by recalling that jurisdiction is the inherent power or authority to decide a case. See *Chicago Lumber Co. v. School Dist. No. 71*, 227 Neb. 355, 417 N.W.2d 757 (1988). "Jurisdiction of the subject matter" means the authority to hear and determine both the class of actions to which the action before the court belongs and the particular question which it assumes to decide. *State v. Smith*, 269 Neb. 773, 779, 696 N.W.2d 871, 879 (2005).

[5,6] As a statutorily created court of limited and special jurisdiction, a juvenile court has only such authority as has been conferred on it by statute. *In re Interest of Jorge O.*, 280 Neb. 411, 786 N.W.2d 343 (2010). Thus, we look to the Nebraska Juvenile Code, Neb. Rev. Stat. §§ 43-245 to 43-2,129 (Reissue 2008 & Supp. 2009), to determine the extent of the juvenile court's jurisdictional authority over this case. And because those statutes relate to the same subject matter, we construe them so as to maintain a sensible and consistent scheme, so that effect is given to every provision. See *In re Application of Metropolitan Util. Dist.*, 270 Neb. 494, 704 N.W.2d 237 (2005).

[7] Both the petition and the amended petition allege that Tegan comes within the meaning of § 43-247(3)(a) because she is lacking proper parental care by reason of the fault or habits of Mikalle. "Juvenile" is defined in the Nebraska Juvenile Code under § 43-245(6) as any person under the age of 18—Tegan is obviously a juvenile. Section 43-247 gives the juvenile courts "exclusive original jurisdiction" as to "any juvenile" defined in § 43-247(3). The juvenile court's subject matter jurisdiction is far reaching. In *Jones v. State*, 175 Neb. 711, 717, 123 N.W.2d 633, 637 (1963), the court said:

> The jurisdiction of a state to regulate the custody of an infant found within its territory does not depend upon the domicile of the parents. It has its origin in the protection that is due to the incompetent or helpless. As we said in [*In re Application of Reed*, 152 Neb. 819, 43 N.W.2d 161 (1950)]: "The jurisdiction of a state to regulate the custody of infants found within its territory does not depend upon the domicile of the child, but it arises out of the power that every sovereignty possesses as parens patriae to every child within its borders to determine its status and the custody that will best meet its needs and wants, and residence within the state suffices even though the domicile may be in another jurisdiction."

Other cases have followed the rule that neither the domicile of the parent nor that of the child is determinative of the court's subject matter jurisdiction. See, *Copple v. Copple*, 186 Neb. 696, 185 N.W.2d 846 (1971); *Miller v. Department of Public*

Welfare, 182 Neb. 155, 153 N.W.2d 737 (1967). This expansive subject matter jurisdiction, found in the State's common law, is codified in the juvenile code. Section 43-247 provides that the juvenile court in "each county" shall have jurisdiction over "any juvenile" who lacks proper parental care by reason of the fault or habits of the child's parent, guardian, or custodian. See § 43-247(3)(a).

Moreover, § 43-282 allows an adjudication proceeding to be filed in any county and allows for discretionary transfer, after adjudication, to the county where the juvenile is living or domiciled, stating in part:

> If a petition alleging a juvenile to be within the jurisdiction of the Nebraska Juvenile Code is filed in a county other than the county where the juvenile is presently living or domiciled, the court, at any time after adjudication and prior to final termination of jurisdiction, may transfer the proceedings to the county where the juvenile lives or is domiciled and the court having juvenile court jurisdiction therein shall thereafter have sole charge of such proceedings and full authority to enter any order it could have entered had the adjudication occurred therein.

[8,9] This statute is consistent with the holding of *In re Interest of Leo L.*, 258 Neb. 877, 606 N.W.2d 783 (2000), where the court considered whether the State has to prove venue in a juvenile case. The court held that "in a proceeding under the Nebraska Juvenile Code, the State is not required to prove proper venue." *In re Interest of Leo L.*, 258 Neb. at 881, 606 N.W.2d at 786. Although *In re Interest of Leo L.* was an adjudication proceeding filed under § 43-247(1) arising out of a juvenile's law violation, the court did not limit its holding to that subsection of § 43-247. Rather, the court concluded its analysis by saying, "Proof of venue is immaterial to the determination of whether a juvenile falls within the meaning of § 43-247." *In re Interest of Leo L.*, 258 Neb. at 881, 606 N.W.2d at 786. Clearly, § 43-282 makes venue immaterial in addition to setting up a procedure for transfer, which in this case could well be to the Sarpy County Separate Juvenile Court, in the discretion of the Douglas County Separate Juvenile Court.

Section 43-274 contains what arguably can be considered as the only limitation on venue for a juvenile proceeding under § 43-247. Section 43-274(1) states, in pertinent part:

> The county attorney, having knowledge of a juvenile *in his or her county* who appears to be a juvenile described in subdivision . . . (3) . . . of section 43-247, may file with the clerk of the court having jurisdiction in the matter a petition in writing specifying which subdivision of section 43-247 is alleged, setting forth the facts verified by affidavit . . . .

(Emphasis supplied.)

Thus, it is clear that § 43-274(1) authorizes a county attorney with knowledge of a juvenile "in his or her county" falling within the purview of § 43-247(3)(a) to file a petition in that county's juvenile court. This is what occurred when the deputy Douglas County Attorney filed the original petition to adjudicate Tegan under § 43-247(3)(a) in the Douglas County Separate Juvenile Court. The original petition was filed in a proper court, because there is no dispute that Tegan was "in" Douglas County residing with Mikalle when the child's burn injuries came to the attention of the authorities, which event gave rise to the filing of the original petition.

By sustaining Mikalle's motion, the Douglas County Separate Juvenile Court implicitly ruled that it no longer had jurisdiction because Tegan was temporarily in Sarpy County when the State filed its amended petition, despite the fact that the court obviously had jurisdiction when the original petition was filed. We have not found a similar procedural background in a reported Nebraska case; nor is there any Nebraska authority—case law or statutory—for what the trial court did. And, construing the juvenile code so as to maintain a sensible and consistent scheme, so that effect is given to every provision, we conclude that the dismissal was error as a matter of law. See *In re Application of Metropolitan Util. Dist.*, 270 Neb. 494, 704 N.W.2d 237 (2005).

Mikalle cites to *In re Interest of Rondell B.*, 249 Neb. 928, 546 N.W.2d 801 (1996), for the proposition that "[w]hen an amended petition is filed, the preceding petition ceases to have any function." Brief for appellee at 14. Her argument is

that "the filing of the Amended Petition wiped out the existence of the original Petition." *Id.* And thus—if we were to follow her logic—the amended petition did not comply with § 43-274, because Tegan was not located in Douglas County when the amended petition was filed. We are not persuaded. First, Mikalle would have us view the adjudication proceeding as having never been instituted by the original petition, when the reality is that the amended petition only really changes the issues to be litigated. Second, were we to uphold her position, and the trial court's dismissal, we would create an absurdity, because any time a child in the custody of DHHS were physically placed outside the geographic boundaries of the county where the juvenile proceedings were initiated, a dismissal would result if the original petition were amended after such placement, meaning that the proceedings would need to be reinstituted in the county that the child was now "in" under § 43-274(1). Obviously, that result would produce great inefficiencies and substantially increase the costs of the juvenile justice system. And, we can envision that DHHS would be forced to forgo what might be the best foster care placement for a child in order to avoid these obvious inefficiencies and costs. Third, we would be ignoring the statutory provisions for the transfer of a juvenile case to another venue, found in § 43-282.

[10] The case upon which Mikalle relies, *In re Interest of Rondell B., supra*, involved the question of whether a juvenile court had personal jurisdiction over a juvenile's mother—not whether a juvenile court lost subject matter jurisdiction when the custodian, DHHS, placed the child in a foster home outside of the county where the adjudication proceedings were pending. The present situation is clearly distinguishable from that of *In re Interest of Rondell B.*, as we are dealing with subject matter, not personal, jurisdiction. Although the grounds for adjudication alleged in the amended petition supersede those in the original petition, the physical locus of the child at the time the amended petition was filed does not affect the Douglas County Separate Juvenile Court's subject matter jurisdiction.

[11] In fact, it is wholly illogical for the Douglas County Separate Juvenile Court to be stripped of its irrefutable

subject matter jurisdiction over Tegan's adjudication proceeding merely because the child was placed in foster care in another county prior to the filing of the State's amended petition. The public policy concerns that would be implicated if that result were truly the applicable law are far reaching. For example, as is the case here, the temporary placement of juveniles with blood relatives in other counties would be discouraged, despite such placement's potentially being in the child's best interests. Such a rule would be completely contradictory to the clear directive from the Nebraska Supreme Court that we construe the Nebraska Juvenile Code liberally to accomplish its purpose of serving the best interests of the juveniles who fall within it. See *In re Interest of Gabriela H.*, 280 Neb. 284, 785 N.W.2d 843 (2010).

[12] And, as the State points out, the juvenile court's dismissal of this case is also at odds with the parties' right to a speedy adjudication hearing. See § 43-279.01(1)(f) and *In re Interest of D.M.B.*, 240 Neb. 349, 481 N.W.2d 905 (1992). The Douglas County Separate Juvenile Court has heard every motion and issued every order in this matter since the filing of the petition in December 2009. We agree that dismissal at this juncture impedes Mikalle and Tegan's mutual right to a speedy and efficient adjudication hearing. Starting over in Sarpy County because an amended petition has been filed and DHHS has physically placed Tegan in that county can only be described as an absurd result.

Thus, construing § 43-282 consistently with the rest of the Nebraska Juvenile Code, see *In re Application of Metropolitan Util. Dist.*, 270 Neb. 494, 704 N.W.2d 237 (2005), we find that the Douglas County Separate Juvenile Court should have continued to exercise jurisdiction over Tegan's adjudication proceedings. Then, if the court determined that Tegan came within the meaning of § 43-247(3)(a), as alleged by the State, the court would have had the discretion under § 43-282, depending on the evidence, to transfer the matter to Sarpy County if Tegan were living or domiciled there at that time. However, dismissal of the matter was wrong because the court undoubtedly retained subject matter jurisdiction over the adjudication proceedings despite Tegan's placement in Sarpy County before

the amended petition was filed. In short, such filing did not affect the court's subject matter jurisdiction.

CONCLUSION

The Douglas County Separate Juvenile Court erred in sustaining Mikalle's motion to dismiss for lack of subject matter jurisdiction. We reverse, and remand the cause to that court for further proceedings.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

KARLA J. SHUCK, APPELLANT, V. DALE C. SHUCK, APPELLEE.

806 N.W.2d 580

Filed January 25, 2011. No. A-10-170.

1. **Divorce: Property Division: Taxes.** In assigning a value to a business for purposes of dividing the property in an action for dissolution of marriage, a trial court should not consider the tax consequences of the sale of the business unless there is a finding by the court that the sale of the business is reasonably certain to occur in the near future. However, the court may consider such tax consequences if it finds that the property division award will, in effect, force a party to sell his or her business in order to meet the obligations imposed by the court.
2. **Property Division.** An appropriate division of marital property turns on reasonableness as determined by the circumstances of each particular case.
3. **Corporations: Valuation.** To determine the value of a closely held corporation, the trial court may consider the nature of the business, the corporation's fixed and liquid assets at the actual or book value, the corporation's net worth, marketability of the shares, past earnings or losses, and future earning capacity.
4. ____: ____. The method of valuation used for a closely held corporation must have an acceptable basis in fact and principle.
5. **Divorce: Property Division: Valuation: Taxes.** Even if it is theoretically true that a potential purchaser of a business would consider "embedded" income tax consequences as a result of capital gains in arriving at a purchase price, discounting for such in the course of business valuation in the context of a marriage dissolution is appropriate only if there is first a finding that the sale of the business is reasonably certain to occur in the near future or that the property division award will, in effect, force a party to sell his or her business in order to meet the obligations imposed by the court.
6. **Valuation: Taxes.** When using an asset-based valuation method, a reduction in value for the taxable gain on a business when a sale or liquidation to pay court-imposed obligations is not reasonably certain in the near future is speculative and improper.

7. **Property Division: Valuation: Taxes.** It is an abuse of discretion for a trial court to make a reduction in the value of a business for tax liability for embedded depreciation recapture or capital gains where there is no finding by the court that the sale of the business is reasonably certain to occur in the near future or that the property division award will, in effect, force a party to sell his or her business in order to meet the obligations imposed by the court.
8. **Divorce: Property Division: Valuation.** A court may use its discretion in considering valuation reductions for lack of control and lack of marketability in the context of determining whether to make an award under *Grace v. Grace*, 221 Neb. 695, 380 N.W.2d 280 (1986), and if so, the amount thereof.
9. **Divorce: Property Division: Agriculture.** Pursuant to *Grace v. Grace*, 221 Neb. 695, 380 N.W.2d 280 (1986), a "*Grace* award" is a device to fairly and reasonably divide marital estates where the prime asset in contention is one spouse's gifted or inherited stock or property in a family agriculture organization.
10. ____: ____: ____. In the division of marital property, awards under *Grace v. Grace*, 221 Neb. 695, 380 N.W.2d 280 (1986), are not strictly limited to agriculture situations, although such would be the most common.
11. **Divorce: Property Division.** The purpose of property division is to equitably distribute the marital assets between the parties, and the polestar for such distribution is fairness and reasonableness as determined by the facts of each case.

Appeal from the District Court for Adams County: STEPHEN R. ILLINGWORTH, Judge. Affirmed in part, and in part reversed and remanded with directions.

Richard L. Alexander for appellant.

Robert J. Parker, Jr., and Lisa D. Stava, of Seiler & Parker, P.C., L.L.O., for appellee.

SIEVERS, MOORE, and CASSEL, Judges.

SIEVERS, Judge.

Karla J. Shuck appeals from a decree entered by the district court for Adams County dissolving her 35-year marriage to Dale C. Shuck and awarding her alimony in the amount of $2,500 per month for not more than 9 years, property valued at $425,045.72, and attorney fees in the amount of $48,816. Karla's assignments of error stem from the district court's valuation of four Shuck family-owned businesses for purposes of the parties' property settlement. The district court discounted the value of such businesses for taxes, lack of control, and lack of marketability. Karla assigns error to such reductions and alleges that Dale should be required to purchase her shares

of stock in two of the businesses at their unadjusted values. She also assigns error to the district court's failure to make a "*Grace* award" to her. See *Grace v. Grace*, 221 Neb. 695, 380 N.W.2d 280 (1986).

We conclude that under the asset-based valuation method applied to three of the four Shuck business entities, it was an abuse of discretion to reduce the value of the businesses by a 40-percent "assumed" rate of built-in capital gains tax, because there was no evidence of an imminent sale of the businesses. As a result, we reverse that aspect of the trial court's valuation of the marital estate and modify the property division as outlined below. In all other aspects, we affirm the decision of the district court.

FACTUAL BACKGROUND

At the time of trial, Dale and Karla had been married for 35 years and were 60 and 56 years old, respectively. The couple met in Fairmont, Minnesota, during the summer of 1973 at their place of employment—Dale was an electrical engineer, and Karla worked for him. The two were married on June 15, 1974, in Minnesota. In 1975, Dale moved to Edgar, Nebraska, to serve as vice president of one of his family's companies, Shuck Drilling Co. (Shuck Drilling), a closely held "C" corporation incorporated by Dale's parents in 1956 and engaged in the business of drilling irrigation wells and selling irrigation equipment. Meanwhile, Karla remained in Minnesota to complete her bachelor's degree in nursing, which she received in 1975. After graduation, Karla joined Dale in Edgar, where housing and other benefits described below were provided for the couple by Shuck Drilling.

After moving to Edgar in 1975, Karla was employed part time at a hospital in Hastings, Nebraska, until she became pregnant with the couple's first child, who was born in 1977; a second child was born in 1979. Karla testified that she did some volunteer nursing between the births of the two children and "did work part-time on and off" after their second child was born, but that she and Dale agreed that her primary responsibility would be taking care of the children and the home. Karla testified that she handled 95 percent of the

household duties whether she was working outside of the home or not.

In 1981, Dale and Karla moved to Hastings and bought a house in which Dale currently resides. From 1981 to 1988, Karla worked 25 to 30 hours per week at a Hastings family planning clinic, while Dale continued his work at Shuck Drilling in Edgar. In 1993, Karla also started a business as an independent consultant for a cosmetics company, which she quit a year or two before the parties' separation in 2006. Between 2003 and 2004, Karla also worked for a women's health care program at the Hastings YMCA, earning wages of $18 per hour.

Since 2006, and continuing to the time of trial in June 2009, Karla was working from 18 to 24 hours per week at the hospital in Hastings as a lifestyles management coach, earning $13.32 per hour. Karla testified that she also works on occasion as a registered nurse at the hospital, administering flu shots, earning $18.82 per hour. The trial court's decree provides that Karla will no longer be covered under Dale's health insurance plan after 6 months. Karla testified that she would be eligible for health insurance at the hospital if she worked at least 24 hours per week every week. She further testified that she is unable to work full time there because such full-time status requires additional training which would take her 1 year to complete and that, in any event, the hospital is under a hiring freeze. Karla also testified that she has not explored other better paying or full-time positions and that she would "rather not" work full time at this point in her life. Karla had no known health issues at the time of trial.

Dale, on the other hand, had quadruple bypass surgery in October 2005 and was diagnosed with lupus in 1996. Nevertheless, at the time of trial, Dale was working full time as the vice president of Shuck Drilling, as he had since 1975. Dale testified that the benefits he receives as a result of his position at Shuck Drilling include a vehicle, as well as fuel, maintenance, and insurance for the vehicle, several company credit cards, 3 percent of his annual salary contributed to his IRA, health insurance, disability insurance, and life insurance. Dale's gross earned income at Shuck Drilling in 2007 was

$161,557, compared to Karla's total earnings of $21,210 in that same year. Dale testified that he is in charge of running Shuck Drilling and that his two brothers each run one of the other two family-owned businesses: Lazy T Milliron, Inc. (Lazy T), and Diamond Seven Corporation (Diamond Seven), which were both incorporated by Dale's parents in 1968. One of Dale's brothers runs Lazy T, an "S" corporation engaged primarily in the business of leasing farmland. Dale's other brother runs Diamond Seven, a "C" corporation chiefly involved in farming the land that it owns, as well as leasing and farming land owned by others. In addition, Dale was a partner in Quatros Hombres, also known as Cuatros Hombres Farms (CH Farms), a general partnership originally formed by Dale and his two brothers in 1972 which was mainly engaged in the business of farming others' land. We note that CH Farms merged into Diamond Seven in 1984.

Throughout the course of Dale and Karla's marriage, Dale's parents gave both parties shares of stock in the four Shuck family businesses. Karla testified at trial that if the court made an award in this case, she would prefer that any stock she owned be "set over" to Dale, because she was not aware of the daily operations of the businesses, she had no control over them, and "[t]he stock wouldn't be of value to [her]." The trial court's determination regarding the marital or nonmarital nature of each party's shares of stock is not in dispute and will be discussed in conjunction with the "Trial Court Decree" section below.

In order to determine the value of each of the family-owned businesses for purposes of the property division, the trial court appointed a property evaluator, Bryan Robertson, of a business valuation firm. In order for Robertson to complete his valuations, an additional expert was also court appointed to appraise the farmland and operational real estate associated with each business entity. And, a third appraiser was appointed by the trial court to assess the value of the companies' machinery. Robertson integrated these additional assessments into his valuation report, which is in evidence as exhibit 8. Robertson's report was the sole evidence offered at trial regarding the value of the four Shuck family businesses.

VALUATION EVIDENCE

Robertson's report explains that his valuations applied the "fair market value standard of value" of the separate and combined ownership interests of Lazy T, Diamond Seven, Shuck Drilling, and CH Farms as of September 1, 2007. The report describes "fair market value" as

> the price, expressed in terms of cash equivalents, at which property would change hands between a hypothetical willing and able buyer and a hypothetical willing and able seller, acting at arm[']s length in an open and unrestricted market, when neither is under compulsion to buy or sell and when both have reasonable knowledge of the relevant facts.

In order to determine the fair market values of the entities, Robertson considered each of three "widely recognized business valuation methodologies"—the asset-, market-, and income-based approaches. When asked during trial to explain the three methodologies in layman's terms, Robertson testified as follows:

> [T]he asset-based method says that in certain situations, . . . the best representation of the value of the assemblage of assets in this entity, is the net asset value or the asset value less the liabilities of that entity. The balance sheet is the truest and best representation of the value of that entity. In a nutshell, that's what the asset method does.
>
> The market method says that . . . [t]here's external evidence of value in terms of trades of comparably-situated companies. And you go to, for example, . . . the public markets.
>
> And you'd say . . . whatever the company . . . so similarly situated [is] a proxy or representative of the values of your company.
>
> There's also a series of proprietary data bases which tend to have a lot more relevance to smaller, closely-held companies. But there are probably four or five solid proprietary data bases that track transactions in the companies. That is the market method.

> The income method . . . is a technique that says tax-affected cash flow is important for purposes of determining the value of the subject business; and you may manipulate or normalize the cash flows of the company and say, "This is the best — this benefit stream is representative of the value of this company."
>
> You capitalize it at some discount rate. And the result is a proxy for value. And . . . I've done that in this report, both from capitalizing five years of historical performance [and] by . . . building a projection, if you will, and discounting those cash flows back to the valuation date.

Robertson explained that he is obliged to consider each of these three methodologies and that, in his opinion, after doing so, the market method, because of a lack of solid, comparable data, was not directly applicable to any of the four Shuck businesses. Robertson thus calculated values for each entity under the asset-based and income-based methods. Under the income-based method, he actually calculated two different values by utilizing two distinct approaches: (1) capitalized equity cashflow and (2) discounted invested cashflow. Robertson selected between the figures he calculated under the asset-based and income-based methods in order to assign one final value to each entity that, in his opinion, was the most accurate representation of that entity's fair market value.

Robertson's report recites that, for the asset-based method, due to the lack of any indication that the companies or the companies' assets will be liquidated, he applied a "going concern premise of value." The report further states that, "for purposes of applying [this] methodology, the valuation must reflect a conclusion relative to the appropriateness of certain income tax adjustments." Robertson's report explains:

> Accordingly, tax should generally be reflected to the extent of the difference between the adjusted value of the assets and their income tax bases. This is particularly appropriate, we believe, if the underlying premise of value is a liquidation based premise. Where, however, the premise is an ongoing operational "value in use" premise,

> and there is no indication of liquidation, the appropriateness of a tax adjustment is less clear.

Robertson testified at trial that the asset-based valuation method he employed "absolutely" contemplates the sale of the businesses. That a pending sale was a component of Robertson's asset valuation is readily evident from his lengthy report that is in our record. But, as will be discussed below, there was no evidence of the imminent sale of any of the Shuck family businesses or individual business assets—a fact of considerable import.

Nevertheless, Robertson applied a uniform combined 40-percent tax rate for purposes of quantifying the "built-in taxable gain adjustment" for the assets (assessed by the other two appraisers) of the "C" corporations (Diamond Seven and Shuck Drilling) and the "S" corporation (Lazy T). We read Robertson's term "built-in taxable gain adjustment" to be synonymous with a reduction for depreciation recapture or capital gains that would be realized upon the liquidation of the entity's assets. As for CH Farms, Robertson elected not to apply the adjustment for such taxes, because a willing purchaser would be permitted to "'step up'" the basis of the assets inside the partnership without tax, so long as the partnership made a timely election to do so.

With regard to the income-based approach, we begin by emphasizing that the only entity Robertson chose to value using this method is Shuck Drilling. For the other three entities, he utilized the values calculated exclusively under the asset-based method. Robertson's report states that under the income-based method, "the valuation must reflect a conclusion relative to the appropriateness of certain income tax adjustments. For example, the report must consider whether income taxes should be accrued with respect to the earnings and cash flow benefit streams." Indeed, Robertson elected to apply a "Tax Affect [sic] at Corporate Rates" to the "benefit streams" of Shuck Drilling. Without digressing further into the minutiae of Robertson's calculations under this methodology, we read his report to say that the income tax adjustment applied to the value of Shuck Drilling under this

approach was with respect to the ordinary annual income tax that would be paid by the corporation in the normal course of business—a different situation than a liquidation of the business.

Moreover, after selecting a value for each entity from the two valuation methods just described, Robertson discounted the value of all four businesses for minority interest and lack of marketability. Robertson testified that a minority discount is a

> discount for lack of control . . . . What that discount attempts to measure is the discount that a buyer of a minority interest in a company will demand for purposes of acquiring an interest that has no independent control . . . .
>
> . . . .
>
> And as a result, you'd be foolish to pay a pro rata share of the underlying assets of the company in order to get in because that's not what it's worth. And that's what that discount attempts to measure and demonstrate.

Robertson thus applied a minority discount in the amount of 25 percent to his valuations of each of the four entities, because Dale and Karla are minority interest holders in all of the entities.

With regard to the marketability adjustment, Robertson testified that marketability is the capacity to liquidate. In that regard, Robertson's report recites:

> We agree with leading commentators that discounts for lack of marketability may be appropriate for purposes of determining fair market value within the framework of the income and asset based approaches. Within the context of the subject interest and the selected approaches, we believe that the marketability adjustment should reflect the lack of liquidity represented by the subject interest and any company specific risk considerations inherent in the subject stock that have not otherwise been reflected in the derivation of prediscount values. Because we believe a potential purchaser would do so, we have quantified this discount

> within the framework of certain empirical studies and certain qualitative issues.
>
> . . . .
>
> . . . Accordingly, we believe a discount of twenty percent is appropriate to reflect the quantitative and qualitative marketability issues . . . .

Robertson testified that he applied the 25-percent minority and 20-percent marketability adjustments fairly and objectively in this case to each of the four entities and, further, that such discounts are quantitatively appropriate. He also testified that his overall valuation results were consistent, independent, and well reasoned.

We summarize the ultimate valuations from Robertson's report, which were wholly adopted by the trial court in its dissolution decree, as follows:

Business Entity	Total Shares Outstanding	Shares Owned by Karla	Shares Owned by Dale	Valuation Method Used	Final Valuation ($)	Value Per Share of Stock ($)
Shuck Drilling	150	6	25	Income-based	4,424,000	17,697.51
Lazy T	28,900	200	3,627	Asset-based	5,671,000	117.73
Diamond Seven	22,070	0	6,206	Asset-based	3,404,000	92.54
CH Farms	3	0	1	Asset-based	399,000	79,869.60

In order to simplify matters for the reader, we emphasize that the only challenge raised by Karla to the data in our above table is that the final valuations include deductions by Robertson for lack of control, lack of marketability, and "embedded capital gains taxes." Because this is the fundamental posture of the appeal, we can focus on such deductions, without burying the reader in the extensive details of Robertson's valuations found in his nearly 200-page, single-spaced report—including footnotes and appendices.

TRIAL COURT DECREE

Karla petitioned the district court for Adams County for dissolution of her marriage to Dale in a complaint filed on July 10, 2006. After a trial dealing with alimony and property division, the court entered a decree on January 21, 2010. In

its decree, the trial court determined that alimony of $2,500 per month to Karla for no more than 9 years was appropriate, due to the economic disparity of the parties and relatively long duration of the marriage. The trial court reasoned:

> In nine years [Karla] can go on Social Security and her need for an alimony award, considering her other assets, will not be necessary. The $2,500.00 award takes into consideration [Karla's] expenses of $3,800.00 per month and $1,000.00 per month in part time income. [Karla] could easily make up the difference by working a forty hour week. She also has several investment accounts she is awarded in this Decree.

Neither party contests the amount or duration of Karla's alimony award on appeal, but the award is relevant for the property division made by the trial court.

The trial court found that Robertson's valuations of the Shuck family businesses were fair and reasonable and based on sound logic. The court thus used the valuations from Robertson's report in determining the property division, without deviation, and no other valuation evidence was offered. The trial court's findings with regard to the valuation of the Shuck family businesses and Dale's and Karla's individual shares of stock, as well as the marital-versus-nonmarital nature of the stock, are as follows:

Shuck Drilling.

At the time of trial, Dale owned 25 shares of Shuck Drilling stock, 14 of which he owned before marrying Karla and 11 of which were given to him during the marriage. Karla owned six shares of Shuck Drilling stock that were given to her during the marriage. The court thus ordered Dale's 25 shares of Shuck Drilling stock to be set aside as nonmarital property, and ordered Dale to purchase Karla's 6 nonmarital shares for $17,697.51 per share—the value calculated by Robertson—for a total amount of $106,185.

CH Farms.

Next, the trial court discussed Dale's interest in CH Farms, a general partnership in which Dale and his two brothers each

own a one-third interest. Although CH Farms merged with Diamond Seven on January 1, 1984, it still maintained some assets at the time of trial, which is why Robertson calculated the value of each share of CH Farms stock (under the asset-based approach) at $79,869.60. The court found that Dale acquired his interest in CH Farms before his marriage to Karla and that no marital funds were contributed to the partnership. Thus, the court set aside Dale's ownership interest in CH Farms as nonmarital property, a finding that Karla does not contest.

Diamond Seven.

Dale received a total of 3,320 shares of Diamond Seven stock as a gift from his parents prior to marrying Karla. After their marriage, Dale's parents also gave Dale and Karla 500 shares apiece. Then, on December 12, 1976, Dale was given an additional 616 shares and Karla was given an additional 300 shares. The trial court additionally found that on August 25, 1983, Karla transferred her 800 shares to Dale, and those shares were thus set aside as nonmarital property, a result that Karla does not dispute.

On May 15, 1985, Dale's uncle sold 187 shares of Diamond Seven stock to Dale for $12,452.33, and Dale admitted that he used marital funds to make that purchase. The trial court thus found that 187 shares of Diamond Seven stock were a marital asset worth $17,305, as set forth in Robertson's report, and awarded them to Dale as marital property in the property division, as Karla requested.

Lazy T.

Dale owned 4,667 shares of Lazy T stock prior to marrying Karla. In 1978, Dale and Karla each received a gift from Dale's father of 200 shares of Lazy T stock. The court found that Karla's 200 nonmarital shares were worth $117.73 per share, as calculated by Robertson in his report. All of Dale's shares were found to be nonmarital because they were given to him before or during the marriage. Dale was thus ordered to purchase Karla's 200 Lazy T shares of stock for a total value of $23,546. Before proceeding further, we emphasize that in

this appeal, there is no claim that the trial court incorrectly determined what was marital property and what was nonmarital property.

Grace *Award.*

The trial court's decree recites that "[t]he parties are worlds apart on the value of the marital estate"—Karla valued the estate at $2,767,893.27, and Dale valued it at $582,067. Because the majority of Dale's shares of stock in the Shuck family businesses were found to be gifts and thus not part of the marital estate, the court valued the marital estate at $590,629.44. The decree states that "[Karla], anticipating this [final valuation], argues that this is a perfect case for a Grace award." The court went on to compare the present facts to those in *Grace v. Grace*, 221 Neb. 695, 380 N.W.2d 280 (1986), and determined that what has come to be commonly referenced as a "*Grace* award" was not required. In so finding, the trial court's decree explains:

> A Grace award is basically a cash award as compensation for the inadequacy of the mar[it]al estate. The Court of Appeals has described a Grace award "as a device to fairly and reasonably divide marital estates where the prime asset in contention is one spouse's gifted or inherited stock or property in a family agriculture organization." Walker v Walker, 9 Neb. App. 839, 843 (2001). This case does not meet the criteria required for a Grace award. In contrast to Mr. Grace, [Dale] had average income from Shuck Drilling alone for the ten year period 1997 to 2007 of $86,763.00. This was not like Mr. Grace's annual salary of $18,000.00. In Grace the parties had not built much of a marital estate. The parties in this case have built a marital estate of almost $600,000.00. In this case the parties own a debt free home valued at $170,000.00 and have significant investments and IRA accounts. In the typical Grace award the wife was a stay at home mother. In this case [Karla] has an R.N. Degree and basically has worked as she wanted.

The trial court noted that even without a *Grace* award, Karla will be receiving property and cash worth $425,045.72, as

well as alimony payments in the amount of $30,000 per year. Moreover, the trial court ordered Dale to pay all of Karla's attorney fees and most of her trial-related expenses. As a result, the court found that a *Grace* award was inappropriate in this case.

Final Decree.

The trial court's final determination with regard to the property division was to award Karla a net marital estate of $273,511.45 and Dale a net marital estate of $317,117.99. The parties stipulated prior to trial that the IRA accounts in evidence as exhibits 126 and 127 are of equal value ($6,521.68) and that each party shall receive an account. The IRA accounts are not included in the above property division. In addition, the court ordered Dale to purchase Karla's non-marital shares of stock in Shuck Drilling and Lazy T for the following amounts, and to make an equalization payment to her as follows:

Shuck Drilling:	$106,185.00
Lazy T . . . :	$ 23,546.00
Plus Equalization Payment:	$ 21,803.27
Total due [to Karla]:	$151,534.27

Therefore, Karla's net marital estate plus the cash payment from Dale equals $425,045.72. Karla timely appeals.

ASSIGNMENTS OF ERROR

Karla alleges, restated, that the trial court erred in (1) reducing the value of the four Shuck family businesses due to the expectancy of taxes, lack of control, and lack of marketability, because there was no evidence any of the businesses were going to be sold; (2) not requiring Dale to purchase Karla's interest in two of the family-owned businesses at their preadjustment value; and (3) failing to award Karla a *Grace* award.

STANDARD OF REVIEW

The division of property is a matter entrusted to the discretion of the trial judge, which will be reviewed de novo on the record and will be affirmed in the absence of an abuse of

discretion. *Schuman v. Schuman*, 265 Neb. 459, 658 N.W.2d 30 (2003).

ANALYSIS

Were Reductions in Value of Businesses for Expectancy of Taxes, Lack of Control, and Lack of Marketability Improper?

[1] As noted earlier, Robertson, a court-appointed expert, provided the only valuation evidence for the Shuck family businesses. Karla, however, disagrees with Robertson's reduction in those values that were wholly adopted by the trial court, by way of discounts for taxes, lack of control, and lack of marketability. Her argument is premised on the fact that there is no evidence the businesses are going to be sold. In support of her contention that the reduction for income taxes was improper, Karla cites *Schuman*, 265 Neb. at 465-66, 658 N.W.2d at 36-37, where the Supreme Court held:

> [I]n assigning a value to a business for purposes of dividing the property in an action for dissolution of marriage, a trial court should not consider the tax consequences of the sale of the business unless there is a finding by the court that the sale of the business is reasonably certain to occur in the near future. However, the court may consider such tax consequences if it finds that the property division award will, in effect, force a party to sell his or her business in order to meet the obligations imposed by the court.

With respect to her assertion that the lack of control and lack of marketability reductions were also improper without evidence of an imminent sale of the businesses, Karla's brief highlights the following language from *Walker v. Walker*, 9 Neb. App. 834, 849, 622 N.W.2d 410, 420 (2001):

> [F]or purposes of the *Grace* award here, we do not apply the 25-percent discount applied by the trial judge. Instead, we follow the teachings of *Grace* that minority ownership interest and lack of control [are] simply a consideration. We have considered the evidence from the certified public accountants that a discount is appropriate in valuation, but on the other hand, the evidence is clear that the [appellant

> and his three] brothers are committed to the continuation of the business and that control is not a problem as they manage by agreement. In short, [the brothers' farming operation] is a viable business run by knowledgeable people who are family, and there is no evidence that the operation will not continue.

[2-4] Under Nebraska jurisprudence, an appropriate division of marital property turns on reasonableness as determined by the circumstances of each particular case. *Else v. Else*, 5 Neb. App. 319, 558 N.W.2d 594 (1997). To determine the value of a closely held corporation, the trial court may consider the nature of the business, the corporation's fixed and liquid assets at the actual or book value, the corporation's net worth, marketability of the shares, past earnings or losses, and future earning capacity. *Id.* The method of valuation used for a closely held corporation must have an acceptable basis in fact and principle. *Id.* Clearly, Robertson's valuations of the four Shuck family businesses incorporate these basic guiding principles.

We begin by discussing the reduction in the Shuck family business entities for expectancy of taxes. Significantly, there was no finding by the trial court, and no evidence in the record, that a sale of any of such entities was "reasonably certain to occur in the near future." See *Schuman v. Schuman*, 265 Neb. 459, 466, 658 N.W.2d 30, 36-37 (2003). Nonetheless, Robertson testified that sale is "absolutely" contemplated under his asset-based valuation method. When Dale was asked on direct examination whether he had any intention in his lifetime of actively selling his businesses, he testified that he would consider selling Shuck Drilling if he could find a buyer, but that "[i]t's just not the kind of business you can sell . . . ." When asked on cross-examination whether he planned on "selling anything" in Lazy T, Diamond Seven, Shuck Drilling, or CH Farms, Dale testified that he is "[n]ot planning on it."

[5] Robertson's report states that income tax deductions were applied under both the asset-based and income-based methods. For the asset-based method, Robertson applied a uniform combined 40-percent "assumed" tax rate for purposes of quantifying the "built-in taxable gain adjustment," i.e.,

the depreciation recapture or capital gains to be recognized upon the sale of the assets of the entity, as described above. In his brief, Dale argues in support of the discount for capital gains:

> [T]his is not [the] same type of tax consequence that the Nebraska Supreme Court has prohibited courts from considering when valuing assets in a divorce, because it is not a tax consequence that Dale would incur upon sale of his ownership interest—rather, it is a tax liability the purchaser of the entity would acquire, and thus it affects the price a purchaser would pay for shares of the entity.

Brief for appellee at 35. Even if it is theoretically true that a potential purchaser would consider "embedded" income tax consequences as a result of capital gains in arriving at a purchase price to offer for any of the businesses, discounting for such in the course of business valuation in the context of a marriage dissolution is appropriate only in limited circumstances, as we discuss shortly.

[6,7] We understand Robertson's report and trial testimony to say that the 40-percent "assumed" tax rate that he used under the asset-based valuation method contemplates depreciation recapture or capital gains "embedded" in the assets of each entity, which would be realized upon the sale of such assets. We agree that a purchaser of any or all of the Shuck family businesses would succeed to the Shuck family's basis in the entity's assets, and the purchaser would thereby have a potential future depreciation recapture or capital gains, which logically would affect what a purchaser would pay to acquire the business. However, these notions are relevant only in the context of this dissolution action in the two circumstances delineated by the decision in *Schuman, supra*: a reasonably certain sale of the business in the near future or a need to liquidate to pay Dale's obligations to Karla under the decree. However, Dale testified that he is not planning on selling anything in Lazy T, Diamond Seven, Shuck Drilling, or CH Farms, and Karla introduced no contrary evidence. Moreover, Dale's financial position after the divorce is not such that he will need to liquidate in order to pay the approximately $150,000 that the trial court ordered that he pay to

Karla. Therefore, after our de novo review, we conclude that a discount in value for such potential capital gains taxation is not appropriate under the facts of this case, given the clear directive of *Schuman v. Schuman*, 265 Neb. 459, 658 N.W.2d 30 (2003), as to when such consequences are appropriate in setting the value of businesses in the context of property division in a dissolution action. In short, when using an asset-based valuation method, a reduction in value for the taxable gain on a business when a sale or liquidation to pay court-imposed obligations is not reasonably certain in the near future is speculative and improper. See, *id.*; *Mathew v. Palmer*, 8 Neb. App. 128, 589 N.W.2d 343 (1999). Consequently, the trial court abused its discretion in reducing the values of the Shuck family businesses for "embedded" depreciation recapture or capital gains, absent evidence of an imminent sale of the entities or the entities' assets.

With respect to the income-based method of valuation, Robertson elected to apply a corporate rate of tax to the "benefit streams" (income) of Shuck Drilling. Under this method, the resulting reduction in value relates to the business' required payment of annual ordinary income taxes, not the built-in depreciation recapture or capital gains that would be realized and taxed upon the sale of the business' assets that we found to be an inappropriate valuation consideration above. Thus, the deduction for annual income taxes under the income-based method—applied only to the valuation of Shuck Drilling—was not a "tax consequence . . . of the sale of the business" and was proper. See *Schuman*, 265 Neb. at 465, 658 N.W.2d at 36.

[8] We now address the additional reductions in the value of the Shuck business entities for lack of control and lack of marketability. We have quoted the portion of *Walker v. Walker*, 9 Neb. App. 834, 622 N.W.2d 410 (2001), that Karla relies on in arguing that such reductions were improper in this case. Although we found that the 25-percent discount applied by the trial court was incorrect in *Walker*, in that case, we were engaged in valuing the husband's nonmarital property for purposes of determining the extent of a *Grace* award. In this case, we are reviewing the district court's valuation of the

marital estate, and the extent to which discounts are supportable in valuing family businesses—portions of which were marital property and portions of which were Dale's and Karla's separate nonmarital property. In addition to this distinction, in *Walker*, we "considered the evidence from the certified public accountants that a discount is appropriate in valuation"; however, "for purposes of the *Grace* award . . . we [did] not apply the 25-percent discount applied by the trial judge. Instead, we follow[ed] the teachings of *Grace* that minority ownership interest and lack of control [are] simply a consideration." 9 Neb. App. at 849, 622 N.W.2d at 420. Therefore, the holding of *Walker* is not that reductions for lack of control and marketability are always improper absent evidence of the imminent sale of a business, as Karla suggests. Rather, a court may use its discretion in considering such reductions in the context of determining whether to make a *Grace* award, and if so, the amount thereof.

Turning to the present facts, we find that the reduction for lack of control was acceptable in determining the fair market value of Dale's and Karla's ownership interests in the entities, because it is undisputed that neither is a majority shareholder in any of the Shuck family businesses. And, with regard to the lack of marketability adjustment, such was also appropriate in calculating fair market value, because the stock in each of the entities is not publicly traded and the other stock is held by other Shuck family members—making the stock less appealing to an outsider purchaser. As a result, Dale and Karla have severely limited ability to liquidate their shares—or to sell assets of the businesses.

Therefore, on our de novo review, we find that the 40-percent "assumed" income taxes deducted from the value of the entities under the asset-based method were an abuse of discretion by the trial court. However, under the income-based method, we find that the reduction in the to-be-capitalized income stream for annual ordinary income taxes was not speculative and thus correctly applied to the value of Shuck Drilling—because that entity was the only one for which the income-based valuation method was utilized. As for the reductions in the overall value of each entity for lack of control and

lack of marketability, we find such adjustments were not an abuse of the trial court's discretion.

Should Dale Have Been Required to Purchase Karla's Ownership Interest at Preadjustment Value?

Next, Karla alleges that Dale should have been ordered to purchase her shares of stock in Shuck Drilling and Lazy T at their unadjusted values. As explained above, the trial court did not abuse its discretion in applying Robertson's income-based valuation of Shuck Drilling, which includes the discounts for lack of control and lack of marketability. With regard to the valuation of Lazy T, we find the trial court did abuse its discretion in making a reduction in value for tax liability for embedded depreciation recapture or capital gains. Thus, we reverse that portion of the trial court's ruling.

As a result, we find that Dale must purchase Karla's shares of stock in Lazy T, not at their unadjusted value, but, rather, at their value without the 40-percent income tax reduction. In order to determine the effect of such modification, we look to Robertson's report, exhibit 8, and add the "real and personal property adjustment" and "growing crops adjustment," described above, back into Lazy T's "balance sheet." After doing so, we find that Lazy T's total "indicated shareholder net equity" is $8,168,173, with each individual share of stock (after a discount for lack of control and lack of marketability) worth $169.60 (rounded). Karla's 200 shares of Lazy T stock, which the trial court ordered Dale to purchase for $23,546, are thus worth $33,920. As a result, Dale is ordered to purchase Karla's 200 shares of Lazy T stock for $33,920.

And, because 187 shares of Diamond Seven stock were deemed marital property by the trial court and assigned to Dale in the property division, it is necessary for us to revalue those shares after taking out the improper reduction for embedded income tax. We find that the overall value of Diamond Seven without the improper tax deduction is $5,411,688—each individual share of Diamond Seven stock is thus worth $147.12 (rounded). As a result, Dale and Karla's 187 marital shares are worth a total of $27,511.44, not $17,305, as

determined by Robertson and adopted and used by the trial court. The difference in those values is $10,206.44, and an equal division of that additional value results in an increase in Dale's equalization payment to Karla—from $21,803.27 to $26,906 (rounded).

Should Karla Have Received Grace *Award?*

[9,10] Karla's final assignment of error is that the trial court should have awarded her a *Grace* award as first set out in *Grace v. Grace*, 221 Neb. 695, 380 N.W.2d 280 (1986). We discussed the concept of a *Grace* award at length in our decision in *Walker v. Walker*, 9 Neb. App. 834, 622 N.W.2d 410 (2001). In *Walker*, we described a *Grace* award as "a device to fairly and reasonably divide marital estates where the prime asset in contention is one spouse's gifted or inherited stock or property in a family agriculture organization." 9 Neb. App. at 843, 622 N.W.2d at 417. However, to the extent that our *Walker* decision implies that *Grace* awards are limited to property division in dissolution cases involving only agricultural entities, we clarify that *Grace* awards are not strictly limited to agriculture situations, although such would be the most common. In that vein, in *Medlock v. Medlock*, 263 Neb. 666, 679, 642 N.W.2d 113, 125-26 (2002), the Supreme Court used the following description of its decision in *Grace, supra*: "[W]e ordered a cash award as compensation for the inadequacy of the marital estate." And, in *Charron v. Charron*, 16 Neb. App. 724, 730, 751 N.W.2d 645, 650 (2008), we further explained:

> The inadequacy of the marital estate in cases of this nature involves a typical factual pattern where the wife devotes herself to running the household and caring for the children and where the husband's labors are devoted to a family farming or ranching corporation in which he owns stock, usually owned prior to the marriage or gifted solely to him during the marriage. Hence, under our cases, the stock is treated as the husband's separate property. Additionally, in the typical situation where the issue arises, the husband receives a rather nominal cash salary in exchange for his labor devoted to his family's farm or ranch but also receives such things as housing,

> utilities, vehicles, fuel, beef, use of the corporation's land for his private livestock herd, et cetera. As a result of the low cash earnings of the husband, the couple often has an inconsequential marital estate. This typical factual backdrop helps explain the Supreme Court's reference in *Medlock, supra*, to a *Grace* award as compensation for the inadequacy of the marital estate.

[11] Here, the trial court found considerable factual dissimilarities from *Grace, supra*, and *Walker, supra*, and thus denied Karla's call for a *Grace* award. The court's decree recites:

> This case does not meet the criteria required for a Grace award. In contrast to Mr. Grace, [Dale] had average income from Shuck Drilling alone for the ten year period 1997 to 2007 of $86,763.00. This was not like Mr. Grace's annual salary of $18,000.00. In Grace the parties had not built much of a marital estate. The parties in this case have built a marital estate of almost $600,000.00. In this case the parties own a debt free home valued at $170,000.00 and have significant investments and IRA accounts. In the typical Grace award the wife was a stay at home mother. In this case [Karla] has an R.N. Degree and basically has worked as she wanted.

We review the trial court's denial of a *Grace* award de novo on the record for an abuse of discretion. In doing so, we note that the purpose of property division is to equitably distribute the marital assets between the parties, and the polestar for such distribution is fairness and reasonableness as determined by the facts of each case. *Charron, supra*. See Neb. Rev. Stat. § 42-365 (Reissue 2008).

We find that this case is distinguishable from *Grace v. Grace*, 221 Neb. 695, 380 N.W.2d 280 (1986), and its progeny in the sense that the parties here have a substantial net marital estate valued by the trial court at $590,629.44. The court equally divided the marital estate; awarded Karla alimony in the amount of $30,000 annually for no more than 9 years, potentially resulting in an additional $270,000 to Karla; plus, awarded her all her attorney fees and most of her expenses. In addition, the court ordered Dale to purchase Karla's shares of stock in Shuck Drilling and Lazy T, resulting

in another payment of roughly $130,000 to Karla—which we have increased to $140,105. The overriding concern is whether said division is fair and reasonable. See *Charron v. Charron*, 16 Neb. App. 724, 751 N.W.2d 645 (2008). On de novo review, we find that the trial court's division, as we have modified it, is fair and reasonable, and thus the trial court did not abuse its discretion in declining to make a *Grace* award to Karla.

After revaluing Karla's 200 nonmarital shares of Lazy T stock and the 187 marital shares of Diamond Seven stock, Karla's award is increased and Dale is required to pay her the following amounts:

Shuck Drilling:	$106,185
Lazy T:	33,920
Plus equalization payment:	26,906
Total due to Karla:	$167,011

In sum, the increase in the total amount due to Karla from Dale is $15,476.73. Even without this increase, we do not see this as an appropriate case for a *Grace* award due to the parties' substantial marital estate. Our recalculation of the marital estate at $600,835.88 and the resulting increase in Karla's property settlement only solidify our position that a *Grace* award is not warranted. This assignment of error is thus without merit.

CONCLUSION

Finding merit to the portion of Karla's assignment of error regarding a reduction in the value of the Shuck business entities for embedded income tax liability under the asset-based valuation method despite a complete lack of evidence such assets or entities would be sold in the near future, we reverse that aspect of the district court's decision. As a result, the property settlement between the parties shall be modified in accordance with the findings fully detailed above, and we remand the cause to the district court to make such modification in the decree. In all other respects, we affirm the decision of the district court.

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

JACQUELINE CRAWFORD, APPELLEE AND CROSS-APPELLANT, V. SAMUEL CRAWFORD, APPELLANT AND CROSS-APPELLEE.
794 N.W.2d 198

Filed February 22, 2011. Nos. A-09-652, A-09-754.

1. **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 court.
2. **Jurisdiction: Appeal and Error.** 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.
3. ____: ____. Notwithstanding whether the parties raise the issue of jurisdiction, an appellate court has a duty to raise and determine the issue of jurisdiction sua sponte.
4. **Pleadings: Judgments: Time: Appeal and Error.** Under Neb. Rev. Stat. § 25-1912(3) (Reissue 2008), a motion to alter or amend timely filed terminates the running of the time for filing a notice of appeal as to all parties.
5. **Pleadings: Judgments: Time.** Neb. Rev. Stat. § 25-1329 (Reissue 2008) provides for the filing of a motion to alter or amend no later than 10 days after the entry of the judgment.
6. **Pleadings: Judgments: Time: Appeal and Error.** A district court's order substantively altering a prior decree creates a new judgment and Neb. Rev. Stat. § 25-1329 (Reissue 2008) provides the parties with a statutory right to timely seek alteration or amendment of that new judgment and that a timely filed motion to alter or amend tolls the time for filing a notice of appeal until 30 days after the motion to alter or amend is disposed of.

Appeals from the District Court for Douglas County: W. MARK ASHFORD, Judge. Appeals dismissed.

David L. Herzog, of Herzog & Herzog, P.C., for appellant.

Virginia A. Albers and Jesse S. Krause, of Lieben, Whitted, Houghton, Slowiaczek & Cavanagh, P.C., L.L.O., for appellee.

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

IRWIN, Judge.

I. INTRODUCTION

Samuel Crawford appeals from an amended decree dissolving his marriage to Jacqueline Crawford. We do not reach the merits of Samuel's appeals, because we conclude that

Samuel filed a timely motion for new trial after the district court for Douglas County, Nebraska, entered the amended decree of dissolution and that the motion for new trial was not yet disposed of at the time Samuel brought the present appeals. Accordingly, we dismiss these appeals for lack of jurisdiction.

II. BACKGROUND

The relevant factual background of this case, for purposes of these appeals and our disposition, is limited to procedural history. Samuel has actually brought two separate appeals in this dissolution of marriage proceeding, and the two appeals have been consolidated.

1. Appeal No. A-09-652

On May 4, 2009, the district court for Douglas County signed a decree dissolving the parties' marriage, although the decree was not file stamped until May 6. On May 5, Samuel filed a motion for new trial in which Samuel challenged, among other matters, the court's findings and award regarding an equalization payment, the court's findings and award regarding pensions of the parties, and the court's findings and award regarding a parcel of real property. On June 1, a docket entry was made, but no signed order was filed, in which the district court purported to deny the motion for new trial.

On June 26, 2009, the district court entered an order denying Samuel's motion for new trial, except that the court indicated that the original decree would be modified with regard to the parties' pensions. Also on June 26, the court entered an amended decree of dissolution of marriage, in which the court amended the original decree with regard to the parties' pensions.

In addition to the two orders entered by the district court on June 26, 2009, Samuel made three filings on June 26. Samuel first filed a motion to vacate the June 1 docket entry; the record presented to us does not reveal whether the motion was ever ruled on. Samuel filed a motion for new trial, in which he "cite[d] each and every grounds, assignment of error

and paragraph in his [May 5] Motion for New Trial," as well as challenging the court's failure to provide adequate notice of the June 1 docket entry and the court's failure to enter the amended decree prior to adjudicating the May 5 motion for new trial. Samuel also filed a notice of appeal, purporting to appeal from the court's order of June 1. According to the file stamps on the June 26 motion for new trial and the June 26 notice of appeal, both were filed at 3:36 p.m., and it is not apparent from the record presented to us which was actually filed first.

2. Appeal No. A-09-754

On June 30, 2009, Samuel filed another motion to vacate, this time seeking to have the district court vacate both the original decree and the amended decree. Samuel again asserted that vacation was appropriate, because of the timing of the court's orders amending the decree and denying the motion for new trial, and also asserted that fraud on the part of Jacqueline concerning the parcel of real property referenced in the first motion for new trial required vacation of the decrees. The record presented to us does not include any ruling on this motion to vacate.

On July 23, 2009, Samuel filed a second notice of appeal. In the notice of appeal, Samuel asserts that "[t]he Trial Court refused to rule on the Second Motion for New Trial . . . . Hence, this appeal."

3. Appellate History

As noted, the two separately docketed appeals in this case have been consolidated. On February 1, 2010, Jacqueline filed a motion seeking summary dismissal of the consolidated appeals pursuant to Neb. Ct. R. App. P. § 2-107(B)(1) (rev. 2008). Jacqueline asserted that the district court's failure to rule on Samuel's June 26, 2009, motion for new trial, as well as the court's failure to rule on Samuel's motions to vacate, demonstrated that the district court had not yet entered an appealable, final order in the case. We denied the motion for summary dismissal to address the jurisdictional issues at oral argument and in this opinion.

III. ANALYSIS

The issue we address in this opinion is the issue of jurisdiction. Specifically, we address the impact that Samuel's motion for new trial filed after the district court entered an amended decree of dissolution of marriage had on the time for Samuel to properly file his notices of appeal and the impact of the district court's having not yet entered a final order ruling on Samuel's second motion for new trial. We conclude that the second motion for new trial is properly considered a motion which tolls the time to perfect an appeal, that the proper time for filing a notice of appeal is within 30 days after the lower court's ruling on the tolling motion, and that the lower court's having not yet entered a final order ruling on the tolling motion precludes this court from having jurisdiction over these consolidated appeals.

[1-3] 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 court. *McCaul v. McCaul*, 17 Neb. App. 801, 771 N.W.2d 222 (2009). 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. *Id.*; *Gebhardt v. Gebhardt*, 16 Neb. App. 565, 746 N.W.2d 707 (2008). Notwithstanding whether the parties raise the issue of jurisdiction, an appellate court has a duty to raise and determine the issue of jurisdiction sua sponte. *Connelly v. City of Omaha*, 278 Neb. 311, 769 N.W.2d 394 (2009); *Gebhardt v. Gebhardt, supra*.

[4] Prior to April 16, 2004, the law in Nebraska had been firmly established to be that successive motions for new trial in a single case did not extend the time in which to appeal a judgment. See *Mason v. Cannon*, 246 Neb. 14, 516 N.W.2d 250 (1994). April 16, 2004, however, was the operative date of the statute providing for the filing of a motion to alter or amend, Neb. Rev. Stat. § 25-1329 (Reissue 2008), which provides for the filing of a motion seeking substantive alteration of the judgment no later than 10 days after the entry of the judgment. See *Gebhardt v. Gebhardt, supra*. Under Neb. Rev. Stat. § 25-1912(3) (Reissue 2008), such a motion timely filed

terminates the running of the time for filing a notice of appeal as to all parties. See *Gebhardt v. Gebhardt, supra*.

In *Mason v. Cannon, supra*, the Nebraska Supreme Court addressed a procedural situation wherein a case was dismissed for want of prosecution. The plaintiff did not appeal the dismissal to the appellate courts, but, rather, filed a motion to vacate the order of dismissal. The motion to vacate was overruled. The plaintiff again did not appeal to the appellate courts, but, rather, filed a motion for new trial in the district court. On appeal, the Nebraska Supreme Court held that the initial motion to vacate was the equivalent of a motion for new trial and tolled the time to appeal the district court's dismissal order. However, the district court's order denying the motion to vacate was a final order, and the successive motion for new trial did not extend the appeal time. As a result, the plaintiff's notice of appeal filed after the district court denied her successive motion for new trial was considered untimely and the appeal was dismissed.

In *Gebhardt v. Gebhardt, supra*, this court addressed the effect of § 25-1329 on the timeliness of notices of appeal and also addressed the effect on appeal times of the trial court's responding to a motion to alter or amend by entering a new judgment that substantively alters the initial judgment. In *Gebhardt*, the district court entered a decree dissolving the parties' marriage. The wife then filed a motion for new trial, in which she raised issues with respect to property division, alimony, and attorney fees. In response, the district court entered an order denying the motion for new trial, but modifying the initial decree solely with respect to property division. The husband then filed a motion to alter or amend the order modifying the initial decree, in which he challenged only the effect of the court's amendment with respect to property division. In response, the district court entered an order modifying its prior order modifying the decree solely with respect to property division. The wife then filed another motion to alter or amend, which was denied by the district court.

On appeal, this court first noted the distinctions between the factual scenario in *Gebhardt v. Gebhardt*, 16 Neb. App. 565, 746 N.W.2d 707 (2008), and the factual scenario in *Mason v.*

Cannon, supra. First, *Mason* did not involve a motion to alter or amend, because it predated the operative date of § 25-1329. More important, the trial court in *Mason* took no action which altered or changed the judgment between the filing of the two motions for new trial filed by the plaintiff. As such, the successive motion for new trial did not seek substantive alteration of any new judgment entered subsequent to the filing of the first motion for new trial.

[5] This court concluded that the appeal in *Gebhardt v. Gebhardt, supra*, was timely. In so doing, this court emphasized that § 25-1329 provides for the filing of a motion to alter or amend no later than "'ten days after the entry of the judgment.'" 16 Neb. App. at 570, 746 N.W.2d at 712. We noted that the trial court in *Gebhardt* had, in response to the wife's first motion for new trial, entered an order substantively altering the initial decree of dissolution of marriage; this resulted in a "'new judgment'" giving rise to the statutory right in § 25-1329 to seek an alteration or amendment within 10 days. 16 Neb. App. at 572, 746 N.W.2d at 713. This court concluded that the husband's motion to alter or amend the new judgment was a tolling motion which had to be disposed of before the 30 days in which to appeal to this court began to run. *Id.* When the district court granted the relief sought by the husband, it entered what became the third judgment in the case, giving rise again to the right under § 25-1329 to seek an alteration or amendment within 10 days. *Gebhardt v. Gebhardt, supra.* The district court's ruling denying the wife's timely motion to alter or amend made the third judgment final and appealable. *Id.*

This court noted that if the wife, instead of filing a notice of appeal at that time, had filed another motion to alter or amend, where the district court had not made any substantive change to the most recent judgment entered, the principles of *Mason v. Cannon*, 246 Neb. 14, 516 N.W.2d 250 (1994), would have applied and her motions would have been considered successive motions to alter or amend the same judgment. *Gebhardt v. Gebhardt, supra*. We concluded that the motions filed in *Gebhardt* were not successive motions, because they were timely filed after the court substantially altered the previous

judgment, giving the parties a statutory right to seek alteration or amendment of the new judgment prior to appealing to this court.

The present case presents a substantially similar procedural pattern as *Gebhardt v. Gebhardt, supra*. As in that case, the district court in the present case entered a decree dissolving the parties' marriage and one of the parties timely filed a motion for new trial seeking to alter or amend the decree. As in that case, the district court in the present case entered an order denying new trial but substantively altering the initial decree. As in that case, one of the parties then timely filed a motion for new trial seeking to alter or amend the new judgment.

[6] We note that the present case does differ from *Gebhardt v. Gebhardt*, 16 Neb. App. 565, 746 N.W.2d 707 (2008), in that the second motion for new trial did not solely attack the substance of the district court's amendment to the initial decree and, instead, asserted grounds contained in the initial motion for new trial. We conclude that this factual distinction, however, is without consequence. As in *Gebhardt*, the district court's order substantively altering the initial decree created a new judgment and § 25-1329 provides the parties with a statutory right to timely seek alteration or amendment of that new judgment. When Samuel filed his June 26, 2009, motion for new trial, he filed a timely motion that constitutes a motion to alter or amend pursuant to § 25-1329. That motion thus tolled the time for filing a notice of appeal until 30 days after the motion to alter or amend was disposed of. See *Gebhardt v. Gebhardt, supra*.

As noted above, the record presented to us does not include any ruling by the district court on Samuel's June 26, 2009, motion for new trial. Indeed, in the notice of appeal Samuel filed in appeal No. A-09-754, Samuel specifically asserted to this court that the district court had not entered an order ruling on his motion. As a result of the court's having not entered an order ruling on Samuel's motion for new trial, the judgment of the district court has not yet become final and appealable, and we are without jurisdiction to address the merits of Samuel's consolidated appeals.

IV. CONCLUSION

We find that there was no final, appealable order entered by the district court, because it had not yet entered an order ruling on Samuel's motion for new trial. As such, the consolidated appeals are dismissed for lack of jurisdiction.

APPEALS DISMISSED.

STATE OF NEBRASKA, APPELLEE, V.
KAPIER R. REYES, APPELLANT.
794 N.W.2d 886

Filed February 22, 2011. Nos. A-10-391, A-10-392.

1. **Motions to Suppress: Confessions: Constitutional Law: Miranda Rights: Appeal and Error.** In reviewing a motion to suppress a confession based on the claimed involuntariness of the statement, including claims that it was procured in violation of the safeguards established by the U.S. Supreme Court in *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966), an appellate court applies a two-part standard of review. With regard to historical facts, an appellate court reviews the trial court's findings for clear error. Whether those facts suffice to meet the constitutional standards, however, is a question of law, which an appellate court reviews independently of the trial court's determination.
2. **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.
3. **Convictions: Evidence: Appeal and Error.** Regardless of whether the evidence is direct, circumstantial, or a combination thereof, an appellate court, in reviewing a criminal conviction, does not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence.
4. **Evidence: Appeal and Error.** Any conflicts in the evidence or questions concerning the credibility of witnesses are for the finder of fact to resolve.
5. **Convictions: Evidence: Appeal and Error.** 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.
6. **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.
7. **Miranda Rights.** *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966), requires procedures that will warn a suspect in custody of his right to

remain silent and which will assure the suspect that the exercise of that right will be honored.

8. **Miranda Rights: Waiver.** *Miranda* rights can be waived if the suspect does so knowingly and voluntarily.
9. ____: ____. A valid *Miranda* waiver must be voluntary in the sense that it was the product of a free and deliberate choice and made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it.
10. ____: ____. In determining whether a *Miranda* waiver is knowingly and voluntarily made, a court applies a totality of the circumstances test. Factors to be considered include the suspect's age, education, intelligence, prior contact with authorities, and conduct.
11. ____: ____. A defendant's limited command of the English language does not bar a finding of a knowing, intelligent, and voluntary waiver of *Miranda* rights; instead, it should be considered as a factor in the totality of the circumstances to determine whether or not that understanding is sufficient to permit the defendant to waive his or her *Miranda* rights.
12. **Appeal and Error.** Absent plain error, assignments of error not discussed in the briefs will not be addressed by an appellate court.
13. **Sexual Assault: Testimony: Corroboration.** The State is not required to corroborate victims' testimony in order to convict the defendant of first degree sexual assault, provided that the testimony alone is believed by the finder of fact.
14. **Sentences: Appeal and Error.** Where a sentence imposed within the statutory limits is alleged on appeal to be excessive, the appellate court must determine whether the sentencing court abused its discretion in considering and applying the relevant factors as well as any applicable legal principles in determining the sentence to be imposed.
15. **Sentences.** The appropriateness of a sentence is necessarily a subjective judgment and includes the sentencing judge's observation of the defendant's demeanor and attitude and all the facts and circumstances surrounding the defendant's life.
16. ____. When imposing a sentence, a sentencing judge should consider the defendant's (1) age, (2) mentality, (3) education and experience, (4) social and cultural background, (5) past criminal record or record of law-abiding conduct, and (6) motivation for the offense, as well as (7) the nature of the offense, and (8) the amount of violence involved in the commission of the crime.

Appeals from the District Court for Douglas County: JAMES T. GLEASON, Judge. Affirmed.

Thomas C. Riley, Douglas County Public Defender, and Kelly M. Steenbock for appellant.

Jon Bruning, Attorney General, and George R. Love for appellee.

IRWIN, SIEVERS, and MOORE, Judges.

MOORE, Judge.

INTRODUCTION

Kapier R. Reyes was found guilty by a jury of two counts of first degree sexual assault on a child, a Class II felony, in Douglas County District Court. The district court sentenced Reyes to 14 to 30 years' imprisonment on each count, with the sentences to run consecutively. Reyes has timely appealed both convictions and sentences to this court. For the following reasons, we affirm.

STATEMENT OF FACTS

In two separate cases which were eventually consolidated for trial, Reyes was charged by information with two counts of first degree sexual assault on a child at least 12 years old, but less than 16 years old. The informations in those cases alleged that Reyes had subjected M.R., his daughter, and D.M., his stepdaughter, to sexual penetration and that the crimes took place in Omaha, Douglas County, Nebraska. Reyes pled not guilty to both counts.

In each case, Reyes filed a motion to suppress to exclude any statements made by himself to Tom Rummel, a detective with the Omaha Police Department's special victims unit, alleging that the statements were obtained in violation of his 4th, 5th, and 14th Amendment rights.

At the suppression hearing, Rummel testified that on April 29, 2009, he investigated allegations of sexual assault made by M.R. after receiving a call from a school resource officer indicating that M.R. had made allegations of sexual abuse by her father, Reyes. Rummel first contacted Reyes at Reyes' home and asked Reyes to come to the police department to discuss the allegations of sexual abuse. Reyes agreed to accompany Rummel to the police department for an interview and rode with Rummel in his unmarked vehicle, in the front seat with no handcuffs.

At the beginning of the interview, Reyes indicated to Rummel that he was originally from Micronesia and had lived in the United States for approximately 9½ years. Rummel testified that Reyes spoke "understandable" English and that during the interview, he appeared to understand Rummel and answered

most of his questions appropriately. Rummel explained that throughout the interview, Reyes would ask him to explain if there was something he did not understand.

Rummel testified that once he gathered some background information from Reyes, approximately 2 to 3 minutes into the interview, he advised Reyes of his *Miranda* rights. Rummel utilized an "Omaha Police Department Rights Advisory Form" to go through those rights with Reyes. The advisory form is in English. Rummel testified that he read each section to Reyes and that Reyes indicated in the affirmative that he understood each statement. Rummel testified that the interview continued and that Reyes was responsive to his questions and appeared to understand where he was and what was happening.

The videotape recording of the interview was received into evidence with no objection. The videotape reveals that Reyes' English was somewhat broken, but was understandable. Reyes also appeared to comprehend Rummel's questions and answer them appropriately. The entire interview was conducted in English, and Reyes did not indicate that he was having difficulty understanding Rummel and did not ask for an interpreter. Reyes appeared to understand his *Miranda* rights as explained by Rummel and answered each question in the affirmative, thus waiving those rights. Throughout the interview, if Rummel asked a question which Reyes did not understand, Reyes would ask for clarification. Reyes admitted that the allegations made by M.R. were true. Reyes told Rummel that he had been drinking and, after the incident, had felt bad and apologized to M.R. Reyes admitted that he had had sexual intercourse with M.R. two times and had also used his fingers to penetrate her vagina. Reyes also admitted that he had had sexual intercourse with D.M. four or five times and had also performed oral sex on her. Reyes told Rummel that each incident had occurred at the family home in Omaha and that the girls were both younger at those times.

Reyes adduced no evidence in support of the motions to suppress. The district court denied the motions to suppress, finding that there was no merit to the motions.

A jury trial was held, during which Reyes renewed his motions to suppress. D.M., Reyes' stepdaughter, testified that

she was 24 years old and had lived in Omaha for 12 years. D.M. was born in 1985 in Micronesia. D.M. testified that her mother married Reyes when D.M. was 4 or 5 years old. D.M. explained that the sexual abuse began in Micronesia when she was 7 years old and continued when the family moved to Omaha. D.M. testified that early on, while she and her family were in Micronesia, she told a relative about the abuse and her mother subsequently confronted Reyes, who then threatened to kill D.M. D.M. testified that shortly after the family relocated to Omaha, when she was approximately 14 years old, Reyes began touching her again and the touching escalated to Reyes' having sexual intercourse with her by putting his penis into her vagina. D.M. testified that the intercourse occurred more than 10 times over the course of at least 3 years. D.M. testified that she spoke to Reyes in both Chuukese and English and that he would tell her he was touching her because he loved her.

After D.M.'s testimony, M.R., Reyes' daughter, testified that she was 17 years old and had been born in Micronesia in 1992. M.R. testified that in 2009, she became depressed and started to miss school because of what Reyes had done to her. M.R. testified that she was 12 or 13 years old the first time Reyes touched her at their house in Omaha. M.R. testified that Reyes first touched her with his hand after instructing her to sit on his lap in the living room. M.R. testified that Reyes then instructed her to go to the bedroom and told her to take off her clothes. She testified that Reyes then put his penis in her vagina. M.R. testified that this happened on three or four other occasions and that Reyes would also put his fingers inside of her vagina. M.R. testified that she and Reyes spoke in English and that she had no trouble understanding him. M.R. explained that eventually, she told her mother what was happening and the abuse stopped.

Rummel also testified to the facts as they were set forth at the suppression hearing. Rummel reiterated that when he interviewed Reyes, he was responsive to Rummel's questions and gave no indication that he did not understand Rummel's questions. The rights advisory form and the videotape recording of the interview were offered and received into evidence. The

videotape recording of the interview was played to the jury, and after further testimony, the State rested its case.

Reyes then took the stand and testified entirely in English, without the services of an interpreter. Reyes testified that he was born in 1968 and was from Micronesia, specifically from the island of Chuuk, which was located in the South Pacific. Reyes testified that his native language was Chuukese and that he had graduated from the eighth grade. Reyes testified that prior to moving to Omaha from Micronesia in 1999, he did not know the English language. Reyes testified that he was employed as a sanitation worker on the night shift at a food company and had been employed there since he arrived in Omaha.

Reyes testified that before going to the police station with Rummel, Reyes talked with Rummel about whether Reyes would be permitted to go to work, and Reyes said that Rummel was friendly with him. Reyes explained that when he told Rummel that he had sexually assaulted M.R. and D.M., he did not mean it and had made it up. Reyes denied ever sexually assaulting either M.R. or D.M. Reyes further explained that he did not understand that he would go to jail if he told Rummel he had sexually assaulted them, because he thought he could give a statement and leave. Initially, Reyes was unable to discuss any cultural differences between the United States and Micronesia, but with additional prompting, he testified that he thought that if he said he was sorry, then he would be released. Reyes testified, "At that time, you know, I'm thinking that — I thought that, if I say something like sorry or something like that [the police would] release me because I know where I came from that we always — always do that where I came from."

On cross-examination, Reyes testified that he did not remember specifics from the interview but did not dispute that Rummel had read him his rights and that he told Rummel that he understood those rights. Reyes then testified that although he watched the videotape of the interview as it was played for the jury, he did not understand the questions asked by Rummel at the time of the interview. Reyes restated several times during his testimony that he made up everything he told to Rummel during the interview. Reyes then testified that he

understood what Rummel was saying during the interview and answered those questions, but did not know the meaning of his own answers.

The matter was submitted to the jury, which found Reyes guilty of two counts of first degree sexual assault on a child. Subsequently, the district court sentenced Reyes to 14 to 30 years' imprisonment on each count, to run consecutively, with 322 days' credit for time served. Reyes has timely appealed his convictions and sentences to this court.

ASSIGNMENTS OF ERROR

Reyes assigns that the district court abused its discretion by denying his motions to suppress statements made to law enforcement personnel, by finding that the evidence was sufficient to support the convictions, and by imposing excessive sentences.

STANDARD OF REVIEW

[1] In reviewing a motion to suppress a confession based on the claimed involuntariness of the statement, including claims that it was procured in violation of the safeguards established by the U.S. Supreme Court in *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966), an appellate court applies a two-part standard of review. With regard to historical facts, we review the trial court's findings for clear error. Whether those facts suffice to meet the constitutional standards, however, is a question of law, which we review independently of the trial court's determination. *State v. Bormann*, 279 Neb. 320, 777 N.W.2d 829 (2010); *State v. Goodwin*, 278 Neb. 945, 774 N.W.2d 733 (2009).

[2-5] 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. Hudson*, 279 Neb. 6, 775 N.W.2d 429 (2009); *State v. Doyle*, 18 Neb. App. 495, 787 N.W.2d 254 (2010). Regardless of whether the evidence is direct, circumstantial, or a combination thereof, an appellate

court, in reviewing a criminal conviction, does not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence. *State v. Hudson, supra*; *State v. Doyle, supra.* Any conflicts in the evidence or questions concerning the credibility of witnesses are for the finder of fact to resolve. *State v. Hudson, supra*; *State v. Doyle, supra.* 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. Hudson, supra*; *State v. Doyle, supra.*

[6] 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. Rung*, 278 Neb. 855, 774 N.W.2d 621 (2009); *State v. Branch*, 277 Neb. 738, 764 N.W.2d 867 (2009).

ANALYSIS

Motions to Suppress.

Reyes argues that the district court erred by denying his motions to suppress statements made to law enforcement personnel because he is a foreign national who did not fully understand the *Miranda* warnings and, therefore, did not knowingly, intelligently, and voluntarily waive those rights.

[7-10] There is no dispute that Reyes was interrogated while in police custody and therefore was entitled to be advised of what have come to be known as *Miranda* rights prior to interrogation. "*Miranda* requires procedures that will warn a suspect in custody of his right to remain silent and which will assure the suspect that the exercise of that right will be honored." *Dickerson v. United States*, 530 U.S. 428, 442, 120 S. Ct. 2326, 147 L. Ed. 2d 405 (2000). *Miranda* rights can be waived if the suspect does so knowingly and voluntarily. *State v. Goodwin*, 278 Neb. 945, 774 N.W.2d 733 (2009); *State v. Walker*, 272 Neb. 725, 724 N.W.2d 552 (2006). A valid *Miranda* waiver must be voluntary in the sense that it was the product of a free and deliberate choice and made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it. See *State v. Walker, supra*, citing *Colorado v. Spring*, 479 U.S. 564, 107 S. Ct. 851, 93 L. Ed. 2d

954 (1987). In determining whether a *Miranda* waiver is knowingly and voluntarily made, a court applies a totality of the circumstances test. Factors to be considered include the suspect's age, education, intelligence, prior contact with authorities, and conduct. *State v. Bormann*, 279 Neb. 320, 777 N.W.2d 829 (2010); *State v. Goodwin, supra*.

Reyes argues that he is from Micronesia, that English is not his first language, and that he has difficulty understanding the English language. Reyes claims that he did not understand the *Miranda* warnings that were given to him in English. The State contends that Reyes had no difficulty understanding English and the *Miranda* warnings given to him and that thus, there was a proper waiver of those rights. While Nebraska cases have analyzed whether *Miranda* warnings given in a defendant's native language other than English were adequate to fully advise the defendant of the nature of the right and the consequences of waiving it, we have not found any cases discussing the adequacy of *Miranda* warnings given in English when English is not the defendant's first language; nor have the parties cited us to any such cases. See *State v. Fernando-Granados*, 268 Neb. 290, 682 N.W.2d 266 (2004) (Spanish rights advisory form, while not verbatim Spanish translation of language used in *Miranda*, was sufficient to prevent misunderstanding of rights).

Our independent research indicates that federal case law regarding language barriers in the context of *Miranda* waivers is well settled. The general conclusion of federal courts considering the issue is that the existence of limitations on language skills does not necessarily bar a finding of a knowing and voluntary waiver and that courts should consider it as a factor in the totality of the circumstances to determine whether or not a defendant's command of English is sufficient to permit the defendant to waive his or her *Miranda* rights. See, *U.S. v. Al-Cholan*, 610 F.3d 945 (6th Cir. 2010); *U.S. v. Marquez*, 605 F.3d 604, 609 (8th Cir. 2010) (defendant voluntarily and intelligently waived his *Miranda* rights where his first language was Spanish but where he conversed with investigators easily in English and his girlfriend testified that he spoke "conversational" English and that she could converse with him on most subjects most of time in English); *U.S. v.*

Ortiz, 315 F.3d 873 (8th Cir. 2003), and *U.S. v. Guay*, 108 F.3d 545 (4th Cir. 1997) (finding effective waiver where defendant with limited English stated he understood rights delivered in English); *U.S. v. Jaswal*, 47 F.3d 539, 542 (2d Cir. 1995) (defendant was able to give knowing and voluntary waiver where he had "reasonably good command of the English language"); *Campaneria v. Reid*, 891 F.2d 1014, 1020 (2d Cir. 1989) (defendant's waiver of *Miranda* rights was knowing and intelligent even though defendant spoke "broken" English and lapsed into Spanish during his conversation with officers). Compare *United States v. Short*, 790 F.2d 464 (6th Cir. 1986) (court found that English-only *Miranda* warning was insufficient where defendant was West German national, had resided in United States only 3 months, could not drive, had no friends in United States other than her husband, and spoke only broken English).

Similarly, state courts in South Dakota, North Carolina, and Florida have also utilized the totality of the circumstances analysis of a defendant's basic command of English in determining whether or not the defendant knowingly, intelligently, and voluntarily waived his or her *Miranda* rights. See, *State v. Ralios*, 783 N.W.2d 647 (S.D. 2010); *State v. Mohamed*, 696 S.E.2d 724 (N.C. App. 2010); *Chavez v. State*, 832 So. 2d 730 (Fla. 2002).

[11] We conclude that a defendant's limited command of the English language does not bar a finding of a knowing, intelligent, and voluntary waiver of *Miranda* rights and that instead, it should be considered as a factor in the totality of the circumstances to determine whether or not that understanding is sufficient to permit the defendant to waive his or her *Miranda* rights. Thus, even though Reyes' proficiency in the English language may have been limited, that factor alone would not bar him from making a knowing, intelligent, and voluntary waiver of his constitutional rights. Instead, we must review the totality of the circumstances to make such a determination.

In considering the totality of the circumstances in this case, we note that Reyes has lived and worked in the United States for approximately 10 years and conversed with the victims

in English. The record reveals that Reyes was able to easily converse with law enforcement personnel in the investigation of these crimes. Rummel testified that he conversed in English without difficulty with Reyes at his home, in Rummel's vehicle, and during the interview at the police station. Rummel testified that Reyes appeared to understand the questions asked of him and responded appropriately to those questions, which testimony is substantiated by the videotape recording of the interview. During the interview, Reyes did not request an interpreter or express any significant comprehension difficulties during the interrogation process; instead, when Reyes did not understand Rummel, he requested clarification and appeared to understand from the additional explanation given by Rummel. Furthermore, Reyes was able to testify in English at length during the trial without an interpreter.

Based upon the totality of these circumstances, we conclude that there was ample evidence before the district court to support a conclusion that Reyes' English skills were sufficient to enable him to understand the contents of the *Miranda* warnings and that he knowingly, intelligently, and voluntarily waived those rights. Reyes' assignment of error to the contrary is without merit.

Reyes also claims he did not waive his *Miranda* rights because of his "background." Brief for appellant at 7. The discussion of this portion of the alleged error is limited to the following:

> [Reyes] testified to the cultural norm in his home country that police will let you go if you simply agree to what is alleged . . . . Given his background and difficulty with the English language, [Reyes'] waiver of his Fifth Amendment rights was not knowingly, intelligently, and voluntarily given as required by *Miranda*.

Brief for appellant at 7-8.

[12] This brief statement, which cites no law in support thereof and which makes no arguments in support thereof, is insufficient to constitute discussion of the assigned error. Absent plain error, assignments of error not discussed in the briefs will not be addressed by this court. *State v. Bjorklund*, 258 Neb. 432, 604 N.W.2d 169 (2000), *abrogated on other*

grounds, State v. Mata, 275 Neb. 1, 745 N.W.2d 229 (2008). Finding no plain error, we decline to discuss this claim which did not receive even minimal argument in Reyes' brief.

Sufficiency of Evidence.

Reyes argues that the evidence was insufficient to support his two convictions for first degree sexual assault on a child because the only evidence presented was the uncorroborated testimony of M.R. and D.M.

Reyes was charged with and convicted of two counts of first degree sexual assault on a child pursuant to Neb. Rev. Stat. § 28-319(1)(c) (Reissue 2008). This section provides that an individual commits first degree sexual assault on a child by subjecting another person to sexual penetration "when the actor is nineteen years of age or older and the victim is at least twelve but less than sixteen years of age." § 28-319(1)(c).

The evidence adduced by the State established that Reyes, born in 1968, subjected M.R., born in 1992, to sexual penetration on several occasions in Omaha when she was between 12 and 16 years old. The evidence adduced also establishes that Reyes similarly subjected D.M., born in 1985, to sexual penetration on several occasions in Omaha when she was between 12 and 16 years of age. Even if we were not to consider the videotape recording which contains Reyes' interview and confession, the testimony of M.R. and D.M. clearly establishes the necessary elements of first degree sexual assault on a child.

[13] Furthermore, contrary to Reyes' argument, the State is not required to corroborate the victims' testimony in order to convict the defendant of first degree sexual assault, provided that the testimony alone is believed by the finder of fact. See *State v. Davis*, 277 Neb. 161, 762 N.W.2d 287 (2009).

Therefore, we find that the evidence, when viewed in a light most favorable to the State, is sufficient to support Reyes' convictions for first degree sexual assault on a child. This assignment of error is without merit.

Excessive Sentences.

Reyes also argues that the district court abused its discretion by imposing excessive sentences.

[14-16] Where a sentence imposed within the statutory limits is alleged on appeal to be excessive, the appellate court must determine whether the sentencing court abused its discretion in considering and applying the relevant factors as well as any applicable legal principles in determining the sentence to be imposed. *State v. Alford*, 278 Neb. 818, 774 N.W.2d 394 (2009). The appropriateness of a sentence is necessarily a subjective judgment and includes the sentencing judge's observation of the defendant's demeanor and attitude and all the facts and circumstances surrounding the defendant's life. *State v. Epp*, 278 Neb. 683, 773 N.W.2d 356 (2009). When imposing a sentence, a sentencing judge should consider the defendant's (1) age, (2) mentality, (3) education and experience, (4) social and cultural background, (5) past criminal record or record of law-abiding conduct, and (6) motivation for the offense, as well as (7) the nature of the offense, and (8) the amount of violence involved in the commission of the crime. *Id.*

Reyes was convicted of two counts of first degree sexual assault on a child, a Class II felony punishable by 1 to 50 years' imprisonment. See § 28-319 and Neb. Rev. Stat. § 28-105 (Reissue 2008). The district court sentenced Reyes to 14 to 30 years' imprisonment for each count, with those sentences to be served consecutively. These sentences are within statutory limits. Nonetheless, Reyes argues that the sentences were an abuse of discretion because he is older, is the primary means of support for his family, and faces imminent deportation back to Micronesia because he is not a citizen of the United States.

All of this information was available to the district court prior to sentencing and was discussed at the sentencing hearing. Reyes is 42 years old and was the primary supporter for his family. Reyes also had a criminal history, albeit brief, which involved minor traffic violations and a conviction for driving under the influence. However, Reyes' daughter and stepdaughter have suffered greatly from the abuse perpetrated by Reyes. M.R. struggles significantly with depression which has led to difficulties in school and relationships. Based upon the record, we find that the sentences imposed upon Reyes were not excessive and that the district court did not abuse its discretion by

imposing sentences within the statutory limits. This assignment of error is without merit.

CONCLUSION

In conclusion, having found no merit to any of Reyes' assignments of error, we affirm Reyes' convictions and sentences.

AFFIRMED.

IN RE INTEREST OF BREANA M., A CHILD UNDER 18 YEARS OF AGE. STATE OF NEBRASKA, APPELLANT, V. KAYLIN B. AND TRAVIS M., APPELLEES.

795 N.W.2d 660

Filed April 5, 2011. No. A-10-734.

1. **Jurisdiction: Words and Phrases.** Jurisdiction is the inherent power or authority to decide a case.
2. ____: ____. Jurisdiction of the subject matter means the authority to hear and determine both the class of actions to which the action before the court belongs and the particular question which it assumes to decide.
3. ____: ____. Personal jurisdiction is the power of a tribunal to subject and bind a particular person or entity to its decisions.
4. **Juvenile Courts: Jurisdiction: Words and Phrases.** The commonly used phrase that a juvenile court "takes jurisdiction over a juvenile" refers to the authority of the juvenile court to utilize the powers conferred on it by the Nebraska Juvenile Code, Neb. Rev. Stat. §§ 43-245 to 43-2,129 (Reissue 2008), to provide for the treatment and rehabilitation of certain juveniles and their parents, after the State has met its burden of proof at an adjudication hearing.
5. **Juvenile Courts: Dismissal and Nonsuit: Appeal and Error.** It is error for a juvenile court to dismiss a petition because a child is currently residing in a different county.
6. **Juvenile Courts: Venue: Proof.** In a proceeding under the Nebraska Juvenile Code, the State is not required to prove proper venue, because proof of venue is immaterial to the determination of whether a juvenile falls within the meaning of Neb. Rev. Stat. § 43-247 (Reissue 2008).
7. **Juvenile Courts: Venue: Motions to Dismiss.** Because venue is immaterial in juvenile proceedings, a court should not grant a motion to dismiss based on an allegation of improper venue; instead, a juvenile court should first hold an adjudication hearing, and after the adjudication hearing, it should determine whether it would be proper to transfer the proceedings to a court in the county where the juvenile resides.

Appeal from the Separate Juvenile Court of Douglas County: VERNON DANIELS, Judge. Reversed and remanded for further proceedings.

Donald W. Kleine, Douglas County Attorney, Amy Schuchman, and Daniel Gubler, Senior Certified Law Student, for appellant.

Joan Garvey, P.C., L.L.O., for appellee Kaylin B.

Thomas C. Riley, Douglas County Public Defender, and John J. Jedlicka for appellee Travis M.

IRWIN, SIEVERS, and MOORE, Judges.

IRWIN, Judge.

I. INTRODUCTION

Pursuant to this court's authority under Neb. Ct. R. App. P. § 2-111(B)(1) (rev. 2008), this case was ordered submitted without oral argument. The State of Nebraska appeals from an order of the Douglas County Separate Juvenile Court, which order granted Kaylin B.'s and Travis M.'s motions to dismiss the adjudication proceedings concerning their minor child, Breana M. Although the record does not reveal the court's explanation for granting the motions to dismiss, the motions were premised on an alleged lack of personal jurisdiction and improper venue because Breana does not reside in Douglas County.

For the reasons set forth below, we find that the juvenile court erred in granting the motions to dismiss. We therefore reverse the dismissal order and remand the case for further proceedings.

II. BACKGROUND

On May 17, 2010, the State filed a petition in the Douglas County Separate Juvenile Court alleging that Breana, born in December 2008, came within the meaning of Neb. Rev. Stat. § 43-247(3)(a) (Reissue 2008) as to Kaylin and Travis, her natural parents. Specifically, the petition alleges that both Kaylin and Travis use alcohol or controlled substances and have failed

to provide Breana with parental care, support, and supervision. The petition also alleges that Breana is enrolled in or is eligible for enrollment in the Rosebud Sioux Tribe.

That same day, the State also filed a motion for temporary custody of Breana. The affidavit in support of the motion reveals that Breana resides with her maternal grandmother in Cass County, Nebraska, and that Breana has resided there intermittently since March 2009, when Kaylin brought Breana to her grandmother because Kaylin was unable to care for her properly. Kaylin and Travis continue to reside in Douglas County.

Since March 2009, Kaylin has removed Breana from her grandmother's home in Cass County on several occasions and taken Breana back to her home in Douglas County, presumably because Kaylin was upset when Breana's grandmother reported Kaylin's drug use to authorities. Ultimately, however, Breana has always returned to her grandmother's home because Kaylin is unable to care for Breana due to her continuing drug use. At the time the petition and the motion for temporary custody were filed, Kaylin and Travis were threatening to take Breana from her grandmother again.

The juvenile court granted the State's motion for temporary custody and scheduled a hearing date. Prior to the hearing on the allegations in the petition, Kaylin and Travis each filed a motion to dismiss the proceedings, arguing that the Douglas County Separate Juvenile Court lacked personal jurisdiction over Breana and that Douglas County was not the proper venue in which to hear this case because Breana did not reside in Douglas County, but, instead, continued to reside in Cass County with her grandmother.

On July 19, 2010, after the hearing, the court issued an order granting Kaylin's and Travis' motions to dismiss. The court did not provide any authority or explanation for this action.

The State appeals from the order of dismissal.

III. ASSIGNMENT OF ERROR

The State alleges that the juvenile court erred in granting the parents' motions to dismiss, because the court had jurisdiction to hear the case.

IV. ANALYSIS

1. Standard of Review

A jurisdictional question which does not involve a factual dispute is determined by an appellate court as a matter of law, which requires the appellate court to reach a conclusion independent from the lower court's decision. *In re Interest of Tegan V., ante* p. 857, 794 N.W.2d 190 (2011).

Statutory interpretation is a question of law, which an appellate court resolves independently of the trial court. *Id.*

2. Jurisdiction

The State alleges that the juvenile court erred in granting the parents' motions to dismiss. Although it is not entirely clear why the juvenile court granted the motions to dismiss, based on the allegations in the motions, we can assume that the juvenile court concluded either that it lacked jurisdiction to adjudicate Breana or that Douglas County was not the proper venue for this case. We address each basis for dismissal in turn.

(a) Jurisdiction to Adjudicate Breana

In their motions to dismiss, Kaylin and Travis allege that the Douglas County Separate Juvenile Court does not have "personal jurisdiction" over Breana because Breana does not reside in Douglas County. Personal jurisdiction, or in personam jurisdiction, is the power of a tribunal to subject and bind a particular person or entity to its decisions. See *Ashby v. State*, 279 Neb. 509, 779 N.W.2d 343 (2010). Although Kaylin and Travis use the legal term "personal jurisdiction," we understand their argument to assert that the Douglas County Separate Juvenile Court does not have subject matter jurisdiction because Breana is not residing in Douglas County.

[1-3] We begin our discussion by defining certain jurisdictional terms to avoid confusion herein and in future cases. Jurisdiction is the inherent power or authority to decide a case. *In re Interest of Tegan V., supra*. Jurisdiction of the subject matter means the authority to hear and determine both the class of actions to which the action before the court belongs and the particular question which it assumes to decide. *Id*. As we explained above, personal jurisdiction is the power of a tribunal

to subject and bind a particular person or entity to its decisions. *Ashby v. State, supra*.

[4] We contrast the above jurisdictional terms with the commonly used phrase that a juvenile court "*takes jurisdiction over a juvenile*" after the State has met its burden of proof at an adjudication hearing. This commonly used phrase refers to the authority of the juvenile court to utilize the powers conferred on it by the Nebraska Juvenile Code, Neb. Rev. Stat. §§ 43-245 to 43-2,129 (Reissue 2008), to provide for the treatment and rehabilitation of certain juveniles and their parents.

In their motions to dismiss, Kaylin and Travis argue that the Douglas County Separate Juvenile Court does not have the authority (they incorrectly term this personal jurisdiction) to adjudicate Breana because she does not reside in Douglas County. This argument relates to the juvenile court's subject matter jurisdiction because it is an assertion concerning the court's authority to hear and determine whether Breana is within the meaning of § 43-247(3)(a).

As a statutorily created court of limited and special jurisdiction, a juvenile court has only such authority as has been conferred on it by statute. *In re Interest of Tegan V., ante* p. 857, 794 N.W.2d 190 (2011). Thus, we look to the Nebraska Juvenile Code to determine the extent of the juvenile court's subject matter jurisdiction over this case.

Pursuant to the juvenile code, the juvenile court's subject matter jurisdiction is far reaching. Moreover, the Nebraska Supreme Court has directed that we construe the Nebraska Juvenile Code liberally to accomplish its purpose of serving the best interests of the juveniles who fall within it. See *In re Interest of Gabriela H.*, 280 Neb. 284, 785 N.W.2d 843 (2010).

Section 43-247 provides that the juvenile court in "each county" shall have jurisdiction over "[a]ny juvenile" who lacks proper parental care by reason of the fault or habits of the child's parent, guardian, or custodian. See § 43-247(3)(a). This statutory language is referring to subject matter jurisdiction. In this case, the State's petition alleges that Breana comes within the meaning of § 43-247(3)(a) because she is lacking

proper parental care by reason of the faults or habits of Kaylin and Travis.

[5] Considering the purposes of the juvenile code, including protecting children and placing them in a stable and secure living environment, we find that to the extent the juvenile court based its decision to grant the motions to dismiss on the court's lack of subject matter jurisdiction to adjudicate Breana, such decision was erroneous. Under the juvenile code, the juvenile court has subject matter jurisdiction over "any juvenile" who lacks proper parental care by reason of the fault or habits of the child's parents. The juvenile code does not indicate that this subject matter jurisdiction is limited by the child's temporary residence in another county. And we are unable to find any other statute or case law which suggests that a juvenile court must dismiss a petition because the child temporarily resides in a different county. In fact, this court has recently held that it is error for a juvenile court to dismiss a petition because a child is currently residing in a different county. *In re Interest of Tegan V., supra* (reversing juvenile court's dismissal of petition when child was placed outside of county after original petition was filed).

(b) Proper Venue

In their motions to dismiss, Kaylin and Travis also allege that the Douglas County Separate Juvenile Court is not the proper venue for these proceedings because Breana does not reside in Douglas County. In the motions, Kaylin and Travis assert that a court in Cass County is the appropriate venue because at the time the State filed its petition, Breana resided in Cass County with her maternal grandmother.

[6] Venue is the place of trial of an action—the site where the power to adjudicate is to be exercised. *Muir v. Nebraska Dept. of Motor Vehicles*, 260 Neb. 450, 618 N.W.2d 444 (2000). The Nebraska Supreme Court has previously held that in a proceeding under the Nebraska Juvenile Code, the State is not required to prove proper venue, because proof of venue is immaterial to the determination of whether a juvenile falls within the meaning of § 43-247. See *In re Interest of Leo L.*, 258 Neb. 877, 606 N.W.2d 783 (2000). Moreover, § 43-282 allows an adjudication

proceeding to be filed in any county and allows for discretionary transfer, after adjudication, to the county where the juvenile is living or domiciled, stating in part:

> If a petition alleging a juvenile to be within the jurisdiction of the Nebraska Juvenile Code is filed in a county other than the county where the juvenile is presently living or domiciled, the court, *at any time after adjudication and prior to final termination of jurisdiction, may transfer the proceedings to the county where the juvenile lives or is domiciled* and the court having juvenile court jurisdiction therein shall thereafter have sole charge of such proceedings and full authority to enter any order it could have entered had the adjudication occurred therein.

(Emphasis supplied.) Based on the language of § 43-282, proof of venue is immaterial when a petition is filed alleging a juvenile to be within the subject matter jurisdiction of the Nebraska Juvenile Code.

[7] Because venue is immaterial in juvenile proceedings, a court should not grant a motion to dismiss based on an allegation of improper venue. Pursuant to the statutory language, a juvenile court should first hold an adjudication hearing, and after the adjudication hearing, it should determine whether it would be proper to transfer the proceedings to a court in the county where the juvenile resides.

In this case, the Douglas County Separate Juvenile Court should have held an adjudication hearing to determine whether Breana was a child within the meaning of § 43-247(3)(a) as the State's petition alleged. If the court adjudicated Breana as such, then it should have considered transferring the case to a court in Cass County. To the extent the juvenile court based its decision to grant the motions to dismiss on the allegation that venue was not proper, such decision was erroneous.

(c) State's Argument

Although we agree with the State's basic assertion that the juvenile court erred in granting the motions to dismiss, we briefly digress to make clear that we do not agree with the State's argument in favor of that basic assertion. In its brief to this court, the State focuses its argument on Breana's eligibility

for enrollment in the Rosebud Sioux Tribe and on the application of the Nebraska Indian Child Welfare Act (the Act). See Neb. Rev. Stat. §§ 43-1501 to 43-1516 (Reissue 2008).

The State has misinterpreted the application of the Act to this case. The petition filed by the State alleges that Breana is an Indian child as defined by the Act because she is enrolled in or is eligible for enrollment in the Rosebud Sioux Tribe. The record reveals that despite Breana's status as an Indian child, neither she nor her parents reside on the reservation. Because Breana does not reside on the reservation, § 43-1504(2) controls the determination of which court has subject matter jurisdiction of these juvenile proceedings. That subsection provides:

> In any state court proceeding for the foster care placement of, or termination of parental rights to, an Indian child not domiciled or residing within the reservation of the Indian child's tribe, the court, in the absence of good cause to the contrary, shall transfer such proceeding to the jurisdiction of the tribe, absent objection by either parent, upon the petition of either parent or the Indian custodian or the Indian child's tribe, except that such transfer shall be subject to declination by the tribal court of such tribe.

In this case, no one has filed a petition to transfer the case to a tribal court. As such, at this time, the state courts retain subject matter jurisdiction over the juvenile court proceedings.

The jurisdictional rules cited by the State in its brief apply to a determination of whether a tribal court or a state court has subject matter jurisdiction over a juvenile proceeding when an Indian child is involved. See *Mississippi Choctaw Indian Band v. Holyfield*, 490 U.S. 30, 109 S. Ct. 1597, 104 L. Ed. 2d 29 (1989). Here, the issue is not whether a state court or a tribal court has subject matter jurisdiction, but which state juvenile court has subject matter jurisdiction. A determination of which state juvenile court has subject matter jurisdiction over a juvenile proceeding is outside the scope of the Act.

Despite the State's misplaced reliance on the Act, we agree with the State's ultimate contention that the juvenile court erred in granting the motions to dismiss the proceedings.

V. CONCLUSION

We conclude that the Douglas County Separate Juvenile Court has subject matter jurisdiction to hear this case because the court has authority to adjudicate Breana as a child within the meaning of § 43-247(3)(a). In addition, we find that proof of venue is immaterial when a petition is filed alleging a juvenile to be within the jurisdiction of the Nebraska Juvenile Code. We find that the juvenile court erred in granting the motions to dismiss. We therefore reverse the dismissal order and remand the case for further proceedings.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

IN RE GUARDIANSHIP OF DAVID G., A MINOR CHILD. DANA G., APPELLANT, V. STEPHANIE P. AND JACK M., APPELLEES.

798 N.W.2d 131

Filed April 5, 2011. No. A-10-927.

1. **Judgments: Appeal and Error.** An appellate court determines questions of law independently of the determination reached by the lower court.
2. ____: ____. Generally, the right of the plaintiff to voluntary dismissal is a right that is not a matter of judicial grace or discretion.
3. **Jurisdiction: Dismissal and Nonsuit.** A dismissal for lack of subject matter jurisdiction is not a judgment on the merits and is entered without prejudice.

Appeal from the County Court for Douglas County: LYN V. WHITE, Judge. Affirmed as modified.

Catherine Mahern and Patrick Erker, Senior Certified Law Student, of Milton R. Abrahams Legal Clinic, for appellant.

No appearance for appellees.

SIEVERS, CARLSON, and CASSEL, Judges.

CASSEL, Judge.

INTRODUCTION

Prior to final submission of Dana G.'s petition for the appointment of a guardian for a minor child, Dana moved

to dismiss her petition without prejudice. The county court instead dismissed the petition with prejudice, and Dana appeals. Because the dismissal without prejudice was both a matter of right and compelled by the absence of subject matter jurisdiction, we modify the dismissal to be without prejudice.

BACKGROUND

Although the identity of the parties is unimportant to our analysis, we note that Stephanie P. and Jack M. are the biological parents of David G., born in Iowa in January 1997. Dana is David's paternal aunt.

On January 27, 2010, in the county court for Douglas County, Nebraska, Dana filed a petition for the appointment of a temporary and permanent guardian for David. She alleged that David had resided in Douglas County since September 2, 2009, that David's mother was unwilling and unable to care for him due to her drug abuse and child neglect, and that David's father had been incarcerated since September 2. Dana further alleged that the best interests of David required that she be appointed his guardian.

The county court entered an order on May 17, 2010, which stated that a court in Iowa "possibly has initial jurisdiction of the custody of the child." The court ordered Dana to provide it with a brief concerning whether it had jurisdiction and continued the hearing to June 21.

On August 16, 2010, Dana filed a motion to dismiss her petition without prejudice, stating that she no longer was seeking to become the child's legal guardian. On August 18, the county court held a hearing on the motion to dismiss. David's guardian ad litem was present, and his mother appeared telephonically, but neither Dana nor her counsel appeared. The county court judge called an Iowa district court judge and had the conversation placed on the record. The Iowa judge confirmed that there had been an action in Iowa which determined David's custody. That same day, the county court entered an order of dismissal with prejudice.

Dana filed a motion to alter or amend the judgment, requesting the county court to amend its dismissal from "with prejudice" to "without prejudice." After a hearing, the court entered

an amended order. The county court found that it lacked jurisdiction because a district court in Iowa had a divorce action with prior initial jurisdiction of the custody of the minor child. The court amended its August 18, 2010, order "to dismiss [Dana's] Petition for Guardianship with prejudice, unless [Dana] files with the Petition appropriate consents required by the law of the State of Iowa."

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

ASSIGNMENT OF ERROR

Dana assigns, restated, that the county court erred in dismissing her motion to dismiss with prejudice rather than doing so without prejudice.

STANDARD OF REVIEW

[1] An appellate court determines questions of law independently of the determination reached by the lower court. *Ashby v. State*, 279 Neb. 509, 779 N.W.2d 343 (2010).

ANALYSIS

Dana's argument concedes that her petition for appointment of guardian should have been dismissed, but urges that the dismissal should have been without prejudice. We agree and conclude that the county court erred for two reasons.

[2] First, an action may be dismissed without prejudice to a future action by the plaintiff before the final submission of the case to the court where the trial is by the court. Neb. Rev. Stat. § 25-601(1) (Reissue 2008). Generally, the right of the plaintiff to voluntary dismissal is a right that is not a matter of judicial grace or discretion. *Knapp v. Village of Beaver City*, 273 Neb. 156, 728 N.W.2d 96 (2007). Because Dana moved to dismiss her petition before submission of the case to the court, the court erred when it dismissed the action with prejudice.

[3] Second, a dismissal for lack of subject matter jurisdiction is not a judgment on the merits and is entered without prejudice. *Stalley v. Orlando Regional Healthcare System*, 524 F.3d 1229 (11th Cir. 2008). See, also, *Garman v. Campbell County*

School Dist. No. 1, 630 F.3d 977 (10th Cir. 2010); *Ernst v. Rising*, 427 F.3d 351 (6th Cir. 2005). If a court lacks subject matter jurisdiction, it lacks the power to reach the merits of the case. See, generally, *In re Interest of J.T.B. and H.J.T.*, 245 Neb. 624, 514 N.W.2d 635 (1994). As a general rule, a dismissal with prejudice is an adjudication on the merits. See *Simpson v. City of North Platte*, 215 Neb. 351, 338 N.W.2d 450 (1983). Clearly, the county court was properly concerned that it did not have subject matter jurisdiction because of the provisions of the Uniform Child Custody Jurisdiction and Enforcement Act. Jurisdiction over a child custody proceeding is governed exclusively by the Uniform Child Custody Jurisdiction and Enforcement Act. *Carter v. Carter*, 276 Neb. 840, 758 N.W.2d 1 (2008). Jurisdiction over custody matters having interstate dimension must be determined independently by application of the Uniform Child Custody Jurisdiction and Enforcement Act. *Carter v. Carter, supra*. Having correctly determined that the county court lacked subject matter jurisdiction of the Nebraska proceeding and having chosen to dismiss the proceeding, the court should have done so without prejudice as it lacked the power to adjudicate the matter on the merits. These circumstances require us to modify the court's order accordingly. See *Hart v. U.S.*, 630 F.3d 1085 (8th Cir. 2011).

CONCLUSION

Because the county court erred in dismissing Dana's petition with prejudice, we modify its dismissal to be without prejudice. As so modified, we affirm.

AFFIRMED AS MODIFIED.

BUCKLEY C. DETERDING, APPELLANT, V. TERESA A. DETERDING, APPELLEE.

797 N.W.2d 33

Filed April 26, 2011. No. A-10-301.

1. **Appeal and Error.** Plain error is error plainly evident from the record and of such a nature that to leave it uncorrected would result in damage to the integrity, reputation, or fairness of the judicial process.
2. **Divorce: Minors: Stipulations.** Parties in a proceeding to dissolve a marriage cannot control the disposition of matters pertaining to minor children by agreement.
3. **Divorce: Child Support.** The Nebraska dissolution statutes do not impose a duty upon any individual other than a parent to pay for the support of minor children.
4. **Parent and Child: Child Support.** A person other than a parent may be responsible for supporting a minor child if the person has assumed, in loco parentis, the obligations incident to a parental relationship.
5. **Parent and Child: Words and Phrases.** A person standing in loco parentis to a child is one who has put himself or herself in the situation of a lawful parent by assuming the obligations incident to the parental relationship, without going through the formalities necessary to a legal adoption, and the rights, duties, and liabilities of such person are the same as those of the lawful parent.
6. **Child Support.** The paramount concern and question in determining child support is the best interests of the child.
7. **Divorce: Child Support: Appeal and Error.** A court commits plain error in failing to award child support on behalf of a minor child without receiving any evidence concerning the circumstances surrounding a child's birth or the child's relationship with the parties prior to the dissolution proceedings.

Appeal from the District Court for Lincoln County: JOHN P. MURPHY, Judge. Reversed and remanded for further proceedings.

R. Bradley Dawson, of Lindemeier, Gillett, Dawson & Troshynski, for appellant.

On brief, Michael E. Piccolo, P.C., L.L.O., for appellee.

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

IRWIN, Judge.

I. INTRODUCTION

Buckley C. Deterding appeals from a decree of dissolution entered by the district court. In the decree, the district court dissolved Buckley's marriage to Teresa A. Deterding, divided

a portion of the parties' marital assets and debts, and ordered Buckley to pay alimony to Teresa. The district court also found that, pursuant to genetic testing, a child born to Teresa during the marriage is not Buckley's biological child. The child was conceived through artificial insemination. The court indicated that because the child was not Buckley's biological child, no child support would be ordered.

On appeal, Buckley asserts that the district court erred in ordering him to pay alimony to Teresa. Neither of the parties raises the issue of the district court's failure to award child support on behalf of the minor child.

Upon our de novo review of the record, we conclude that the district court committed plain error in failing to award child support on behalf of the minor child without receiving any evidence concerning the circumstances surrounding the child's birth or the child's relationship with Buckley prior to the dissolution proceedings. We reverse, and remand for further proceedings where the parties should provide evidence concerning the minor child and her best interests. Because we reverse, and remand on this basis, we decline to address Buckley's assertion regarding the alimony award.

Both parties waived oral argument. As such, this case was submitted without oral argument pursuant to Neb. Ct. R. App. P. § 2-111(E)(6) (rev. 2008).

II. BACKGROUND

Buckley and Teresa were married on March 30, 1994. They were unable to conceive a child naturally, so Teresa was artificially inseminated. In November 2003, Teresa gave birth to a child. Genetic testing proves that the child is not Buckley's biological child.

On January 20, 2009, more than 5 years after the child's birth, Buckley filed a complaint for dissolution of the parties' marriage. The complaint alleged, among other things, that "there are no minor children of the parties." Buckley indicated that Teresa gave birth to a child during the marriage, but that this child is not his biological child. Buckley sought "a decree of the Court determining that [the child] is not his child and that he owes no duty of support to said child."

On September 18, 2009, trial was held. Prior to the submission of evidence, Buckley's counsel informed the court that the primary issue to be resolved was whether alimony should be awarded to Teresa. Counsel indicated, "We have a child that was born during the period of the marriage, but everybody here knows that it's not the child of [Buckley]."

During the trial, Teresa testified that Buckley is not the child's biological father and that, as a result, it was her understanding he did not have a legal obligation to support the child. She also indicated that she wished to move forward and support the child on her own. Teresa then testified about her monthly income and expenses. Teresa testified that she was requesting alimony so that she would be able to afford to care for the child and provide the child with health insurance.

Conspicuous by its absence is the evidence about the child. For example, neither of the parties offered any evidence about the circumstances surrounding the child's conception and birth. They did not provide any evidence about the child's life during the nearly 6 years that had passed from the time she was born. There was no evidence about Buckley's involvement or lack of involvement in the child's life for the nearly 6 years after her birth and prior to the time of trial. In short, there is no evidence about Buckley's association, relationship, or connection with the child in any way, shape, or manner.

In the decree of dissolution, the district court found that the child is not the minor child of Buckley and "no support shall be ordered at this time." The court awarded Teresa $500 per month in alimony for a period of 84 months.

Buckley appeals here.

III. ASSIGNMENT OF ERROR

On appeal, Buckley asserts that the district court erred in ordering him to pay to Teresa $500 per month in alimony for a period of 84 months.

IV. ANALYSIS

On appeal, neither Buckley nor Teresa complains of the district court's failure to award child support on behalf of the minor child. However, we conclude that the district court's

failure to award child support without receiving any evidence concerning the circumstances surrounding the child's birth or her relationship with Buckley prior to the dissolution proceedings amounts to plain error. We reverse, and remand for further proceedings.

[1] Although an appellate court ordinarily considers only those errors assigned and discussed in the briefs, the appellate court may, at its option, notice plain error. *Krumwiede v. Krumwiede*, 258 Neb. 785, 606 N.W.2d 778 (2000). Plain error is error plainly evident from the record and of such a nature that to leave it uncorrected would result in damage to the integrity, reputation, or fairness of the judicial process. *In re Interest of Markice M.*, 275 Neb. 908, 750 N.W.2d 345 (2008); *In re Interest of Mainor T. & Estela T.*, 267 Neb. 232, 674 N.W.2d 442 (2004).

It is clear from the record that although the child was born during the parties' marriage, she is not Buckley's biological child. Genetic testing completed on Buckley and the child specifically indicates that Buckley cannot be the biological father of the child. Buckley and Teresa appear to have reached an agreement that because Buckley is not the child's biological father, he does not have a duty to support her. We disagree with the parties' generalized assumption about Buckley's duty to support the child.

[2] First, we note that we are not bound by the parties' agreement regarding child custody and alimony. Parties in a proceeding to dissolve a marriage cannot control the disposition of matters pertaining to minor children by agreement. *Weinand v. Weinand*, 260 Neb. 146, 616 N.W.2d 1 (2000).

Second, we recognize that because the child was conceived through artificial insemination, this is not a situation where the child has a readily identifiable biological father who is responsible for her care and support. Rather, the only father in the child's life is Buckley.

There is evidence in the record which indicates that the parties tried to have a child together naturally, but were unable to do so. This evidence suggests that both Buckley and Teresa wanted a child and agreed to certain fertility treatments and Teresa's artificial insemination. Unfortunately, because the

parties did not offer any evidence concerning the circumstances surrounding Teresa's conceiving and giving birth to the child, we have no idea whether both Buckley and Teresa consented to the artificial insemination.

If Buckley consented to Teresa's being artificially inseminated, he made a decision to bring a child into the world, and he should not be permitted to abandon his responsibility to that child simply because he is not the biological father. Both the Legislature and the Nebraska Supreme Court have recognized that there are situations where a person who is not a biological parent may still have a responsibility to support a child.

In Neb. Rev. Stat. § 43-1412.01 (Reissue 2008), the Legislature established the procedure for setting aside a legal determination of paternity. The statute provides:

> An individual may file a complaint for relief and the court may set aside a final judgment, court order, administrative order, obligation to pay child support, or any other legal determination of paternity if a scientifically reliable genetic test . . . establishes the exclusion of the individual named as a father in the legal determination.

However, § 43-1412.01 also provides, "A court shall not grant relief from determination of paternity if the individual named as father . . . knew that the child was conceived through artificial insemination." This statutory language suggests that if Buckley knew and consented to Teresa's being artificially inseminated, he has some responsibility to support the child even if he is not her biological parent.

[3,4] The Nebraska dissolution statutes do not impose a duty upon any individual other than a parent to pay for the support of minor children. See Neb. Rev. Stat. § 42-364 (Supp. 2009). However, the term "parent" is not specifically defined in the statutes. See *Weinand v. Weinand, supra*. Assuming, without deciding, that Buckley would not be considered a "parent" pursuant to § 42-364, he still may be responsible for supporting the child if he has assumed, in loco parentis, the obligations incident to a parental relationship. See *Weinand v. Weinand, supra*.

[5] The Nebraska Supreme Court has held that a person standing in loco parentis to a child is one who has put himself or herself in the situation of a lawful parent by assuming the obligations incident to the parental relationship, without going through the formalities necessary to a legal adoption, and the rights, duties, and liabilities of such person are the same as those of the lawful parent. *Weinand v. Weinand, supra*; *Hickenbottom v. Hickenbottom*, 239 Neb. 579, 477 N.W.2d 8 (1991). The Parenting Act, Neb. Rev. Stat. § 43-2920 et seq. (Reissue 2008), provides guidance regarding the rights, duties, and liabilities that the Legislature considers important in parental functioning. Section 43-2922 states, in pertinent part:

> For Purposes of the Parenting Act:
>
> . . . .
>
> (17) Parenting functions means those aspects of the relationship in which a parent or person in the parenting role makes . . . fundamental functions necessary for the care and development of a child. Parenting functions include, but are not limited to:
>
> (a) Maintaining a safe, stable, consistent, and nurturing relationship with the child;
>
> (b) Attending to the ongoing developmental needs of the child, including feeding, clothing, physical care and grooming, health and medical needs, emotional stability, supervision, and appropriate conflict resolution skills and engaging in other activities appropriate to the healthy development of the child within the social and economic circumstances of the family;
>
> (c) Attending to adequate education for the child, including remedial or other special education essential to the best interests of the child;
>
> . . . .
>
> (f) Assisting the child in developing skills to maintain safe, positive, and appropriate interpersonal relationships; and
>
> (g) Exercising appropriate support for social, academic, athletic, or other special interests and abilities of the

child within the social and economic circumstances of the family.

In this case, neither party offered any evidence to demonstrate the role Buckley played in the child's life prior to Buckley's filing the complaint for dissolution of marriage. The evidence does demonstrate that the child was 5 years old at the time of the filing. The amount of time that passed between the child's birth and the dissolution proceedings suggests that she had some type of relationship with Buckley and that he provided some care and support for her.

Because there is no specific evidence concerning the relationship between Buckley and the child, we are unable to determine whether Buckley has assumed, in loco parentis, the obligations incident to a parental relationship with the child and whether he may be responsible for supporting her. We do find, however, that the district court erred in failing to award child support simply because Buckley is not the child's biological father.

[6] The paramount concern and question in determining child support is the best interests of the child. See, *Gangwish v. Gangwish*, 267 Neb. 901, 678 N.W.2d 503 (2004); *Claborn v. Claborn*, 267 Neb. 201, 673 N.W.2d 533 (2004); *Gase v. Gase*, 266 Neb. 975, 671 N.W.2d 223 (2003); *Peter v. Peter*, 262 Neb. 1017, 637 N.W.2d 865 (2002). It is impossible to make a determination regarding a child's best interests without receiving any evidence about the child or the relationship between the parents and the child.

We reverse, and remand for further proceedings where the parties should present evidence regarding the circumstances surrounding the child's conception and birth and regarding Buckley's relationship with the child for the first 6 years of her life. Because we reverse, and remand on this basis, we decline to address Buckley's assertion regarding the alimony award.

V. CONCLUSION

[7] We conclude that the district court committed plain error in failing to award child support on behalf of the child without receiving any evidence concerning the circumstances

surrounding her birth or her relationship with Buckley prior to the dissolution proceedings. We reverse, and remand for further proceedings where the parties shall adduce relevant evidence concerning Buckley, Teresa, and the child and any other evidence necessary for a correct determination of child custody and child support. This evidence should include, but is not limited to, evidence of the circumstances surrounding the child's conception and the child's relationship with Buckley prior to the dissolution proceedings.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

RANDALL BOJANSKI AND RHONDA BOJANSKI, APPELLANTS, V. MICHAEL FOLEY AND JOHN WYVILL, APPELLEES.

798 N.W.2d 134

Filed April 26, 2011. No. A-10-572.

1. **Motions to Dismiss: Pleadings.** To prevail against a motion to dismiss for failure to state a claim, a plaintiff must allege sufficient facts, accepted as true, to state a claim to relief that is plausible on its face. In cases in which a plaintiff does not or cannot allege specific facts showing a necessary element, the factual allegations, taken as true, are nonetheless plausible if they suggest the existence of the element and raise a reasonable expectation that discovery will reveal evidence of the element or claim.
2. **Constitutional Law: Legislature: Immunity.** The Nebraska Constitution, article V, § 22, provides for a waiver of sovereign immunity: The State may sue and be sued, and the Legislature shall provide by law in what manner and in what courts suits shall be brought.
3. **Tort Claims Act.** The State Tort Claims Act shall not apply to any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights.
4. **Political Subdivisions Tort Claims Act.** The requirements of the Political Subdivisions Tort Claims Act apply where an individual is sued in his or her individual capacity, but is performing within the scope of employment.
5. **Political Subdivisions Tort Claims Act: Tort Claims Act.** The provisions in the Political Subdivisions Tort Claims Act should be construed in harmony with similar provisions in the State Tort Claims Act.
6. **Tort Claims Act: Immunity: Waiver: Public Officers and Employees.** While a state employee or officer may be allegedly sued individually, if he or she is acting

within the scope of employment or office, the State Tort Claims Act still applies and provides immunity, unless such has been waived.

7. **Statutes: Immunity: Waiver: Intent.** Statutes that purport to waive the State's sovereign immunity must be clear in their intent and are strictly construed in favor of the sovereign and against the waiver.
8. **Immunity: Waiver: Public Officers and Employees: Libel and Slander: Contracts.** The State has not waived its sovereign immunity with respect to claims against its officers and employees who, while acting in the scope of their duties, are alleged to have committed libel, slander, or interference with contractual rights.
9. **Tort Claims Act: Immunity: Invasion of Privacy.** Invasion of privacy was not added to the list of torts exempted from the State Tort Claims Act, and therefore, sovereign immunity does not extend to the tort of invasion of privacy.
10. **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.
11. **Invasion of Privacy: Liability.** Any person, firm, or corporation which gives publicity to a matter concerning a natural person that places that person before the public in a false light is subject to liability for invasion of privacy if (1) the false light in which the other was placed would be highly offensive to a reasonable person and (2) the actor had knowledge of or acted in reckless disregard as to the falsity of the publicized matter and the false light in which the other would be placed.
12. **Election of Remedies: Damages.** The doctrine of election of remedies is applicable only where inconsistent remedies are asserted against the same party or persons in privity with such a party; however, a party may not have double recovery for a single injury or be made more than whole by compensation which exceeds the actual damages sustained.
13. **Election of Remedies: Libel and Slander: Invasion of Privacy.** Neb. Rev. Stat. § 20-209 (Reissue 2007) prevents multiple recoveries from a single publication, but it does not force a plaintiff to elect among libel, slander, and invasion of privacy with respect to the claim a plaintiff advances resulting from a single publication by the defendant.
14. **Statutes.** It is not within the province of a court to read a meaning into a statute that is not warranted by the legislative language.
15. **Pleadings.** An amended pleading supersedes the original pleading, and after the amendment, the original pleading ceases to perform any office as a pleading.
16. **Constitutional Law: Actions.** In order to assert a claim under 42 U.S.C. § 1983 (2006), the plaintiff must allege that he or she has been deprived of a federal constitutional right and that such deprivation was by a person acting under color of state law.
17. **Property: Claims.** To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. The person must have more than a unilateral expectation of it. He or she must, instead, have a legitimate claim of entitlement to it.
18. ____: ____. Property interests are not created by the federal Constitution. Rather, they are created and their dimensions are defined by existing rules or

understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits.

19. **Constitutional Law: Property.** An injury to reputation by itself is not a liberty or property interest protected under the 14th Amendment.
20. ____: ____. The loss of outside private employment does not come within the ambit of a constitutionally protected property interest.
21. ____: ____. The right to follow a chosen profession free from unreasonable governmental interference comes within both the liberty and property concepts of the 5th and 14th Amendments.
22. **Constitutional Law.** It is the right to pursue a calling or occupation, and not the right to a specific job, that is protected by the 14th Amendment.
23. ____. The federal Constitution protects only against state actions that threaten to deprive persons of the right to pursue their chosen occupation.
24. **Due Process.** State actions that exclude a person from one particular job or job opening are not actionable in suits brought directly under the Due Process Clause.
25. **Conspiracy: Words and Phrases.** A civil conspiracy is a combination of two or more persons to accomplish by concerted action an unlawful or oppressive object, or a lawful object by unlawful or oppressive means.
26. **Immunity: Waiver: Public Officers and Employees: Contracts: Conspiracy.** If sovereign immunity has not been waived for interference with contractual rights, then such nonwaiver still prevails even though it is alleged that two or more government employees acted in concert.
27. **Actions: Conspiracy.** Civil conspiracy requires an agreement to participate in an unlawful activity and an overt act that causes injury, so it does not set forth an independent cause of action, but, rather, is sustainable only after an underlying tort claim has been established.

Appeal from the District Court for Douglas County: J. MICHAEL COFFEY, Judge. Affirmed in part, and in part reversed and remanded for further proceedings.

Raymond R. Aranza, of Scheldrup, Blades, Schrock, Smith & Aranza, P.C., for appellants.

Jon Bruning, Attorney General, Michael J. Rumbaugh, and Thomas E. Stine for appellees.

SIEVERS and CASSEL, Judges, and HANNON, Judge, Retired.

SIEVERS, Judge.

INTRODUCTION

The Autism Center of Nebraska, Inc. (ACN), is a nonprofit organization providing services to people with autism

and pervasive developmental disorders. Nebraska's Auditor of Public Accounts (State Auditor), Mike Foley, released an audit report that was highly critical of ACN and its principal officers, who then filed this suit against the State Auditor (and others) for libel and slander, among other claims. The district court for Douglas County, Nebraska, ultimately sustained motions to dismiss, and the plaintiffs appeal.

PROCEDURAL AND FACTUAL BACKGROUND

ACN was initially incorporated by Randall Bojanski and Rhonda Bojanski, a married couple. Randall served as the chief executive officer, and Rhonda served as the chief operations officer. On June 18, 2008, Foley released an "Investigation of the Autism Center of Nebraska" which was subtitled "*Rampant Improprieties Exposed*" (emphasis in original) and which we shall generally refer to as a "press release." This release to the public and press was critical of a number of facets of ACN's business, noting that 98 percent of its funding was received from government sources and asserting that ACN's "'operational style is an affront to the taxpayers of our State and exploits some of Nebraska's most vulnerable citizens who suffer from autism and developmental disabilities.'" Thereafter, on June 17, 2009, the Bojanskis filed suit in the district court for Douglas County against Foley; against John Wyvill, director of the Division of Developmental Disabilities of the Nebraska Department of Health and Human Services (DHHS); and against DHHS, the Governor, and the State of Nebraska.

On October 16, 2009, an amended petition was filed, but it advanced claims against only Foley and Wyvill, "[i]ndividually." That amended petition contained substantially the same allegations as in the first petition and likewise attached and incorporated by reference Foley's press release of June 18, 2008. A second amended petition was filed against only Foley and Wyvill, "[i]ndividually," on December 11, 2009—this is the operative pleading for purposes of this appeal, and we will hereafter reference it as "the complaint" and the remaining defendants, Foley and Wyvill, as "the defendants." The press

release of June 18, 2008, was incorporated therein by reference. The defendants filed a motion to dismiss on January 8, 2010, which the district court sustained in its entirety on May 10, and the lawsuit was "dismissed with prejudice." The Bojanskis filed this timely appeal.

Because this matter was dismissed in the district court on the pleadings, there is no bill of exceptions and our factual knowledge is limited to the allegations of the complaint and Foley's press release of June 18, 2008, incorporated by reference therein. Because the key to resolution of the appeal is found solely in the pleadings, we recount such in some detail.

The complaint alleges that the defendants are both sued in their "individual capacit[ies]," that the events at issue with respect to Foley occurred "[d]uring the time . . . he served as the State Auditor," and that the events with respect to Wyvill occurred while he "served as the Director of Developmental Disabilities" at DHHS. The Bojanskis allege that in February 2008, the State Auditor as well as DHHS requested an audit of billing practices of ACN. The Bojanskis allege that during the time period of June 18 through June 24, 2008, Foley issued statements to the public and the press "which were libelous, defamatory, [and] slanderous and placed the Bojanskis in a false light." It is alleged that such statements were made through the use of a "Special Evaluation Summary," a press release, and at least one press conference. The complaint, while incorporating the entire press release, selects several statements from it apparently illustrative of the alleged libel and slander. The complaint quotes from Foley's press release as follows:

> "The short story on [ACN] is that unethical management practices at the top of the organization render it unworthy of governmental funding. While I have no doubt that most of its employees are dedicated and honest, I have no confidence in the senior executives of that organization. . . ."
>
> . . . .
>
> "The operational style is an affront to the tax payers of our state and exploits some of Nebraska's most

> vulnerable citizens who suffer from autism and developmental disabilities[.]"
>
> . . . .
>
> "[ACN] maintained 18 different credit card accounts and ran up over $140,000 in charges during a nine month period, with little back-up documentation to show whether those charges were truly related to the care of developmentally disabled clients. Senior executives routinely used the organization's credit cards for personal purchases[.]"
>
> . . . .
>
> "We are convinced now that [ACN] has deliberately falsified some very important records. . . ."

Other quotes from Foley's press release of June 18, 2008, concerning ACN illustrate its tenor and tone:

> [The Bojanskis] set up a sweetheart leasing deal approved by the organization's board that resulted in tens of thousands of dollars in rent payments on an empty house for 10 months. The rental payments were made to a limited liability corporation created for the benefit of the Bojanski children. Rhonda . . . signed the lease as both landlord and tenant; however, the home was actually owned by her parents at the time the lease was created.
>
> [ACN] spent $17,000 in government funds for a deck replacement on the rental house and $2,800 on a new furnace for the rental house despite representations made to the [ACN] board that the Bojanski's [sic] would make capital improvements.
>
> . . . .
>
> [ACN] billed the Omaha Public School District for tens of thousands of dollars for services to an autistic client and then double-billed [DHHS] who also paid [ACN] for services provided at the same time.
>
> The [State A]uditor's report challenges over $226,000 in government payments to [ACN] on the basis that [ACN's] invoices to the government were not properly supported by adequate records. The report casts serious doubt as to whether the services were ever truly provided

> to the developmentally disabled clients. Tens of thousands of dollars of the questionable billings relate to services for developmentally disabled children of employees of [ACN].

The complaint in count I, entitled "SLANDER (Michael Foley)," alleges slander because Foley's statements in the press release carry the implication that the Bojanskis have committed a crime or such statements have subjected them to public ridicule, ignominy, or disgrace. Count II, entitled "LIBEL (Michael Foley)," contends that the statements "are highly offensive to a reasonable person [and] invade the privacy of [the Bojanskis]." This count alleges that Foley "had knowledge or acted in reckless disregard as to the falsity of the publicized matter" and "placed [the Bojanskis] in a false light." In count III, entitled "INTERFERENCE WITH CONTRACTUAL RELATIONSHIP," such is alleged to have occurred because the defendants "directed that [the Bojanskis] be terminated from their individual contracts with ACN." It is alleged that the defendants knew or should have known of the employment contract each of the Bojanskis had with ACN (providing them each compensation of $6,250 per month) and that the "demand that [the Bojanskis' employment] be terminated was an unjustified, intentional act of interference . . . conducted outside the scope of [the defendants'] authority as government officials." Count IV of the complaint is designated as "CIVIL RIGHTS VIOLATIONS" and alleges that the defendants, acting under color of law, deprived the Bojanskis of their liberty and property interests without due process of law, in violation of the 5th and 14th Amendments to the U.S. Constitution, by interfering with their employment contracts and making accusations that foreclosed the Bojanskis' freedom to take advantage of employment opportunities with ACN or other employers. The Bojanskis allege that the actions of the defendants "were so outrageous [as] to fairly shock the contemporary consci[ence]." In count V, entitled "CONSPIRACY," the Bojanskis allege that the defendants, in combination with one another, acted to accomplish "by concerted action an unlawful object by unlawful or oppressive means" that interfered with the Bojanskis' employment

contracts and employment relationships with ACN and continued to prevent them from being employed by ACN. With respect to each of the five counts, the Bojanskis allege damages in the form of lost wages, lost income, lost future wages, lost fringe benefits, and pain and humiliation, plus "other general damages." We note that attached to the complaint, in addition to the press release, are the employment and deferred compensation agreements of both Randall and Rhonda with ACN.

DISTRICT COURT DECISION

Following the filing of the complaint, the defendants filed a motion to dismiss asserting that as to count I, Foley is immune from suit for slander under Neb. Rev. Stat. § 81-8,219(4) (Reissue 2008), and that he is immune under the same statute for the libel alleged in count II. Additionally, the motion to dismiss asserts that the claim of false light is not a separate cause of action but merely an element of the claim for invasion of privacy. The defendants also assert that the Bojanskis alleged different causes of action for the same alleged acts, violating Neb. Rev. Stat. § 20-209 (Reissue 2007). With respect to count III of the complaint, both defendants claim immunity from suit for interference with a contractual relationship, due to sovereign immunity pursuant to § 81-8,219(4). They assert that as to count IV, the Bojanskis have failed to state a claim upon which relief can be granted under 42 U.S.C. § 1983 (2006). Finally, with respect to count V, conspiracy, the defendants assert that it is not a separate cause of action and applies only if an underlying tort has been proved and that both defendants are immune from all torts alleged by the Bojanskis.

On May 11, 2010, the trial court entered its signed and file-stamped order sustaining the defendants' motion to dismiss without comment other than that such dismissal was with prejudice. The Bojanskis filed their notice of appeal on June 4.

ASSIGNMENTS OF ERROR

The Bojanskis assign seven errors, five of which can be reduced to the assertion that the trial court erred in dismissing

each of the five counts of the complaint. For their sixth assignment, the Bojanskis allege that the district court erred in finding that a claim for invasion of privacy cannot be brought as a part of the claim for libel and false light. The seventh assignment of error is that the district court erred in dismissing the negligence claim against the governmental defendants, which was alleged in the original petition; but we note that that claim was not reasserted in the operative complaint and that neither the Governor, the State, nor DHHS was named as a defendant in the operative complaint.

STANDARD OF REVIEW

[1] In the Nebraska Supreme Court's decision in *Doe v. Board of Regents*, 280 Neb. 492, 788 N.W.2d 264 (2010), the court set forth the proper standard of review for a case such as this. Because our present pleading rules are derived from the Federal Rules of Civil Procedure, the court engaged in a detailed examination of the proper standard in light of two U.S. Supreme Court decisions: *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007), and *Ashcroft v. Iqbal*, 556 U.S. 662, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009). Thus, for simplicity's sake, we refer the interested reader to *Doe* for that involved discussion and limit our opinion to simply setting forth the operative rule from *Doe* as well as the *Doe* court's observation, "[W]e believe that the Court's decision in *Twombly* provides a balanced approach for determining whether a complaint should survive a motion to dismiss and proceed to discovery." 280 Neb. at 506, 788 N.W.2d at 278.

> [W]e hold that to prevail against a motion to dismiss for failure to state a claim, a plaintiff must allege sufficient facts, accepted as true, to state a claim to relief that is plausible on its face. In cases in which a plaintiff does not or cannot allege specific facts showing a necessary element, the factual allegations, taken as true, are nonetheless plausible if they suggest the existence of the element and raise a reasonable expectation that discovery will reveal evidence of the element or claim.

Id.

ANALYSIS

Libel, Slander, Interference With Contract, and Conspiracy.

The defendants argue that the district court's dismissal of counts I, II, III, and V is correct because the defendants are protected from such claims by the doctrine of sovereign immunity. While the Bojanskis' operative complaint asserts or designates that they are suing the defendants "[i]ndividually," it is clear that the audit at the core of this lawsuit was performed by Foley because he is the State Auditor. And, the public release of the information upon which the Bojanskis premise their claims is part of the audit process. In short, Foley performed the actions involved in this litigation not as an individual, but, rather, as a constitutional officer of the executive branch of the government of the State of Nebraska. See Neb. Const. art. IV, § 1. Thus, consistent with the above standard of review for a motion to dismiss, it is not "plausible" to view the claims against Foley "individually." With respect to Wyvill, the only allegation is that he was a director at DHHS, the state department with which ACN contracted and by which it was paid. The Bojanskis' lawsuit simply "lumps" Wyvill in with Foley; thus, it follows that it is not "plausible" to view the claims as being against Wyvill "individually." That being said, the Bojanskis argue that "there is nothing, either statutorily or in state regulations, which allows the State Auditor to commit libel or slander as a function of its office." Brief for appellants at 22.

[2-8] This argument begs the real question, which is whether the State Auditor can be liable under Nebraska law, assuming there was libel and slander, when acting within the scope of his or her official duties, as Foley plainly was. Obviously, the State, as a political and governmental entity, can act only through its constitutional officers and employees. The Nebraska Constitution, article V, § 22, provides for a waiver of sovereign immunity: "The [S]tate may sue and be sued, and the Legislature shall provide by law in what manner and in what courts suits shall be brought." The Legislature has so provided via the State Tort Claims Act. However, a defendant may affirmatively plead that the plaintiff has failed to state a

cause of action under § 81-8,219 of the act because an exception to the waiver of sovereign immunity applies. See *Johnson v. State*, 270 Neb. 316, 700 N.W.2d 620 (2005). Neb. Rev. Stat. § 81-8,209 (Reissue 2008) of the State Tort Claims Act provides in part:

> The State of Nebraska shall not be liable for the torts of its officers, agents, or employees, and no suit shall be maintained against the state, any state agency, or any employee of the state on any tort claim except to the extent, and only to the extent, provided by the State Tort Claims Act.

Section 81-8,219(4) provides that the State Tort Claims Act shall not apply to "[a]ny claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights." In *Cole v. Wilson*, 10 Neb. App. 156, 627 N.W.2d 140 (2001), an inmate sued his public defender, claiming that, as here, the suit was against the defendant in his individual capacity. We rejected that argument, holding that "[t]he requirements of the Political Subdivisions Tort Claims Act apply where an individual is sued in his or her individual capacity, but is performing within the scope of employment." *Cole*, 10 Neb. App. at 160, 627 N.W.2d at 144. The Supreme Court has said that generally, provisions in the Political Subdivisions Tort Claims Act should be construed in harmony with similar provisions in the State Tort Claims Act. See *Jasa v. Douglas County*, 244 Neb. 944, 510 N.W.2d 281 (1994). Thus, while a state employee or officer may be allegedly sued "individually," if he or she is acting within the scope of employment or office, the State Tort Claims Act still applies and provides immunity, unless such has been waived. See *Cole, supra*. Clearly, there is no waiver of immunity for claims of libel, slander, or interference with contract rights under the applicable statute. Statutes that purport to waive the State's sovereign immunity must be clear in their intent and are strictly construed in favor of the sovereign and against the waiver. See *King v. State*, 260 Neb. 14, 614 N.W.2d 341 (2000). It is clear that the State has not waived its sovereign immunity with respect to claims against its officers and

employees who, while acting in the scope of their duties, are alleged to have committed libel, slander, or interference with contractual rights. Accordingly, the district court correctly sustained the motion to dismiss with respect to the Bojanskis' suit for libel, slander, and interference with contractual rights against the defendants. The complaint also attempts to plead a cause of action called interference with "business expectancies." See brief for appellants at 22. However, this is merely another name for the Bojanskis' claim that as a result of the defendants' actions, their employment relationships with ACN were interfered with and terminated. Strictly construing the waiver of sovereign immunity, as we must, we conclude that such claim is within the ambit of sovereign immunity extending to "interference with contract rights" and that thus, the district court's dismissal as to such was likewise correct. See § 81-8,219(4).

Was Claim for Invasion of Privacy Properly Dismissed?

[9] The Bojanskis assign as error the district court's dismissal of their claim for invasion of privacy on the ground that such "shall be dismissed as a separate cause of action and therefore cannot be brought with part of the claim for libel and false light." Initially, we note that because the district court's order of dismissal provided no reasoning or rationale, we do not know the basis of its dismissal in general, or of any particular claim. Thus, we cannot comment on its reasoning, only on the ultimate result reached. That said, we note that in *Wadman v. State*, 1 Neb. App. 839, 845-46, 510 N.W.2d 426, 430 (1993), this court held:

> In construing a statute, an appellate court must look to 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 its purpose, rather than a construction which will defeat the statutory purpose. *State v. Seaman*, 237 Neb. 916, 468 N.W.2d 121 (1991). We find that the Legislature intended to waive the State's immunity from suit, except when there is an exception specifically

> exempting certain conduct, such as those exceptions enumerated in § 81-8,219. We note that § 81-8,219 has been amended three times (in 1986, 1988, and 1992) subsequent to the enactment of the right of privacy laws. *Invasion of privacy was not added to the list of torts exempted from the State Tort Claims Act.*
>
> The trial court was incorrect in finding that the State has not waived its sovereign immunity to be sued for the tort of invasion of privacy.

Since our *Wadman* opinion, § 81-8,219 has been amended in 1993, 1999, 2004, 2005, and 2007, yet claims for invasion of privacy are still not among those claims for which sovereign immunity provides protection for State employees or officers. Our examination of the operative complaint reveals that in paragraphs 1 through 12, which are the introductory factual allegations, a number of the assertions in Foley's press release are alleged by the Bojanskis to be false, to place the Bojanskis in a false light, and to "violate their rights to privacy." For example, the complaint alleges at paragraph 9: "g. Foley made reference to the Bojanskis' use of credit cards and improper charges to [ACN]. Such statement is false and is without foundation. Further, such statements violate the Bojanskis' privacy rights."

[10,11] The structure of the operative complaint is that after the 12 introductory paragraphs, there are "counts" set forth—for example, "COUNT II LIBEL (Michael Foley)." In this count, despite the implied limiting label of "LIBEL," the allegations of paragraphs 1 through 12 are incorporated and it is alleged that "[t]he statements made by the [d]efendants placed [the Bojanskis] in a false light and constituted a violation of Neb. Rev. Stat. §20-204." In *Vande Guchte v. Kort*, 13 Neb. App. 875, 883, 703 N.W.2d 611, 619 (2005), citing *Greenwood v. Ross*, 778 F.2d 448 (8th Cir. 1985), we said: "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." Thus, despite the label of count II as "LIBEL," given the allegations quoted above, the Bojanskis have pleaded a claim for invasion of privacy under Neb. Rev. Stat. § 20-204 (Reissue 2007). That statute provides:

> Any person, firm, or corporation which gives publicity to a matter concerning a natural person that places that person before the public in a false light is subject to liability for invasion of privacy, if:
>
> (1) The false light in which the other was placed would be highly offensive to a reasonable person; and
>
> (2) The actor had knowledge of or acted in reckless disregard as to the falsity of the publicized matter and the false light in which the other would be placed.

The defendants' response to the assertion that the invasion of privacy claim should not have been dismissed is to cite us to § 20-209, which provides:

> No person shall have more than one cause of action for damages for libel or slander or invasion of privacy or any other tort founded upon any single publication, exhibition, or utterance, such as any one issue of a newspaper or book or magazine or any one presentation to an audience or any one broadcast over radio or television or any one exhibition of a motion picture. Recovery in any action shall include all damages for any such tort suffered by the plaintiff in all jurisdictions.

[12] We have found no reported case in which § 20-209 has been discussed in connection with conduct by a state official or employee which is alleged to be libelous as well as constituting an invasion of privacy. Nor have we found any authority dealing with § 20-209 and the Political Subdivisions Tort Claims Act. The defendants argue that because the Bojanskis have asserted claims for libel and slander, they cannot "stack causes of action all arising from" the same conduct, and that "[a] plaintiff must select one cause of action from the statutory listing and may not proceed on multiple causes of action relating to a single publication." Brief for appellees at 7-8. No authority is cited for this proposition. Furthermore, the defendants' argument is at odds with the general rule that the doctrine of election of remedies is applicable only where inconsistent remedies are asserted against the same party or persons in privity with such a party; however, a party may not have double recovery for a single injury or be made "'"more than whole"'" by compensation which exceeds the actual damages sustained.

Genetti v. Caterpillar, Inc., 261 Neb. 98, 120, 621 N.W.2d 529, 546 (2001). And, the defendants do not mention our decision in *Wadman v. State*, 1 Neb. App. 839, 510 N.W.2d 426 (1993), let alone explain why it would not be the controlling authority on whether there is a waiver of sovereign immunity with respect to claims for invasion of privacy.

[13,14] Finally, we find that § 20-209 prevents multiple recoveries from a single publication, but that it does not force a plaintiff to elect among libel, slander, and invasion of privacy with respect to the claim a plaintiff advances resulting from a single publication by the defendant. Absent anything to the contrary, an appellate court will give statutory language its plain and ordinary meaning. *Koch v. Cedar Cty. Freeholder Bd.*, 276 Neb. 1009, 759 N.W.2d 464 (2009). We think this is the only logical result when the statute is read in conjunction with the authority regarding alternative pleading. And it is not within the province of a court to read a meaning into a statute that is not warranted by the legislative language. *Steffen v. Progressive Northern Ins. Co.*, 276 Neb. 378, 754 N.W.2d 730 (2008). Our role, to the extent possible, is to give effect to the statute's entire language and to reconcile different provisions of the statute so they are consistent, harmonious, and sensible. See *In re Interest of Tamantha S.*, 267 Neb. 78, 672 N.W.2d 24 (2003), *disapproved on other grounds, In re Interest of Jorge O.*, 280 Neb. 411, 786 N.W.2d 343 (2010).

In this case, the Bojanskis did not elect a single theory of recovery, but, rather, asserted all available theories of recovery. As it turns out, the libel and slander claims do not survive the motion to dismiss because of sovereign immunity. But, under *Wadman, supra*, sovereign immunity does not protect the defendants from a claim of invasion of privacy occasioned by Foley's press release of June 18, 2008. And, contrary to the defendants' argument, § 20-209 does not prevent the Bojanskis from advancing an invasion of privacy action, even though claims for libel and slander are barred by the doctrine of sovereign immunity. For all of these reasons, we hold that the district court erred in sustaining the motion to dismiss as to the claim for invasion of privacy, and we reverse the district court's dismissal to that extent.

Negligence.

[15] The Bojanskis assign, "The District Court erred in dismissing the negligence claim against the governmental Defendants. (Count IX, Petition)." The reference in the assignment of error can only be to the original "petition" filed herein on June 17, 2009, which does contain a negligence allegation, although such is actually designated as "COUNT VIIII . . . NEGLIGENCE," not "Count IX." However, that pleading was superseded by an amended petition and then a second amended petition, the latter being what we have dealt with as the operative pleading and which we have designated as "the complaint." An amended pleading supersedes the original pleading, and after the amendment, the original pleading ceases to perform any office as a pleading. See *In re Interest of Rondell B.*, 249 Neb. 928, 546 N.W.2d 801 (1996). Thus, under this rule, we need not discuss this assignment of error any further, because there is no negligence claim asserted in the Bojanskis' operative pleading.

Did Trial Court Err in Dismissing Bojanskis' 42 U.S.C. § 1983 Civil Rights Claim?

[16-18] In order to assert a claim under 42 U.S.C. § 1983, the plaintiff must allege that he or she has been deprived of a federal constitutional right and that such deprivation was by a person acting under color of state law. See *Amanda C. v. Case*, 275 Neb. 757, 749 N.W.2d 429 (2008). The Bojanskis allege that Foley's actions which form the basis for the now-rejected claims of libel, slander, and interference with employment contractual rights also were violations of their constitutional rights, giving rise to a cause of action under 42 U.S.C. § 1983. The Bojanskis allege deprivation of due process and equal protection claims, in violation of the 5th and 14th Amendments to the U.S. Constitution, because of the defendants' interference with their employment because of alleged statements made by the defendants directing that ACN terminate the Bojanskis' employment. To support the argument that their termination from their private employer, ACN, states a cause of action under 42 U.S.C. § 1983, the Bojanskis direct us to *Board of Regents v. Roth*, 408 U.S. 564, 92 S. Ct. 2701, 33 L. Ed. 2d

548 (1972). *Roth* dealt with the failure of a state university to rehire an untenured professor who had only a 1-year contract, and the Court found that he had no property right entitled to due process protection. The Court said:

> To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it. It is a purpose of the ancient institution of property to protect those claims upon which people rely in their daily lives, reliance that must not be arbitrarily undermined. It is a purpose of the constitutional right to a hearing to provide an opportunity for a person to vindicate those claims.
>
> Property interests, of course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits.

Id. at 577. The Bojanskis point to their employment contracts with ACN, attached to the operative complaint, as the source of their expectation of continued employment. The contracts do not provide for a set term of employment, but by implication provide that ACN can terminate their employment only for "cause." The complaint alleges that the Bojanskis were terminated from their employment because the defendants insisted upon their termination by ACN and that such termination was "a condition to allow ACN to continue its contract with DHHS." We take these allegations as true, as we must for purposes of the motion to dismiss. In *Roth*, the university professor was denied relief when the U.S. Supreme Court found that he had no liberty or property interest protected by the 14th Amendment:

> Thus, the terms of the [professor's] appointment secured absolutely no interest in re-employment for the next year. They supported absolutely no possible claim of entitlement to re-employment. Nor, significantly, was there any state statute or University rule or policy that

> secured his interest in re-employment or that created any legitimate claim to it. In these circumstances, the [professor] surely had an abstract concern in being rehired, but he did not have a property interest sufficient to require the University authorities to give him a hearing when they declined to renew his contract of employment.

408 U.S. at 578 (emphasis omitted).

[19,20] Given the terms of the contracts between the Bojanskis and ACN, we find that *Roth* is distinguishable from this case, although the holdings of *Roth* obviously provide guidance. The complaint here alleges a property interest by way of an expectation of continuing employment given the contracts earlier mentioned. The Bojanskis further rely upon *McMath v. City of Gary, Ind.*, 976 F.2d 1026 (7th Cir. 1992), which holds that deprivation of an occupational liberty interest exists when an employee is fired for publicly announced reasons that impugn his or her moral character to the point of stigmatization in future employment. We recognize that under *Paul v. Davis*, 424 U.S. 693, 709, 96 S. Ct. 1155, 47 L. Ed. 2d 405 (1976), injury to reputation, such as by defamation, is not by itself a deprivation of a protected "'liberty'" interest. In the present case, there are allegations that the cause of the termination was the insistence by the defendants that the Bojanskis be terminated from employment by ACN, which they alleged caused them economic loss and adversely affected their ability to gain similar employment. Thus, the defendants' argument that the Bojanskis' "tort claims are not magically transformed into claims for due process violations protected by the Fourteenth Amendment by virtue of [the defendants'] positions as state officials," brief for appellees at 10, misses the mark given the allegations of loss of employment by virtue of the alleged insistence of the defendants that the Bojanskis be terminated from employment by ACN. The defendants further argue that the Nebraska Supreme Court has "squarely rejected," *id.*, the Bojanskis' argument in *Gordon v. Community First State Bank*, 255 Neb. 637, 587 N.W.2d 343 (1998). While *Gordon* is a complicated case, the short story is that the plaintiff was a lawyer who represented a bank. In his lawsuit, he alleged that as a result of the defendants'

actions, his relationship with the bank was terminated and he lost his position with his law firm. The Supreme Court's opinion says the plaintiff characterized his claim as one alleging that "'individuals working for the State of Nebraska and the United States Government conspired with private individuals to destroy the reputation, professional standing, earning ability, and employment of [the plaintiff].'" *Id.* at 653-54, 587 N.W.2d at 354. The court then said with respect to the plaintiff's 42 U.S.C. § 1983 claim:

> We are aware of no authority recognizing a constitutionally protected right of a lawyer to represent a particular client or work for a particular law firm. Such relationships among private parties and entities are usually terminable at will or governed by contract. They do not constitute intimate human relationships or groups formed for the purpose of exercising First Amendment rights which are subject to a constitutionally protected freedom of association. See *Roberts v. United States Jaycees*, 468 U.S. 609, 104 S. Ct. 3244, 82 L. Ed. 2d 462 (1984). [The plaintiff] does not allege any form of public employment which would implicate his freedom of speech under the First Amendment. See, e.g., *Vinci v. Nebraska Dept. of Corr. Servs.*, 253 Neb. 423, 571 N.W.2d 53 (1997).
>
> An injury to reputation by itself is not a liberty or property interest protected under the 14th Amendment. *Siegert v. Gilley*, 500 U.S. 226, 111 S. Ct. 1789, 114 L. Ed. 2d 277 (1991); *Paul v. Davis*, 424 U.S. 693, 96 S. Ct. 1155, 47 L. Ed. 2d 405 (1976); *Lynch v. City of Boston*, 989 F. Supp. 275 (D. Mass. 1997). Likewise, the loss of outside private employment does not come within the ambit of a constitutionally protected property interest. *Id.* In general, any damages for loss of employment opportunities that flow from harm to reputation may be recoverable under state tort law, but not under § 1983. *Siegert, supra.*
>
> Construing the operative petition in a light most favorable to [the plaintiff], we conclude it does not contain factual allegations sufficient to constitute a cause of action

> under § 1983, because it does not allege a deprivation of a right, privilege, or immunity guaranteed by the Constitution or laws of the United States.

Gordon, 255 Neb. at 654, 587 N.W.2d at 354-55.

[21-24] In *McCool v. City of Philadelphia*, 494 F. Supp. 2d 307 (E.D. Pa. 2007), the plaintiff challenged a restriction that required that firefighters for the city of Philadelphia live within certain geographic boundaries, and he claimed constitutional violations giving rise to a 42 U.S.C. § 1983 claim. The federal court rejected the plaintiff's claim, and we quote its summary of the applicable law which closely parallels the Nebraska Supreme Court's holding in *Gordon, supra*:

> The right "to follow a chosen profession free from unreasonable governmental interference comes within both the liberty and property concepts of the Fifth and Fourteenth Amendments." *Piecknick v. Commonwealth*, 36 F.3d 1250, 1259 (3d Cir.1994). Indeed, "the right to work for a living in the common occupations of the community is of the very essence of the personal freedom and opportunity that it was the purpose of the [Fourteenth] Amendment to secure." *Truax v. Raich*, 239 U.S. 33, 41, 36 S.Ct. 7, 60 L.Ed. 131 (1915). However, "it is the right to pursue a calling or occupation, and not the right to a specific job, that is protected by the Fourteenth Amendment." *Piecknick*, 36 F.3d at 1259 (*quoting Wroblewski v. City of Washburn*, 965 F.2d 452, 455 (7th Cir. 1992)). Thus, the Constitution protects only against state actions that threaten to deprive persons of the right to pursue their chosen occupation. *Id.* Accordingly, state actions that exclude a person from one particular job or job opening are not actionable in suits brought directly under the due process clause. *Id.* (*quoting Bernard v. United Township High Sch. Dist. No. 30*, 5 F.3d 1090, 1092 (7th Cir.1993)).

McCool, 494 F. Supp. 2d at 325.

Here, the operative complaint with respect to the 42 U.S.C. § 1983 claim alleges the termination of the Bojanskis' employment by ACN, a particular employer, rather than the loss of the right to pursue an occupation, and thus, we find that the

claim fails under the principles outlined above in *Gordon v. Community First State Bank*, 255 Neb. 637, 587 N.W.2d 343 (1998), and *McCool, supra*, and in the authority cited by those opinions. Therefore, we find that the district court properly sustained the motion to dismiss as to the 42 U.S.C. § 1983 claim because such claim does not allege the violation of a constitutional right. And, under the factual scenario alleged by the Bojanskis, they have not stated a claim to relief that is plausible on its face; nor are facts alleged that suggest the existence of the missing element and raise a reasonable expectation that discovery will reveal evidence of the element, i.e., the loss by state action of the right to pursue their occupation. Thus, we affirm this portion of the district court's decision.

Did District Court Err in Dismissing Bojanskis' Claim of "Civil Conspiracy"?

[25-27] The allegation of "COUNT V CONSPIRACY" is that the defendants acted in concert to accomplish an unlawful object by unlawful or oppressive means—the object is alleged to have been "to interfere with [the Bojanskis'] employment contract[s] and employment relationship[s] with ACN" and to prevent their continued employment by ACN. A civil conspiracy is a combination of two or more persons to accomplish by concerted action an unlawful or oppressive object, or a lawful object by unlawful or oppressive means. *Four R Cattle Co. v. Mullins*, 253 Neb. 133, 570 N.W.2d 813 (1997). The defendants, citing *Runs After v. United States*, 766 F.2d 347 (8th Cir. 1985), argue that there is a failure to state a claim upon which relief can be granted because there is no allegation that they acted outside of their authority. But, we find that such allegation was made, at least with respect to the claim of contractual interference. However, although we reject that argument by the defendants, the claim of civil conspiracy is resolved against the Bojanskis on the simple basis that if sovereign immunity has not been waived for interference with contractual rights, which obviously includes interference with the Bojanskis' employment contracts with ACN, such nonwaiver logically still prevails even though it is alleged that two or more government employees acted in concert. Any

other result would be an absurd construction of § 81-8,219 and would eviscerate the protection from suits for contractual interference provided for in such statute. In *K & S Partnership v. Continental Bank, N.A.*, 952 F.2d 971, 980 (8th Cir. 1991), the court said:

> [L]iability for civil conspiracy is in substance the same thing as aiding and abetting liability. Civil conspiracy requires an agreement to participate in an unlawful activity and an overt act that causes injury, so it "do[es] not set forth an independent cause of action" but rather is "sustainable only after an underlying tort claim has been established." *McCarthy v. Kleindienst*, 741 F.2d 1406, 1413 n. 7 (D.C.Cir.1984); *accord Mizokami Bros. v. Mobay Chem. Corp.*, 660 F.2d 712, 718 n. 8 (8th Cir.1981); *Rotermund v. United States Steel Corp.*, 474 F.2d 1139, 1145 (8th Cir.1973).

The Bojanskis cannot establish the underlying tort of interference with a contractual relationship, because sovereign immunity for such has not been waived. Thus, there can be no actionable civil conspiracy claim against the defendants. Therefore, the district court properly dismissed the civil conspiracy claim against them.

CONCLUSION

In summary, we conclude that the district court for Douglas County properly dismissed all of the Bojanskis' claims against the defendants except for the claim for invasion of privacy, as sovereign immunity for such a claim has been waived by the Legislature. Therefore, this claim, given the standard for the resolution of a motion to dismiss, survives, as the Bojanskis have met the standard of stating a claim to relief on this basis that is plausible on its face. Therefore, we remand the claim for invasion of privacy to the district court for further proceedings. In all other respects, the district court's decision on the motion to dismiss is affirmed.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

RON HASHMAN, APPELLANT, V. BEVERLY NETH, DIRECTOR, STATE OF NEBRASKA, DEPARTMENT OF MOTOR VEHICLES, APPELLEE.

797 N.W.2d 275

Filed May 3, 2011. No. A-10-256.

1. **Administrative Law: Final Orders: Appeal and Error.** Under the Administrative Procedure Act, Neb. Rev. Stat. §§ 84-901 to 84-920 (Reissue 2008 & Supp. 2009), an appellate court may reverse, vacate, or modify a district court's judgment or final order for errors appearing on the record.
2. **Administrative Law: Judgments: Appeal and Error.** 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.
3. **Judgments: Appeal and Error.** Whether a decision conforms to law is by definition a question of law, in connection with which an appellate court reaches a conclusion independent of that reached by the lower court.
4. **Jurisdiction: Appeal and Error.** A jurisdictional question which does not involve a factual dispute is determined by an appellate court as a matter of law.
5. ____: ____. Before reaching the legal issues presented for review, it is the power and duty of an appellate court to determine whether it has jurisdiction over the matter before it, irrespective of whether the issue is raised by the parties.
6. **Administrative Law: Judgments.** Every decision and order adverse to a party to the proceeding, rendered by an agency in a contested case, shall be in writing or stated in the record and shall be accompanied by findings of fact and conclusions of law.
7. **Statutes: Appeal and Error.** Absent anything to the contrary, an appellate court will give statutory language its plain and ordinary meaning.
8. **Jurisdiction: Appeal and Error.** When a lower court lacks the authority to exercise its subject matter jurisdiction to adjudicate the merits of the claim, issue, or question, an appellate court also lacks the power to determine the merits of the claim, issue, or question presented to the lower court.
9. **Jurisdiction: Judgments: Appeal and Error.** When an appeal is dismissed because the lower court lacked jurisdiction to enter the order appealed from, an appellate court may nevertheless enter an order vacating the order issued by the lower court without jurisdiction.

Appeal from the District Court for Box Butte County: BRIAN C. SILVERMAN, Judge. Vacated and dismissed.

Bell Island, of Island, Huff & Nichols, P.C., L.L.O., for appellant.

Jon Bruning, Attorney General, and Gregory J. Walklin for appellee.

SIEVERS and CASSEL, Judges, and HANNON, Judge, Retired.

CASSEL, Judge.

INTRODUCTION

Ron Hashman appeals from a district court judgment affirming an "automatic" order issued by the director of the Nebraska Department of Motor Vehicles (the Department) revoking his motor vehicle operator's license for 1 year. Although we reject the Department's argument that a continuance ordered by the hearing officer was not chargeable to the director, we conclude that Hashman's subsequent written rest concluded the hearing and that because the rest occurred prior to the expiration of the statutory 30-day temporary license, it operated to terminate the stay resulting from the director's continuance. Because the "automatic" order was not a final, appealable order, the district court lacked jurisdiction of Hashman's petition for review, and accordingly, we lack jurisdiction of this appeal.

BACKGROUND

Hashman was arrested by Alliance police officer Jim Grumbles on March 28, 2009, for driving under the influence of alcohol. After being arrested, Hashman submitted to a blood test that revealed the presence of alcohol in the amount of .219 of a gram of alcohol per 100 milliliters of blood. Hashman subsequently received a notice of administrative license revocation (ALR) dated April 16, 2009, stating that he was receiving a temporary 30-day license, which would expire on May 16. Hashman timely requested an ALR hearing before the Department to determine whether his license should be revoked.

An ALR hearing was held via teleconference on May 6, 2009. At the hearing, Grumbles was called as a witness by the Department. Grumbles testified that he completed a sworn report in regard to Hashman, which he signed in the presence of a notary and submitted to the Department. The hearing officer received the sworn report into evidence. When testifying about the details of Hashman's arrest on cross-examination, Grumbles testified that he used his police report to help refresh

his memory for his testimony. Hashman's counsel requested a copy of Grumbles' report. The following exchange took place in regard to Hashman's counsel's request:

> [Hashman's counsel]: And at this point, Ms. Hearing Officer, I'm going to ask for a copy of the police report be provided to me so I can finish my cross-examination to see if there is anything I have missed based on the police report that [Grumbles] used to base his testimony for this hearing.
>
> HEARING OFFICER . . . : Officer Grumbles, are you anywhere you can fax this to [Hashman's counsel]?
>
> [Grumbles]: I am not.
>
> HEARING OFFICER . . . : Okay. Well, you'll have to get it later, [Hashman's counsel].
>
> [Hashman's counsel]: You're denying my request; is that —
>
> HEARING OFFICER . . . : I can't comply with your request. I'm unable to provide it at this time, so, you know, you can always ask for discovery prior to the hearing.
>
> . . . .
>
> HEARING OFFICER . . . : I'm not denying it to you, but we may have to continue it because of this.
>
> [Hashman's counsel]: Otherwise, I would ask to just strike the officer's testimony, then, if I can't —
>
> HEARING OFFICER . . . : No, I'm not going to do that.
>
> [Hashman's counsel]: I'm asking for some type of remedy here.
>
> [The Department's counsel]: I would have no objection to a continuance so that you can — I will get the officer's report for you and forward it to you if you wish to ask for a continuance.
>
> [Hashman's counsel]: Fine.
>
> [The Department's counsel]: But we can't get it to you right now. There really isn't any choice.
>
> [Hashman's counsel]: I understand that. I didn't hear. Is the [D]epartment asking for a continuance to be able to be allowed to do that?

> HEARING OFFICER . . . : No, it's your continuance.
>
> [Hashman's counsel]: It's not my continuance.
>
> HEARING OFFICER . . . : Yes, it is.
>
> . . . .
>
> HEARING OFFICER . . . : Well, you have got your option: We continue this so that you can get the reports and you may finish . . . cross-examining Officer Grumbles or —
>
> [Hashman's counsel]: If the [D]epartment is asking for a continuance, fine.
>
> HEARING OFFICER . . . : No, it's not the [D]epartment's motion.
>
> [Hashman's counsel]: I'll ask to strike the testimony. Those are the remedies I'm asking for which I think are appropriate under the circumstances.
>
> [The Department's counsel]: You'll just have to make a decision, [hearing officer].
>
> HEARING OFFICER . . . : All right. We'll continue this. It will be rescheduled.

At the conclusion of the hearing, Hashman's counsel told the hearing officer that he "ha[d] no further evidence other than cross-examination."

Following the hearing, the hearing officer issued an order to continue, finding that good cause existed to continue the ALR hearing. The order also stated that the expiration of Hashman's temporary license was not stayed. The hearing was continued to June 5, 2009.

On May 15, 2009, Hashman filed a motion to strike the testimony of Grumbles and then stated in the written motion that he rested his case.

On May 18, 2009, the director issued an "automatic" order of ALR, revoking Hashman's license for 1 year. On May 20, Hashman filed an appeal in the district court for Box Butte County, and the district court affirmed the director's order of revocation. Hashman filed a timely appeal to this court.

ASSIGNMENT OF ERROR

Hashman assigns that the district court erred in affirming the director's order revoking his driver's license for 1 year.

STANDARD OF REVIEW

[1,2] Under the Administrative Procedure Act, Neb. Rev. Stat. §§ 84-901 to 84-920 (Reissue 2008 & Supp. 2009), an appellate court may reverse, vacate, or modify a district court's judgment or final order for errors appearing on the record. *Murray v. Neth*, 279 Neb. 947, 783 N.W.2d 424 (2010). 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. *Murray v. Neth, supra.*

[3] Whether a decision conforms to law is by definition a question of law, in connection with which an appellate court reaches a conclusion independent of that reached by the lower court. *Nothnagel v. Neth*, 276 Neb. 95, 752 N.W.2d 149 (2008).

[4] A jurisdictional question which does not involve a factual dispute is determined by an appellate court as a matter of law. *O'Hara v. Department of Motor Vehicles*, 14 Neb. App. 709, 713 N.W.2d 508 (2006).

ANALYSIS

Hashman argues that the "automatic" order of revocation should not have been issued because the director was charged with continuing the ALR hearing, thereby staying the expiration of Hashman's temporary license. The State argues, on the other hand, that the director's "automatic" order of revocation was not a final, appealable order, that the district court was without jurisdiction to hear Hashman's petition for review, and that therefore we do not have jurisdiction of the instant appeal.

[5] We first consider whether the district court had jurisdiction over this matter and, consequently, whether we have jurisdiction. Before reaching the legal issues presented for review, it is the power and duty of an appellate court to determine whether it has jurisdiction over the matter before it, irrespective of whether the issue is raised by the parties. *Id.*

[6] The State argues that Hashman's appeal is premature in that he should have waited for the director to issue an order

with findings of fact and conclusions of law and appealed from that order. The Administrative Procedure Act, specifically § 84-915, provides in part that "[e]very decision and order adverse to a party to the proceeding, rendered by an agency in a contested case, shall be in writing or stated in the record and shall be accompanied by findings of fact and conclusions of law." Hashman's case became a "contested case," as that term is defined in § 84-901(3), when he requested an ALR hearing. The order that Hashman received was an order revoking his driver's license for 1 year, and it contained no findings of fact or conclusions of law. Thus, the "automatic" order failed to provide the findings of fact and conclusions of law required by § 84-915 in a contested case.

[7] As authority for this argument, the State relies upon Neb. Rev. Stat. § 60-498.01(6)(b) (Reissue 2010) and asserts that this section mandated the issuance of an "automatic and ministerial order." Brief for appellee at 4. Before considering the effect of subsection (6)(b), we note that under subsection (6)(a) where the results of a chemical test are not available to the arresting peace officer while the arrested person is in custody, such person's operator's license shall be "automatically revoked upon the expiration of thirty days after the date of mailing of the notice of revocation by the director." Subsection (6)(a) then authorizes a timely petition for a hearing. The State does not dispute that Hashman's petition was timely filed. Next, subsection (6)(b) states that "[t]he filing of the petition shall not prevent the automatic revocation of the petitioner's operator's license at the expiration of the thirty-day period." According to the State, this language mandated the "automatic" order. However, subsection (6)(b) then continues, stating that "[a] continuance of the hearing to a date beyond the expiration of the temporary operator's license shall stay the expiration of the temporary license when the request for continuance is made by the director." Absent anything to the contrary, an appellate court will give statutory language its plain and ordinary meaning. *Metropolitan Comm. College Area v. City of Omaha*, 277 Neb. 782, 765 N.W.2d 440 (2009). Plainly, if the request for continuance was "made by the director" and continued the hearing to a date "beyond the

expiration of the temporary operator's license," the expiration of Hashman's temporary license was stayed. It would naturally follow that in such circumstances, the automatic order should not be issued.

Hashman argues that the "automatic" order of revocation should not have been issued because the director is charged with continuing the ALR hearing, which stayed the expiration of Hashman's temporary license. In the present case, Hashman received his 30-day temporary license on April 16, 2009, and was told it would expire on May 16. The ALR hearing was initially held on May 6 and was continued to June 5. Thus, the hearing was continued to a date beyond the expiration of the temporary operator's license. However, we must determine if the request for the continuance was made by the director, as Hashman contends.

Under the circumstances of this case, the hearing officer "request[ed]" the continuance. There was a discussion at the ALR hearing, as set forth in the background section of this opinion, about who should be charged with the continuance to allow Hashman's counsel to obtain the police report. Hashman specifically disclaimed making a request for continuance. The Department's counsel also emphasized that he was not requesting a continuance and told the hearing officer, "[y]ou'll just have to make a decision . . . ." The hearing officer then ordered a continuance. We disagree with the Department's argument that Hashman requested the continuance.

The continuance requested by the hearing officer was the equivalent of a continuance requested by the director. Section 60-498.01(6)(b) states that "[t]he director shall conduct the hearing . . . ." Section 60-498.01(7) provides in part that "[t]he director may appoint a hearing officer to preside at the hearing, administer oaths, examine witnesses, take testimony, and report to the director." The statute requires the director to conduct the hearing, but allows the director to appoint a hearing officer to preside at the hearing. Thus, the hearing officer serves as the director's agent. Because the hearing officer acts for the director, who by statute is to conduct the hearing, the continuance was chargeable to the director.

However, the written rest later filed on Hashman's behalf concluded the hearing and ended the stay of the expiration of Hashman's temporary license. As previously stated, the hearing was continued to a date beyond the expiration of Hashman's temporary license. Pursuant to § 60-498.01(6)(b), the director's continuance stayed the expiration of Hashman's temporary license, despite the hearing officer's conclusion to the contrary. However, on May 15, 2009, Hashman's counsel filed a notice of rest. We conclude that such notice of rest effectively concluded the ALR hearing and that the stay of the expiration of the temporary license was also terminated by Hashman's rest. Accordingly, the temporary license expired on May 16—the day Hashman was initially notified it would expire—and the director issued the automatic order revoking Hashman's license on May 18. Because the hearing was concluded prior to the expiration of the 30-day period, the director's continuance did not have the effect of continuing the hearing to a date after the 30-day period. In the absence of such a continuance, § 60-498.01(6) clearly mandated that Hashman's operator's license be automatically revoked at the conclusion of the 30-day period. Thus, the automatic order was properly issued by the director.

Although the automatic order was properly issued, the order did not resolve Hashman's "contested case" because it did not set forth findings of fact and conclusions of law as required by § 84-915. When Hashman rested his case on May 15, 2009, effectively concluding the ALR hearing, the director had 7 days after the conclusion of the hearing to make a determination of the issue. See § 60-498.01(7). Hashman filed his notice of appeal to the district court on May 20. At that time, the 7-day period after the conclusion of the hearing had not expired and the director had not issued an order setting forth the required findings and conclusions. Thus, Hashman's appeal to the district court was premature. Consequently, when the district court reviewed the director's automatic order of revocation and entered its order of affirmance, it was without jurisdiction to do so because of the absence of a final, appealable order. Because the district court lacked jurisdiction to enter its order, we do not have jurisdiction over an appeal from

such order, and we must dismiss the appeal. See *O'Hara v. Department of Motor Vehicles*, 14 Neb. App. 709, 713 N.W.2d 508 (2006).

CONCLUSION

Before disposing of the instant appeal, we summarize the analysis. The continuance was "request[ed]" by the hearing officer. As the hearing officer acted on behalf of the director, the request was chargeable to her. However, Hashman's written notice of rest both concluded the hearing and ended the stay of the termination of the 30-day period before automatic revocation. Because this occurred prior to the expiration of the 30-day period, § 60-498.01(6) mandated that Hashman's license be automatically revoked. The director was thereby required to issue the "automatic" order, even though such order had only temporary effect until a final order—one which included the required findings of fact and conclusions of law—was issued by the director to conclude the contested case. Because of the absence of a final, appealable order, the district court lacked subject matter jurisdiction of Hashman's petition for review under the Administrative Procedure Act. And we therefore lack jurisdiction of this appeal.

[8,9] We dispose of the instant appeal by vacating the district court's judgment and dismissing the instant appeal. Although we lack jurisdiction to adjudicate the merits of the appeal, we do have jurisdiction to vacate the district court's order issued without jurisdiction. When a lower court lacks the authority to exercise its subject matter jurisdiction to adjudicate the merits of the claim, issue, or question, an appellate court also lacks the power to determine the merits of the claim, issue, or question presented to the lower court. *McClellan v. Board of Equal. of Douglas Cty.*, 275 Neb. 581, 748 N.W.2d 66 (2008). However, when an appeal is dismissed because the lower court lacked jurisdiction to enter the order appealed from, an appellate court may nevertheless enter an order vacating the order issued by the lower court without jurisdiction. *Id.* We therefore vacate the judgment of the district court and dismiss the appeal.

VACATED AND DISMISSED.

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

797 N.W.2d 755

Filed May 3, 2011. No. A-10-566.

1. **Justiciable Issues.** Justiciability issues that do not involve a factual dispute present a question of law.
2. **Moot Question: Jurisdiction: Appeal and Error.** Because mootness is a justiciability doctrine that operates to prevent courts from exercising jurisdiction, an appellate court reviews mootness determinations under the same standard of review as other jurisdictional questions.
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. **Juvenile Courts: Appeal and Error.** An appellate court reviews juvenile cases de novo on the record and reaches its conclusions independently of the juvenile court's findings.
5. **Statutes: Appeal and Error.** To the extent an appeal calls for statutory interpretation or presents questions of law, an appellate court must reach an independent conclusion irrespective of the determination made by the court below.
6. **Juvenile Courts: Minors: Right to Counsel: Waiver: Appeal and Error.** The juvenile court's determination as to whether a juvenile's waiver of counsel was voluntary, knowing, and intelligent is reviewed de novo on the record for an abuse of discretion.
7. **Pleas: Appeal and Error.** The right to withdraw a plea previously entered is not absolute, and, in the absence of an abuse of discretion on the part of the trial court, refusal to allow a defendant's withdrawal of a plea will not be disturbed on appeal.
8. **Standing: Moot Question.** Standing is judged at the time the action is begun, and thereafter, the analysis is under the rubric of mootness.
9. **Moot Question: Words and Phrases.** A case becomes moot when the issues initially presented in the litigation cease to exist, when the litigants lack a legally cognizable interest in the outcome of litigation, or when the litigants seek to determine a question which does not rest upon existing facts or rights, in which the issues presented are no longer alive.
10. **Courts: Jurisdiction.** Although not a constitutional prerequisite for jurisdiction, an actual case or controversy is necessary for the exercise of judicial power.
11. **Courts: Judgments.** In the absence of an actual case or controversy requiring judicial resolution, it is not the function of the courts to render a judgment that is merely advisory.
12. **Moot Question.** As a general rule, a moot case is subject to summary dismissal.

13. **Criminal Law: Convictions: Proof: Moot Question.** A criminal case is moot only if it is shown that there is no possibility that any collateral legal consequences will be imposed on the basis of the challenged conviction.
14. **Juvenile Courts: Minors: Right to Counsel: Waiver.** Whether a juvenile has knowingly, voluntarily, and intelligently waived the right to counsel is to be determined from the totality of the circumstances.
15. ____: ____: ____: ____. The circumstances considered in a totality of the circumstances analysis of a juvenile's waiver of counsel include the age, intelligence, and education of the juvenile; the juvenile's background and experience generally, and more specifically, in the court system; the presence of the juvenile's parents; the language used by the court in describing the juvenile's rights; the juvenile's conduct; the juvenile's emotional stability; and the intricacy of the offense.
16. **Juvenile Courts: Minors: Right to Counsel: Waiver: Proof.** Where a juvenile waives his or her right to counsel, the burden lies with the State, by a preponderance of the evidence, to show that the waiver was knowingly, intelligently, and voluntarily made.
17. **Juvenile Courts: Minors: Confessions: Waiver.** Courts should take special care in scrutinizing a purported confession or waiver by a child.
18. **Juvenile Courts: Minors: Right to Counsel: Waiver.** In explaining to a juvenile his or her right to counsel, courts should take care to employ language that the juvenile can understand and should take the time necessary to conduct a sufficient inquiry into the juvenile's understanding of the right to counsel and waiver thereof.
19. **Pleas: Appeal and Error.** Prior to sentencing, the withdrawal of a plea forming the basis of a conviction is addressed to the discretion of the trial court, and its ruling will not be disturbed on appeal absent an abuse of that discretion.
20. **Pleas.** After the entry of a plea of guilty or no contest, but before sentencing, a court, in its discretion, may allow a defendant to withdraw his or her plea for any fair and just reason, provided that the prosecution has not been or would not be substantially prejudiced by its reliance on the plea entered.
21. **Pleas: Proof.** The burden is on the defendant to establish by clear and convincing evidence the grounds for withdrawal of a plea.

Appeal from the Separate Juvenile Court of Lancaster County: REGGIE L. RYDER, Judge. Affirmed.

Carlos A. Monzón, of Monzón Law, P.C., L.L.O., for appellant.

Gary E. Lacey, Lancaster County Attorney, Alicia B. Henderson, and Meagan Deichert, Senior Certified Law Student, for appellee.

IRWIN, MOORE, and CASSEL, Judges.

MOORE, Judge.

INTRODUCTION

Justin V. appeals from an order of the separate juvenile court of Lancaster County denying his request to withdraw his initial admission to a charge of criminal mischief. Justin asserts that he did not make a knowing waiver of his right to counsel and that he had a fair and just reason for withdrawing his admission to the charge in this case. Because the juvenile court did not abuse its discretion in determining that Justin's waiver of counsel was knowing, voluntary, and intelligent or in denying Justin's motion to withdraw his admission, we affirm.

BACKGROUND

On July 10, 2009, the State filed a petition in the juvenile court, charging Justin with criminal mischief, a Class II misdemeanor, in violation of Neb. Rev. Stat. § 28-519(4) (Reissue 2008). Specifically, the State alleged that Justin was within the meaning of Neb. Rev. Stat. § 43-247(1) (Reissue 2008) in that on June 13, he had intentionally or maliciously damaged property belonging to a particular entity, causing a pecuniary loss of more than $200 but less than $500.

On August 13, 2009, Justin, then 17 years old, appeared before the juvenile court on the criminal mischief charge. His mother was present with him at the hearing. The court began by asking Justin if he had received a copy of the charge and understood what the charge was. Justin confirmed that a copy had been sent to him and that he knew what the charge was.

Next, the juvenile court explained Justin's various rights. The court explained Justin's right to be represented by an attorney during the course of the proceedings. The court informed Justin that he could hire and consult with a private attorney; that if his family could not afford an attorney, Justin could request an attorney and the court would appoint one at no cost; or that Justin could waive this right and proceed without an attorney. The court then explained Justin's right to a speedy adjudication hearing, the State's burden of proof, and Justin's right to cross-examine witnesses. At this point, the court asked Justin if he had any questions, and Justin replied that he did not.

The juvenile court also explained Justin's right to testify, to put on his own defense, and to remain silent. The court again informed Justin that the State, rather than Justin, had the burden of proof with respect to the charge. The court warned Justin that if he chose to say something during the hearing, it could be used by the State against him. The court clarified by stating that if Justin said something in court about the charge that he had not previously said, he was "stuck with it." The court then explained that Justin had the right to a prompt or quick hearing. The court told Justin that if he were placed at a juvenile detention center, he would have the right to request a hearing at any time to determine if he could be released to return home. The court also explained Justin's right to appeal the court's decisions. The court then asked Justin if he understood his rights and whether he had any questions. Justin indicated that he understood his rights and did not have any questions.

Next, the juvenile court explained the potential consequences if Justin admitted to the charge or the State proved that it was true at trial. The court told Justin that he could be placed on probation or with the Department of Health and Human Services, Office of Juvenile Services, and that there would be specific terms and conditions he would have to follow as part of either option. With regard to placement, the court explained that it could allow Justin to remain with his family, but that if the court determined at some point that it was necessary and in Justin's best interests, the court had the option to consider various out-of-home placements and even to consider placement at the Youth Rehabilitation and Treatment Center in Kearney, Nebraska. The court told Justin that it would need to find out more information about him before determining the best option. The court further explained the possible terms and conditions that Justin might have to follow if the charge were found to be true, such as paying restitution or performing community service. The court also informed Justin that the longest amount of time the case could remain pending would be until Justin turned 19, but that the case could end sooner if the court determined that Justin did not need to be under the court's jurisdiction that

long. The court told Justin that if the charge were found not to be true, it would be dismissed. The court asked Justin if he understood what could happen if the court found the charge to be true and whether he had any questions. Justin replied that he understood what could happen and that he did not have any questions.

The court inquired whether Justin's mother understood Justin's rights and potential consequences and whether she had any questions. Justin's mother replied that she understood and that she did not have any questions.

The juvenile court then further discussed Justin's right to an attorney. The court again explained that Justin could hire a private attorney, have a court-appointed attorney if the family could not afford one, or choose to proceed without an attorney. The court asked if Justin understood and if he had any questions. Justin responded that he understood and did not have any questions. The court asked Justin if he knew what he wanted to do about an attorney or if he wanted to talk to his mother before letting the court know his decision. The following dialog then took place: "[Justin]: Talk to her about it. THE COURT: Okay. Why don't you go ahead and do that. [Justin]: Proceed. THE COURT: Which way? [Justin's mother]: Proceed with no attorney. [Justin]: No attorney." The court advised Justin that the decision to proceed without an attorney was his to make and asked if he understood or had questions. Justin indicated that he understood and did not have any questions. He again informed the court that he wanted to proceed without an attorney. In response to the next series of questions from the court, Justin informed the court that no one had forced him to give up his right to an attorney or threatened him to persuade him to do so and that he was doing so of his own free will and as his own voluntary act. Justin's mother confirmed for the court that she agreed with Justin's decision to waive his right to an attorney. The court then found that Justin had waived his right to an attorney freely, voluntarily, and intelligently.

After being informed that Justin was not eligible for diversion, the juvenile court read Justin the specifics of the criminal mischief charge. Justin stated that he understood the charge.

The court informed Justin that he could deny the charge, which would lead to a hearing where the State would have to call witnesses and present evidence. The court explained that if the State did not prove the charge, the case would be over, but that if the charge were proved at trial, the court would then have to decide what would happen. The court informed Justin that he also had the option to admit the charge, which the court described as being "like pleading guilty" and admitting to the court that he had done what was alleged. The court explained that if Justin admitted the charge, there would not be a trial. In response to the court's questioning, Justin stated that he understood the two ways he could respond to the charge and that he did not have any questions. The court asked Justin if he would admit or deny the charge, and Justin replied that he would admit the charge.

After Justin's admission of the charge, he informed the court of his age and the court proceeded to question him further about the admission. In response to this questioning, Justin told the court that he admitted and understood the charge, that his admission was made of his own free will and was his own voluntary act, that no one had forced him to admit the charge or threatened him to persuade him to do so, that no one had made him any promises in exchange for his admission, and that he was not under the influence of any drugs or alcohol. Justin also told the court that he understood that there would not be a trial; that no witnesses would testify or evidence be presented by the State to prove the charge; that he was giving up his right to see, hear, and cross-examine such witnesses; that he was giving up the right to testify, put on a defense, or bring his own witnesses; and that he was giving up his right to remain silent.

In response to further questioning by the juvenile court, Justin stated that he understood the court would have to decide which disposition would be in Justin's best interests and that he did not have any questions. Justin again told the court that it was his decision to admit the charge and informed the court that he was admitting the charge because it was true. Justin's mother informed the court that she had no objection to the court's accepting Justin's admission. The court then found that

Justin's admission was entered freely, voluntarily, and intelligently with the consent of his parent.

The juvenile court informed Justin that the State would read the factual basis, or what it believed the evidence would be if there were a trial, and asked Justin to listen carefully. The State then read the factual basis, which stated that on June 13, 2009, Justin and two other named juveniles were identified as throwing rocks at a particular building in Hickman, Nebraska; that witnesses observed a glass window in the building break; and that Justin and the other juveniles were contacted and admitted to throwing the rocks, but that they denied that the damage was a result of their throwing the rocks. All three juveniles were cited for criminal mischief and turned over to their parents. The estimated damage to the broken window was $388. In response to further questioning by the court, Justin acknowledged that he had heard what the State had said and that it was still his decision to admit the charge.

The juvenile court found that there was a factual basis to support Justin's admission to the charge, accepted Justin's admission, and adjudicated Justin as a juvenile under § 43-247(1). The court explained what would happen next, which would include options of probation or placement with the Department of Health and Human Services at a group or foster home, "an institution," or "even Kearney." The court encouraged Justin to stay out of trouble with the law, to follow the rules at home, to attend school, and to refrain from using drugs and alcohol between the date of the admission and the next hearing, as those were the types of issues that the court would consider in its decision process. Both Justin and his mother informed the court that they did not have any questions at that point in the hearing.

The case was set for a dispositional hearing on September 29, 2009. The case was continued, and on October 29, the juvenile court placed Justin in the juvenile detention center for allegations that he violated his conditional release. On November 3, the court held a detention hearing and authorized Justin to be released to the custody of his mother and appointed an attorney for Justin. On January 13, 2010, Justin was accepted into drug court. On January 20, an order for immediate custody

was issued because Justin falsified a urine test by switching his urine with someone else's. Justin used marijuana on January 27, the day he was released from the juvenile detention center. Justin was released to attend residential treatment on February 16, but he was "kicked out" 8 days later for unruly, threatening, and intimidating behavior.

On April 2, 2010, Justin appeared in court with his mother, stepfather, and attorney for his disposition hearing. Justin's attorney made an oral motion, asking that Justin be allowed to withdraw his plea and that the matter be set for an evidentiary hearing. The juvenile court continued the hearing to give Justin an opportunity to present evidence on the motion.

The juvenile court heard Justin's motion to withdraw his plea on April 12, 2010. Justin's mother testified that on April 1 and 8, she spoke with one of the individuals who had been with Justin when the rocks were thrown. She also spoke with another of the involved juveniles on April 8. Justin's mother spoke with a third individual approximately a week after the rock-throwing incident. She testified that based on these conversations, she believed that Justin did not throw any rocks and should be allowed to withdraw his plea. Justin's mother testified that she was present with Justin in court on at least a dozen occasions between August 13, 2009, and April 12, 2010. Justin's mother acknowledged that she was able to speak to Justin about the incident on the day it happened, when law enforcement came to their residence to issue Justin a ticket for the criminal mischief.

The juvenile court then asked Justin's mother a series of clarifying questions. Justin's mother had testified that she did not have a chance to talk to Justin about waiving his right to an attorney. In response to the court's questions, she agreed that she was present in court for the explanation of Justin's rights and the potential consequences of the proceedings. She confirmed that she had been asked whether she agreed and that she had agreed, at the time, with Justin's waiver of his right to an attorney. Justin's mother stated that she agreed to the waiver only because she did not have the funds for a private attorney, but agreed that Justin had been advised that an attorney would be provided at no cost if the family could

not afford one. Justin's mother said she had believed the court would appoint an attorney based upon her earning capacity. When asked why she did not ask the court to appoint an attorney for Justin at that time, she replied, "I really don't know." She also agreed that she had not objected to the court's accepting Justin's admission at the time of the August 2009 hearing.

Justin also testified at the April 12, 2010, hearing. He stated that his admission was voluntary; however, he testified that he did not believe he entered his plea knowingly because it was his first time in court and he did not really understand what the judge was saying.

The hearing on Justin's motion to set aside his plea resumed on May 6, 2010, and a dispositional hearing was also held. One of the other juveniles involved in the rock-throwing incident testified that the third juvenile was the one who threw the rock that broke the window and that Justin never picked up a rock.

After reviewing the evidence on Justin's motion, the juvenile court determined that it had clearly explained Justin's rights to him at the time of the August 2009 hearing in accordance with statutory requirements. The court observed that Justin had been appointed an attorney in November 2009 and that in the intervening 5 months, he did not make a request to set aside his admission. The court noted that Justin had numerous hearings in drug court and that it was not until he was removed from drug court and the matter was set for disposition in the juvenile court that he made the request to set aside his admission. The court determined that Justin had entered into his plea freely, voluntarily, and intelligently and denied Justin's motion to withdraw his admission.

During the dispositional portion of the hearing, the court discussed Justin's actions, behavior, and attitude during the period after August 13, 2009, including his noncompliance at home, his behaviors at school, his use of marijuana, and his unwillingness to accept responsibility. The court determined that it would be in Justin's best interests to be committed to the Office of Juvenile Services at the Youth Rehabilitation and

Treatment Center in Kearney until he is discharged or paroled. Justin subsequently perfected his appeal to this court.

ASSIGNMENT OF ERROR

Justin asserts that the juvenile court erred in denying his motion to withdraw his admission where the admission resulted from an unknowing and uncounseled waiver of his right to counsel.

STANDARD OF REVIEW

[1-3] Justiciability issues that do not involve a factual dispute present a question of law. *Wetovick v. County of Nance*, 279 Neb. 773, 782 N.W.2d 298 (2010). Because mootness is a justiciability doctrine that operates to prevent courts from exercising jurisdiction, an appellate court reviews mootness determinations under the same standard of review as other jurisdictional questions. *Kuhn v. Wells Fargo Bank of Neb.*, 278 Neb. 428, 771 N.W.2d 103 (2009). 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. *Id.*

[4,5] An appellate court reviews juvenile cases de novo on the record and reaches its conclusions independently of the juvenile court's findings. *In re Interest of Jorge O.*, 280 Neb. 411, 786 N.W.2d 343 (2010). To the extent an appeal calls for statutory interpretation or presents questions of law, an appellate court must reach an independent conclusion irrespective of the determination made by the court below. *Id.*

[6] The juvenile court's determination as to whether a juvenile's waiver of counsel was voluntary, knowing, and intelligent is reviewed de novo on the record for an abuse of discretion. *In re Interest of Dalton S.*, 273 Neb. 504, 730 N.W.2d 816 (2007).

[7] The right to withdraw a plea previously entered is not absolute, and, in the absence of an abuse of discretion on the part of the trial court, refusal to allow a defendant's withdrawal of a plea will not be disturbed on appeal. *State v. Williams*, 276 Neb. 716, 757 N.W.2d 187 (2008).

ANALYSIS

Mootness.

On January 14, 2011, the State filed a motion for summary dismissal, alleging that this case is moot because, as of December 1, 2010, Justin is no longer a ward of the State, his case has been closed, and he is no longer considered a parolee or is not on parole. In response, Justin argues that he continues to be aggrieved and injured by the disposition and order of confinement entered by the juvenile court and asserts that we should consider this case under the public interest exception to the mootness doctrine because other rights and liabilities may be affected by the determination of this case. We reserved ruling on the State's motion until after oral argument and now proceed to consider the parties' arguments concerning mootness.

[8] In support of its motion, the State relies on *In re Interest of William G.*, 256 Neb. 788, 592 N.W.2d 499 (1999). In that case, the Nebraska Supreme Court dismissed an appeal from an order of the juvenile court, finding that the appellant no longer had standing to appeal because after the notice of appeal was filed, he was discharged from the Youth Rehabilitation and Treatment Center and he no longer had any further contact with the Office of Juvenile Services. However, since its decision in *In re Interest of William G.*, the Nebraska Supreme Court has determined that standing is judged at the time the action is begun and that thereafter, the analysis is under the rubric of mootness. See *Myers v. Nebraska Invest. Council*, 272 Neb. 669, 724 N.W.2d 776 (2006). Accordingly, we find that *In re Interest of William G.* is not controlling in the instant case; rather, our analysis must be under the rubric of mootness.

[9-12] A case becomes moot when the issues initially presented in the litigation cease to exist, when the litigants lack a legally cognizable interest in the outcome of litigation, or when the litigants seek to determine a question which does not rest upon existing facts or rights, in which the issues presented are no longer alive. *Kuhn v. Wells Fargo Bank of Neb.*, 278 Neb. 428, 771 N.W.2d 103 (2009). Although not a constitutional prerequisite for jurisdiction, an actual case or controversy is

necessary for the exercise of judicial power. *Id.* In the absence of an actual case or controversy requiring judicial resolution, it is not the function of the courts to render a judgment that is merely advisory. *Id.* As a general rule, a moot case is subject to summary dismissal. *Id.*

Justin is no longer a ward of the State, his case has been closed, and he is no longer considered a parolee or is not on parole. Thus, Justin's case has become moot, a conclusion that Justin does not dispute. However, Justin argues that an exception to the mootness doctrine should be applied in this case because he will continue to be aggrieved by the decision.

[13] We turn to an examination of the collateral consequences exception to the mootness doctrine which has been applied in the context of criminal proceedings in Nebraska. In *State v. Patterson*, 237 Neb. 198, 465 N.W.2d 743 (1991), the Nebraska Supreme Court found that the appeal was not moot, even though the appellant had completed his sentence, because the felony conviction subjected him to collateral consequences, including the loss of voting rights in state elections, possible use of the felony conviction to impeach his credibility, and possible consideration of the felony conviction in imposing a sentence for any subsequent offense. The court in *Patterson* relied, in part, on *Sibron v. New York*, 392 U.S. 40, 88 S. Ct. 1889, 20 L. Ed. 2d 917 (1968), which held that a criminal case is moot only if it is shown that there is no possibility that any collateral legal consequences will be imposed on the basis of the challenged conviction.

Although Nebraska has not applied the collateral consequences exception found in the criminal arena to a juvenile matter, other states have done so. In *Carillo v. State*, 480 S.W.2d 612 (Tex. 1972), the Texas Supreme Court was presented with a situation very similar to the case at hand. In *Carillo*, the juvenile appealed from an order finding him to be delinquent and committing him to the Texas Youth Council. After the appeal was filed, the juvenile was released from probation and also reached the age of majority. The State of Texas suggested that the case therefore had become moot. The Texas Supreme Court disagreed, finding that the case was not moot, relying in part upon *Sibron v. New York, supra*.

The court reasoned that a juvenile would have no way to exonerate himself if his appeal were mooted due to the expiration of a relatively short sentence, the lifting of probation, or the juvenile's attaining the age of majority. The court also noted that an adjudication of delinquency could affect admission to a profession, the armed services, or private employment, and it noted other legal consequences of adjudication, including consideration upon setting punishment for future criminal or juvenile cases and publication of the record if the juvenile were later charged with a felony. See, also, *In re S.J.C.*, 304 S.W.3d 563 (Tex. App. 2010) (Texas Court of Appeals found mother's appeal from finding that she contributed to child's delinquency reviewable under collateral consequences exception to mootness doctrine after child completed probation due to various legal consequences, including requirement that mother attend counseling, pay fees and restitution, and provide probation department with child's school records); *In re S.J.K.*, 114 Ohio St. 3d 23, 867 N.E.2d 408 (2007) (Ohio Supreme Court found juvenile's appeal from adjudication as juvenile traffic offender not moot following voluntary payment of fine because imposition of points on license was statutorily imposed penalty sufficient to create collateral disability); *In re P.*, 42 A.D.2d 908, 347 N.Y.S.2d 735 (1973) (New York Supreme Court, Appellate Division, found juvenile's appeal from adjudication not moot following his discharge from probation due to possibility of collateral legal consequences).

We conclude that the collateral consequences exception to the mootness doctrine should be applied in this case. Justin asserts that he will be subject to various collateral consequences as a result of his juvenile record. We agree. Courts in Nebraska routinely consider a defendant's juvenile court record when sentencing in adult criminal cases. See, e.g., *State v. Erickson*, 281 Neb. 31, 793 N.W.2d 155 (2011); *State v. Hamilton*, 277 Neb. 593, 763 N.W.2d 731 (2009); *State v. Albers*, 276 Neb. 942, 758 N.W.2d 411 (2008); *State v. Hall*, 237 Neb. 169, 465 N.W.2d 150 (1991); *State v. Parks*, 8 Neb. App. 491, 596 N.W.2d 712 (1999). Justin may also have a duty to divulge a juvenile disposition order on various

admissions and applications, such as the Nebraska bar examination application questionnaire. See, e.g., http://nebar.com/associations/8143/files/NSBC-ExamApp072007.pdf (last visited Apr. 22, 2011) (requiring reporting of citations, arrests, charges, or convictions as adult or juvenile for violation of any law except moving traffic violations which are reported elsewhere). We also note that the military considers an applicant's juvenile record when determining fitness to enter into the armed services or suitability for participation in special programs. See 32 C.F.R. § 96.1 et seq. (2010) (concerning acquisition and use of criminal history record information by military services). We conclude that Justin may be subject to collateral consequences such that his appeal is not moot.

We are mindful of the Nebraska statutes that allow for the sealing of juvenile records upon the satisfactory completion of probation or another treatment or rehabilitation program and which prohibit questioning a person, with respect to any arrest for which the record is sealed, in connection with applications for employment, a license, or other rights or privileges. See Neb. Rev. Stat. §§ 43-2,108.01 to 43-2,108.05 (Cum. Supp. 2010). These statutes provide, however, that a sealed record is still accessible to law enforcement officers, prosecutors, and sentencing judges in the investigation of crimes and in the prosecution and sentencing of criminal defendants. § 43-2,108.05(3). There is no evidence in our record with respect to whether Justin satisfactorily completed his treatment or rehabilitation program or whether his record has been sealed.

Having concluded that Justin's appeal is not moot, we now turn to the merits of Justin's appeal.

Did Juvenile Court Err in Denying Motion to Withdraw Admission?

Justin asserts that the juvenile court erred in denying his motion to withdraw his admission where the admission resulted from an unknowing and uncounseled waiver of his right to counsel. In considering Justin's assignment of error, we first consider whether he knowingly, voluntarily, and intelligently waived his right to counsel. Then we consider whether Justin's

newfound claim of innocence is a fair and just reason to withdraw his admission.

Waiver of Counsel.

The first step in examining Justin's waiver of his right to counsel is to determine whether he was fully advised of his rights. The juvenile court is required to advise a juvenile of his or her right to counsel. Neb. Rev. Stat. § 43-272(1) (Reissue 2008) provides in part:

> When any juvenile shall be brought without counsel before a juvenile court, the court shall advise such juvenile and his or her parent or guardian of their right to retain counsel and shall inquire of such juvenile and his or her parent or guardian as to whether they desire to retain counsel. The court shall inform such juvenile and his or her parent or guardian of such juvenile's right to counsel at county expense if none of them is able to afford counsel.

Additionally, under Neb. Rev. Stat. § 43-279(1) (Reissue 2008), the juvenile court shall inform a juvenile:

> (a) Of the nature of the proceedings and the possible consequences or dispositions . . . ;
>
> (b) Of such juvenile's right to counsel . . . ;
>
> (c) Of the privilege against self-incrimination by advising the juvenile, parent, guardian, or custodian that the juvenile may remain silent concerning the charges against the juvenile and that anything said may be used against the juvenile;
>
> (d) Of the right to confront anyone who testifies against the juvenile and to cross-examine any persons who appear against the juvenile;
>
> (e) Of the right of the juvenile to testify and to compel other witnesses to attend and testify in his or her own behalf;
>
> (f) Of the right of the juvenile to a speedy adjudication hearing; and
>
> (g) Of the right to appeal and have a transcript for such purpose.

It is clear from the record that the juvenile court explained Justin's rights as required by §§ 43-272 and 43-279. The court

provided a very detailed explanation of Justin's rights and the potential consequences or dispositions, stopping at numerous points during the hearing to inquire whether Justin understood the explanation or had any questions. There is no question that the court's advisement met the statutory requirements.

[14-18] Next, we consider whether Justin knowingly waived his right to counsel. Whether a juvenile has knowingly, voluntarily, and intelligently waived the right to counsel is to be determined from the totality of the circumstances. *In re Interest of Dalton S.*, 273 Neb. 504, 730 N.W.2d 816 (2007). The circumstances considered in a totality of the circumstances analysis of a juvenile's waiver of counsel include the age, intelligence, and education of the juvenile; the juvenile's background and experience generally, and more specifically, in the court system; the presence of the juvenile's parents; the language used by the court in describing the juvenile's rights; the juvenile's conduct; the juvenile's emotional stability; and the intricacy of the offense. *Id.* Where a juvenile waives his or her right to counsel, the burden lies with the State, by a preponderance of the evidence, to show that the waiver was knowingly, intelligently, and voluntarily made. *Id.* Courts should take special care in scrutinizing a purported confession or waiver by a child. *Id.* In explaining to a juvenile his or her right to counsel, courts should take care to employ language that the juvenile can understand and should take the time necessary to conduct a sufficient inquiry into the juvenile's understanding of the right to counsel and waiver thereof. *Id.*

The juvenile in *In re Interest of Dalton S., supra*, was 9 years old and mildly mentally handicapped. He was charged with disorderly conduct for hitting another child and knocking over chairs at school. He was not experienced in the court system, but his mother was present at the hearing and able to speak freely with him. The court used plain language in explaining the right to counsel. After the admission hearing, the juvenile was appointed a guardian ad litem, who represented his interests throughout the remaining proceedings, and by the time of the dispositional hearings, when the issues grew more complex, he was represented by both a guardian ad litem and retained counsel. Under the totality of the circumstances in

that case, the Nebraska Supreme Court found no violation of the juvenile's right to counsel.

In this case, the totality of the circumstances also points to a knowing, voluntary, and intelligent waiver of counsel. Justin was 17 years old. Justin was charged with criminal mischief for throwing rocks and causing damage to a building, which is not a complicated offense. Although he was not experienced in the court system, his mother was present with him at the hearing. The juvenile court used plain language in explaining Justin's rights, often pausing to provide additional clarification. The court gave Justin the opportunity to speak with his mother prior to making his decision about counsel. Justin's mother stated that she agreed with the decision to proceed without an attorney. We also note that Justin was appointed an attorney in November 2009 and continued to be represented by counsel through the remaining proceedings prior to appeal. The district court did not abuse its discretion in finding that Justin made a knowing, voluntary, and intelligent waiver of his right to counsel.

Withdrawal of Admission.

There is no case law in Nebraska setting forth standards for appropriate grounds for withdrawing an admission in a juvenile case. The State asserts that the standard for withdrawing pleas in adult criminal cases is appropriate for use in juvenile court, since it balances the interests of justice and fairness to a defendant against the potential prejudice to the State by the withdrawal of the plea.

Our review of case law from other jurisdictions, although not exhaustive, reveals several cases which apply the adult criminal standard for withdrawal of pleas in cases analyzing a juvenile's request to withdraw an admission. See, *In re P.L.B.*, 40 Kan. App. 2d 182, 190 P.3d 274 (2008); *In re J.E.H.*, 689 A.2d 528 (D.C. 1996); *People in Interest of J.F.C.*, 660 P.2d 7 (Colo. App. 1982). But see *In Interest of Bradford*, 705 A.2d 443 (Pa. Super. 1997) (finding adult criminal rules and guidelines inapplicable and applying best interests of child standard to review of decision refusing to permit juvenile to withdraw admission of delinquency). In *In re P.L.B., supra*, the Kansas

Court of Appeals considered an appeal from the denial of a juvenile's motion to withdraw his plea and to set aside his juvenile adjudication. Because there was no provision in the juvenile justice code for plea withdrawal, the court looked to the withdrawal provisions of the criminal code for the appropriate standard. *Id.* In *People in Interest of J.F.C., supra*, the Colorado Court of Appeals observed that delinquency proceedings were to be conducted in accordance with Colorado's criminal procedure rules, except as otherwise provided by statute or Colorado's juvenile procedure rules. The court analogized to the adult criminal rules concerning withdrawal of guilty pleas. *Id.* Finally, we note that some states have actual juvenile procedure rules incorporating standards for withdrawing pleas. See, Fla. R. Juv. P. 8.075(e) (court may permit withdrawal of guilty plea for good cause any time prior to beginning of disposition hearing); Minn. R. Juv. Del. P. 17.06, subdivision 3 (child may withdraw plea of guilty before disposition for any just reason and after disposition if necessary to correct manifest injustice). Because neither the Nebraska Juvenile Code nor prior case law has determined the standard for a juvenile's withdrawal of an admission to a crime, we conclude that it is appropriate to adopt the criminal standard for withdrawal of a plea in the context of a request to withdraw an admission in a juvenile proceeding.

[19-21] Prior to sentencing, the withdrawal of a plea forming the basis of a conviction is addressed to the discretion of the trial court, and its ruling will not be disturbed on appeal absent an abuse of that discretion. *State v. Williams*, 276 Neb. 716, 757 N.W.2d 187 (2008). After the entry of a plea of guilty or no contest, but before sentencing, a court, in its discretion, may allow a defendant to withdraw his or her plea for any fair and just reason, provided that the prosecution has not been or would not be substantially prejudiced by its reliance on the plea entered. *Id.* The burden is on the defendant to establish by clear and convincing evidence the grounds for withdrawal of a plea. *Id.* The right to withdraw a plea previously entered is not absolute, and, in the absence of an abuse of discretion on the part of the trial court, refusal to allow a defendant's withdrawal of a plea will not be disturbed on appeal. *Id.*

Justin argues that he had a fair and just reason to withdraw his admission because he pled after an unknowing waiver of his right to counsel and because he now states that he was innocent of the crime. We have already found that Justin knowingly, voluntarily, and intelligently waived his right to counsel, so the question is whether Justin's newfound claim of innocence is a fair and just reason to withdraw his admission.

At the August 2009 hearing, Justin told the juvenile court that it was his decision to admit the charge and informed the court that he was admitting the charge because it was true. After hearing the factual basis for the criminal mischief charge, Justin told the court that it was still his decision to admit the charge. In support of Justin's assertion that he did not commit the crime, his mother testified that she now believes that Justin did not throw any rocks and should be allowed to withdraw his plea. Another of the juveniles involved in the incident testified that Justin never picked up a rock on the evening in question. Justin also testified that he did not throw a rock. We note, as did the juvenile court, that Justin did not seek to withdraw his admission until after being removed from drug court, at which time he had had appointed counsel for 5 months. We agree with Justin's assertion that courts should be attentive to the capacity of juveniles to comprehend how and why they are being held accountable for their behavior, but there is nothing in the record to show that Justin was incapable of such understanding. He was a 17-year-old high school student being asked to account for throwing rocks and damaging a window. Justin has not shown a fair and just reason for withdrawal of his plea. The juvenile court did not abuse its discretion in denying Justin's motion.

CONCLUSION

The district court did not abuse its discretion in finding that Justin made a knowing, voluntary, and intelligent waiver of his right to counsel or in denying Justin's motion to withdraw his admission.

AFFIRMED.

HEADNOTES
Contained in this Volume